

In Search of the Public Interest

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“Public interest” standards in statutory delegations to agencies represent the greatest hopes and the darkest fears of the U.S. administrative state. On the one hand, the public interest standard provides a vessel for agencies to infuse policymaking with the moral and ethical commitments of the community. On the other hand, regulation in the public interest opens the door to the arbitrary exercise of tyrannical state power. Despite the lofty aspirations and ominous warnings about regulation in the public interest, little is known about how agencies actually decide what is in the public interest when charged by statute to do so. This Article seeks to move beyond the rhetoric surrounding regulation in the public interest by conducting a grounded inquiry into how agencies implement public interest standards in the statutes they administer. Using data from agency adjudications under four different statutory schemes dating from the early twentieth century to the present, the study investigates how agencies define the public interest, whether agencies use public interest standards with unfettered discretion based on whatever criteria they wish (as some fear), and whether agencies apply public interest standards in ways that infuse policy making with common good or community values (as some hope).

The study’s findings will surprise many and please few. First, it demonstrates that agencies applying statutory public interest standards exhibit rational and predictable patterns that comport with rule-of-law values of transparency and consistency. Second, the study finds that agencies rarely consider what might be characterized as “common good” or “community” values in their public interest analyses unless such considerations are mandated by statute, and that agencies tend to discount such considerations even when statutorily required. Third, in terms of substantive conceptions of the public interest, the study reveals that in most contexts studied, economic arguments are the most-raised and most-accepted justifications for why a particular outcome is in the public interest.

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The study makes three contributions to scholarly and jurisprudential understandings of what it means to regulate in the public interest. First, it provides a novel descriptive account of what agencies actually do when authorized to regulate some facet of social or economic life in the public interest, extending important strands of administrative law scholarship on bureaucratic accountability, public utility law, and the meaning of “publicness.” Second, it dispels common concerns that regulation under a broad public interest delegation violates rule-of-law or separation-of-powers principles. The analysis presented here provides evidence that statutory public interest standards do not pose nondelegation problems and suggests a methodology for analyzing other broad statutory mandates likely to be subjected to nondelegation challenges. Third, the study casts doubt on the willingness and ability of agencies to champion common good or community values even under clear statutory direction. This has important implications for how advocates of values-informed administrative decision making should approach their project.

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Introduction

“Public interest” standards in statutory delegations to agencies represent the greatest hopes and the darkest fears of the U.S. administrative state. On the one hand, the public interest standard provides a vessel for agencies to infuse policymaking with the moral and ethical commitments of the community. On the other hand, regulation in the public interest opens the door to the arbitrary exercise of tyrannical state power.

It is difficult to find a more maligned legal standard than the “public interest.” Legal scholars have decried the public interest standard as “vacuous,”¹ “empty,”² and “so vague that it can mean whatever [regulators] say it means on any given day.”³ Generations of judges likewise have bemoaned the lawlessness of public interest standards in statutory delegations of authority to administrative agencies.⁴ As early as 1939, Justice Owen Roberts dissented from a decision upholding a statutory provision requiring the Secretary of Agriculture to set milk prices in the “public interest,” questioning “whether this constitutes a standard at all.”⁵ Almost a century later, Chief Justice John Roberts chided in dissent that “the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, ‘in the public interest’—can perhaps be excused for thinking that it is the agency really doing the legislating.”⁶ It has been suggested that the indeterminacy of the public interest standard and the scope of discretion it lodges in agency officials “would surely shock . . . the founders of our nation.”⁷ These critiques gain force as the U.S. Supreme Court adopts doctrinal innovations such as the major questions doctrine to rein in statutory delegations of authority,⁸ and as a majority of Justices appears poised

1. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 n.8 (2002).

2. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474 (1985); see also Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 16 (Max D. Paglin ed., 1989) (“Plainly the ‘public interest’ phrase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policymaker . . .”); J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 584-85 (1972) (reviewing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969)) (“When Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language about the ‘public interest’ which tells the agency, in effect, to get the job done.”).

3. Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 453 (2001); see also, Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 574 (1947) (“[N]othing can be vaguer than the delegation to act in the ‘public interest.’”).

4. See, e.g., *Misretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (“What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?”).

5. *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588, 607 (1939).

6. *City of Arlington v. Fed. Commc’ns Comm’n*, 569 U.S. 290, 315 (2013).

7. May, *supra* note 3, at 428.

8. Explicitly articulated for the first time in *West Virginia v. EPA*, the major questions doctrine requires Congress to legislate particularly clearly when authorizing an agency to make “decisions of vast economic and political significance.” 142 S. Ct. 2587, 2605 (2022) (quoting *Util. Air Regul. Grp. v. EPA*,

to reinvigorate the nondelegation doctrine.⁹ Indeed, some commentators have set their sights on the public interest standard as “easy kill number one.”¹⁰

Yet, the public interest has a long history in the theory and practice of regulation in the United States. Historian William Novak describes how broadly-worded public interest legislation provided a vehicle for government officials to pursue “a far-reaching conception of law and state serving the people’s welfare” in the “well-regulated society” of nineteenth- and early-twentieth-century America.¹¹ His most recent work finds an “expansive concept of regulation in the public interest at the turn of the century” that has deep roots in the common law of public callings, police power, and public-service corporations.¹² Indeed, public interest was the lynchpin of economic regulation in the *Lochner* era, shielding protective legislation from substantive due process challenges if it regulated businesses “affected with a public interest.”¹³ And even after the substantive due process threat had passed, the notion of the public interest continued to play a role in shaping regulation. New Deal administrative agencies were conceptualized by Progressive Era reformers as a means of promoting the

573 U.S. 302, 324 (2014) (internal quotation marks omitted)). Commentators have called *West Virginia*’s articulation of the major questions doctrine “a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective.” Daniel T. Deacon & Leah L. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 [https://perma.cc/5TC7-RQSH].

9. As Justice Kagan explained in *Gundy v. United States*, the “nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.” 139 S. Ct. 2116, 2121 (2019). The Court has consistently recognized that Congress needs flexibility to perform its policymaking functions in a complex, technologically advanced society, and has consistently held that a statutory delegation is constitutional as long as “Congress has supplied an intelligible principle to guide the delegatee’s use of discretion.” *Id.* at 2123. Yet the only other justice who joined Kagan’s opinion and remains on the Court is Justice Sotomayor. Most of the other justices seem to oppose Kagan’s articulation of the nondelegation doctrine. Dissenting in *Gundy*, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, argued that the prevailing nondelegation doctrine is based on “an understanding of the Constitution at war with its text and history,” and proposed a new test for determining when statutory delegations of authority to the executive branch are constitutional. *Id.* at 2131 (Gorsuch, J., dissenting). Justice Alito concurred with the judgment in *Gundy*, but wrote separately to indicate that he would be willing to “reconsider the [nondelegation] approach we have taken for the past 84 years.” *Id.* (Alito, J., concurring in the judgment). Justice Kavanaugh did not participate in the decision, but took the opportunity five months later in a denial of certiorari to praise “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine” in *Gundy* and to note that this dissent “raised important points that may warrant further consideration in future cases.” *Paul v. United States*, 140 S. Ct. 342, 342 (2019), *denying cert. to United States v. Paul*, 718 F. App’x 360 (6th Cir. 2017). Justice Gorsuch characterized the Court’s recent embrace of the major questions doctrine in *West Virginia v. EPA* as a part of the project of reining in broad statutory delegations. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

10. Gary Lawson, *Delegation and the Constitution*, 22 REGUL. 23, 29 (1999); see also Wright, *supra* note 2 (contending that delegations to agencies to make policy decisions in the “public interest” suggest the need for a “vigorous reassertion of the delegation doctrine”).

11. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 235 (1996).

12. WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 120 (2022).

13. *Munn v. Illinois*, 94 U.S. 113, 126 (1876); see Joshua C. Macey & Brian Richardson, *The Public Utility Settlement 15-19* (unpublished manuscript) (on file with author).

public interest and the public welfare by supporting citizens' care and flourishing.¹⁴

Regulation in the public interest is having a contemporary moment in scholarship spanning the political spectrum that advocates for greater attention to “the public and its values”¹⁵ in administrative decision making. Prominent voices in the conservative legal movement advocate common good constitutionalism, which maintains that legal decisionmakers (including agency officials) should be guided by natural law theories of the common good—specifically “the provision of the goods of peace, justice, and abundance”¹⁶—in implementing positive law.

Progressive legal scholarship has also grown increasingly interested in how public interest values define the obligations of government officials. Blake Emerson, for example, posits a duty of public care, grounded in statutory and constitutional law, that requires agency officials “to invest in the welfare of individuals [and] to provide those institutions, services, and protections that are necessary to people’s moral and political agency but which they cannot obtain on their own initiative.”¹⁷ Alan Rozenshtein suggests that even the power of the presidency is constitutionally cabined by the expectation that it will be dispatched in a manner consistent with public interest or common good virtues.¹⁸ K. Sabeel Rahman and William Boyd seek to revive public utility principles to govern wicked problems such as climate change¹⁹ and technology platforms.²⁰ And scholarly umbrella projects such as *Democratizing Administrative Law* at the Law and Political Economy Project²¹ and the *Vulnerability and the Human Condition Initiative* at Emory University²² provide space and momentum for theorizing the substantive values undergirding the exercise of power and

14. See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 117 (2019); Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL. REV. 35, 43-47 (2022).

15. DAVID COHEN & ALLEN MIKAELIAN, *THE PRIVATIZATION OF EVERYTHING: HOW THE PLUNDER OF PUBLIC GOODS TRANSFORMED AMERICA AND HOW WE CAN FIGHT BACK* 6 (2021).

16. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 135 (2022).

17. Emerson, *supra* note 14, at 38.

18. See generally Alan Z. Rozenshtein, *The Virtuous Executive*, 108 MINN. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233347 [<https://perma.cc/39DR-W5HZ>] (arguing that the Framers drafted Article II based on assumptions that presidents would possess virtues including loyalty, honesty, responsibility, justice, inclusiveness, and judgment).

19. See generally William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1614 (2014) (arguing that “a revitalized and expanded notion of public utility has a critical role to play in efforts to decarbonize the power sector in the United States”).

20. See generally K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1622 (2018) (arguing that public utility principles can help address the concentrated private control over “infrastructural” goods by too-big-to-fail firms and internet service providers).

21. Symposium, *DEMOCRATIZING ADMINISTRATIVE LAW*, L. & POL. ECON. PROJECT <https://lpeproject.org/symposia/democratizing-administrative-law/> [<https://perma.cc/5YQ6-EU9K>].

22. *VULNERABILITY AND THE HUMAN CONDITION INITIATIVE*, EMORY UNIV. <https://web.gs.emory.edu/vulnerability/index.html> [<https://perma.cc/P8ZT-XNGA>].

responsibility in the administrative state.²³ Statutory public interest standards provide an attractive vehicle to advance these various projects because they are precisely the sort of “generally stated principles whose interpretation inherently requires judgments of political morality.”²⁴

Despite the lofty aspirations and ominous warnings swirling around regulation in the public interest, little is known about how agencies actually decide what the public interest is when charged by statute to do so. There are more than 1,200 public interest standards in the U.S. Code and legions more in state statutory law. Agencies implement these standards every day. This Article seeks to move beyond the rhetoric surrounding regulation in the public interest by conducting a grounded inquiry into how agencies implement public interest standards in the statutes they administer. Using data from agency adjudications under four different statutory schemes dating from the early twentieth century to the early twenty-first century, the study presented in this Article asks: How do agencies define the public interest? Do they use public interest standards as a pretext to act as a “junior varsity Congress”²⁵ with unfettered discretion to decide cases based on any criteria they wish, as many fear? Do they apply public interest standards in ways that infuse policymaking with substantive common good or community values, as some might hope? What work, if any, do public interest standards do?

The study’s findings will surprise many and please few. First, it demonstrates that agencies applying statutory public interest standards exhibit rational and predictable patterns that comport with rule-of-law values of transparency and consistency.²⁶ By and large, agencies explicitly define what constitutes the “public interest” in their respective contexts, and these definitions

23. *Democratizing Administrative Law* focuses on values such as democracy and inclusion, *See, e.g.*, Conor Dwyer Reynolds, *To Democratize Environmental Law, Let Ordinary People Decide*, L. & POL. ECON. PROJECT (Sept. 26, 2019), <https://lpeproject.org/blog/to-democratize-environmental-law-let-ordinary-people-decide/> [<https://perma.cc/4X34-EKJV>] (advocating the use of administrative juries in environmental policymaking to “ensure that regulation is *for* the people by making regulation *by* the people”); K. Sabeel Rahman, *The Democratic Political Economy of Administrative Law*, L. & POL. ECON. PROJECT (Sept. 25, 2019), <https://lpeproject.org/blog/the-democratic-political-economy-of-administrative-law/> [<https://perma.cc/R69S-NEYS>] (“[T]he administrative state plays a key role in making real—or inhibiting—the on-the-ground realities of inclusion and democracy. This substantive and moral valence is critical to our understanding of the movements seeking to dismantle, or remake, the administrative state.”). The *Vulnerability and the Human Condition Initiative* “centers the vulnerable subject in place of the liberal subject in constitutional law and legal theory” and “uses vulnerability theory to rethink traditional approaches to law” including in regulatory domains such as healthcare and public-health emergencies. Mangala Kanayson, *Law and Structuring Individual and Institutional Responsibility: Beyond Equality and Freedom*, EMORY UNIV.: VULNERABILITY AND THE HUMAN CONDITION INITIATIVE (Feb. 10, 2022), <https://scholarblogs.emory.edu/vulnerability/2022/02/10/chapter-titles/> [<https://perma.cc/BTH8-4V3P>].

24. VERMEULE, *supra* note 16, at 146.

25. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

26. *See* Jeremy Waldron, *The Rule of Law*, in *STAN. ENCYC. PHIL.* (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/> [<https://perma.cc/MJV4-BMVG>] (“The Rule of Law envisages law operating as a relatively stable set of norms available as public knowledge. It requires that laws be public and that they be promulgated well in advance of individuals’ being held responsible for complying with them. . . . Laws must be public not only in the sense of actual promulgation but also in the sense of accessibility and intelligibility.”).

remain stable over time. Significant changes to agencies' public interest analyses are usually triggered by statutory amendments or judicial decisions, *not* the agencies' own initiative. Second, the study finds that agencies rarely consider what might be characterized as "common good" or "community" values in their public interest analyses *unless* such considerations are mandated by statute. And even then, such considerations are rarely outcome-determinative—at most providing atmospherics. Third, in terms of substantive conceptions of the public interest, the study reveals that in most contexts studied, economic arguments are the most-raised and most-accepted justifications for why a particular outcome is in the public interest. Long before the late-twentieth-century economic critique of regulation and the imposition of regulatory cost-benefit analysis requirements, the agencies in this study and the parties in administrative proceedings articulated their public interest claims primarily in the language of economics and efficiency.

The study makes three contributions to scholarly and jurisprudential understandings of what it means to regulate in the public interest. First, it provides a novel descriptive account of what agencies do when authorized to regulate some facet of social or economic life in the public interest. More than a half-century ago, a commentator observed that "[t]he only really satisfactory way of approaching 'the public interest' would be to take a great number of examples of actual uses . . . and see what could be made of them."²⁷ But, to date, there has been no such undertaking.²⁸ This descriptive account contributes to three important strands of administrative law scholarship: (1) empirical studies examining the intricate inner workings of bureaucratic institutions that are often caricatured in political and legal discourse to reveal mechanisms of bureaucratic accountability;²⁹ (2) research that seeks to recover lost constructs from the law of public utilities (or, in current parlance, *Networks, Platforms & Utilities*) to inform theoretical and doctrinal debates about regulation;³⁰ (3) research that

27. Brian Barry, *The Use and Abuse of "The Public Interest,"* in 5 NOMOS: THE PUBLIC INTEREST 191, 196 (Carl J. Friedrich ed., 1962).

28. Previous studies of statutory public interest standards have analyzed judicial cases interpreting them, not agency proceedings applying them. *See generally* Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENV. WATER L. REV. 485 (2006) (examining two models of public interest review of water permit applications in the context of litigation); Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681 (1987) [hereinafter Grant, *Public Interest Review of Water Right Allocation and Transfer in the West*] (exploring how public interest review of water allocation and transfer in the West evolved to recognize public values).

29. *See, e.g.*, Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620 (2018); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

30. *See, e.g.*, MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS & UTILITIES: LAW & POLICY (2022) (responding to siloed approaches to the law of networks, platforms, and utilities (NPU) by examining the common legal principles and tools that govern NPUs); NOVAK, *supra* note 12, at 108-45; Macey & Richardson, *supra* note 13; Rahman, *supra* note 20; Boyd, *supra* note 19.

grappling with the complex meaning of “publicness.”³¹ Second, this study dispels common concerns that regulation under a broad public interest delegation necessarily violates rule-of-law or separation-of-powers principles. The analysis presented here provides evidence that statutory public interest standards do not pose nondelegation problems and suggests a methodology for analyzing other broad statutory mandates that might be subjected to nondelegation challenges. Third, the study casts doubt on the willingness and ability of agencies to champion common good or community values, even when given clear statutory authority to do so. This has important implications for how advocates of values-informed administrative decision making should approach their project.

The Article proceeds as follows. Part I documents the widespread use of public interest standards in statutory law and summarizes the extensive body of case law upholding their constitutionality to date. Part II reviews scholarly literature on the concept of the public interest, including critiques of the public interest and attempts to define it, to develop the conceptual categories that will form the basis of the empirical analysis in Part III. Part III presents a novel empirical study of the implementation of statutory public interest standards by four different regulatory agencies: the Interstate Commerce Commission (ICC), the Federal Communications Commission (FCC), the Federal Energy Regulatory Commission (FERC), and the California State Water Resources Control Board (the Board). Part IV summarizes and synthesizes findings from the case studies and draws out their doctrinal, theoretical, and normative implications. It concludes that agencies implementing public interest standards realize neither critics’ worst fears nor defenders’ highest ideals—indeed, they do not even come close—and discusses how these findings should reorient understandings of statutory public interest standards.

I. Statutory Public Interest Standards

The term “public interest” appears in the U.S. Code no less than 1,280 times.³² These references are distributed throughout various provisions of the Code, but they are concentrated most heavily in Commerce and Trade, Conservation, Public Health and Welfare, and Transportation. Myriad more public interest standards appear in state statutes. Some of these public interest standards provide decisional criteria for courts³³ or set expectations for the

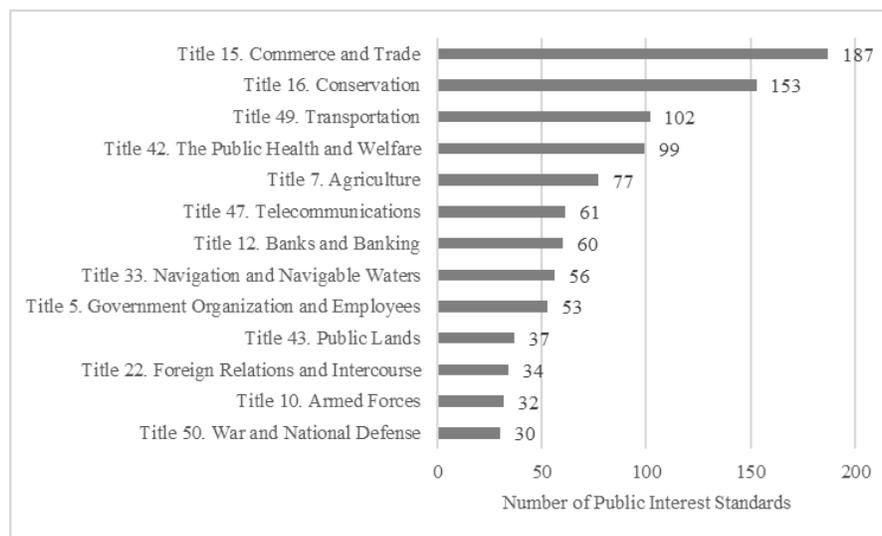
31. See, e.g., Sarah E. Light, *National Parks, Incorporated*, 169 U. PA. L. REV. 33 (2020); Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465 (2020); Hillary A. Sale, *The New “Public” Corporation*, 74 L. & CONTEMP. PROBS. 137 (2011).

32. The search was conducted on 4/2/2020. The count excludes references to “public interest” in federal court rules.

33. See, e.g., 15 U.S.C. § 16(e) (2018) (“Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest.”).

conduct of private parties.³⁴ But most public interest standards accompany delegations of authority to administrative agencies, instructing that this authority be exercised in the “public interest.” For instance, Congress has authorized the Securities and Exchange Commission (SEC) to regulate the use of proxies “as necessary or appropriate *in the public interest*.”³⁵ The Consumer Product Safety Commission may not promulgate a consumer product safety rule unless it finds (among other things) that “the promulgation of the rule is *in the public interest*.”³⁶ And the Federal Communications Act requires the Federal Communications Commission (FCC) to make over 100 different decisions in the “public interest”—from the imposition of open-access requirements on mobile services to the promulgation of regulations on program availability.³⁷ Table 1, below, shows the thirteen titles of the U.S. Code containing thirty or more public interest standards.³⁸

Table 1. Public Interest Standards in the U.S. Code



“Public interest” regulation has its genesis in common-law doctrines justifying government regulation of business activities. Out of common-law roots in public callings, public utility, police power, and the public-service

34. See, e.g., 11 U.S.C. § 1165 (2018) (providing that, in applying various listed sections of this title, “the [bankruptcy] trustee shall consider the public interest in addition to the interests of the debtors, creditors, and equity security holders”).

35. 15 U.S.C. § 78 (2018) (emphasis added).

36. *Id.* § 2058(f)(3)(B) (2018) (emphasis added).

37. The Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.).

38. Thirty-four other titles of the U.S. Code contain a total of 300 more public interest standards, with an average of 9.5 public interest standards per title. Because the average is low, these titles are not individually visualized. Appendix A contains a complete list of public interest standards by title.

corporation, “there emerged a distinctively more modern and expansive concept of regulation in the public interest at the turn of the century.”³⁹ Indeed, the public interest became a lynchpin of economic regulation following the Court’s holding in *Munn v. Illinois* that the government could regulate private property that was “affected with a public interest.”⁴⁰ The concept took on an important role in New Deal legislation, as Congress enacted statutes investing agencies with the power to regulate various domains in the “public interest.”⁴¹ These statutory public interest standards served a function analogous to the market in laissez-faire philosophies of government: providing a regulatory principle for “shaping the activities in the public sector to the common good.”⁴²

Statutory public interest standards have been subject to legal challenge for over a century, and they have been upheld time and again as appropriate delegations of authority. As early as 1892, in a case upholding a broad statutory delegation of authority to the President to impose tariffs, the U.S. Supreme Court approvingly cited a different statute providing “[t]hat the president of the United States be and he is hereby authorized further to suspend the operation of the aforesaid act, if in his judgment the public interest should require it.”⁴³ In 1924, the Court upheld a provision of the Transportation Act of 1920 authorizing the ICC:

whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it as in the Commission’s opinion will best promote the service in the interest of the public and the commerce of the people; and also, among other things, to give direction for preference or priority in transportation or movement of traffic.⁴⁴

Even at this early date, the Court observed that the question of whether Congress may delegate to the Commission the authority to make important decisions about traffic priorities in the public interest “no longer admits of dispute.”⁴⁵

Indeed, as disputes over the validity of statutory public interest standards persisted, the Court continued to uphold them. These decisions typically marshalled three types of arguments: (1) public interest standards are imbued

39. NOVAK, *supra* note 12, at 120.

40. *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

41. Arthur S. Miller, *The Public Interest Undefined*, 10 J. PUB. L. 184, 188 (1961).

42. Norton E. Long, *Conceptual Notes on the Public Interest for Public Administration and Policy Analysts*, 22 ADMIN. & SOC. 170, 172 (1990) (citing PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936)); *see also* NOVAK, *supra* note 11, at 2 (“Public regulation—the power of the state to restrict individual liberty and property for the common welfare—colored all facets of early American development. It was the central component of a reigning theory and practice of governance committed to the pursuit of the people’s welfare and happiness in a well-ordered society and polity.”).

43. *Field v. Clark*, 143 U.S. 649, 685 (1892).

44. *Avent v. United States*, 266 U.S. 127, 129 (1924).

45. *Id.* at 130.

with substantive content by the broader statutory scheme in which they are embedded; (2) public interest standards are no more vague than other common legal standards; and (3) public interest standards are an essential tool at Congress' disposal to regulate complex areas in a flexible manner based on regulators' applied expertise.

First, as the Court has explained many times, “[i]t is a mistaken assumption that [the public interest criterion] is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.”⁴⁶ In *United States v. Chemical Foundation, Inc.*, for instance, the Court upheld a statutory delegation authorizing the President to determine whether sales of enemy property are in the “public interest.”⁴⁷ Its decision rested on the fact that other provisions of the Trading with the Enemy Act supplied the relevant considerations for making this public interest determination.⁴⁸ Similarly, in a challenge to the Transportation Act of 1920, the Court insisted that

the term ‘public interest’ as thus used [was] not a concept without ascertainable criteria, but [had] direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission [had] constantly addressed itself in the exercise of the authority conferred.⁴⁹

And in *United States v. Rock Royal Co-Operative, Inc.*, the Court upheld a delegation of authority to the Secretary of Agriculture to set milk prices “in the public interest,”⁵⁰ recognizing that the standard was embedded in a broader set of specified statutory considerations.⁵¹ The statutory context gave “ample indications of the various factors to be considered by the Secretary,”⁵² while the public interest criterion acknowledged that the “price cannot be determined by mathematical formula.”⁵³

46. *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932); *accord* *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976) (“This Court’s cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.”).

47. 272 U.S. 1, 12-13 (1926).

48. *Id.* at 12.

49. *N.Y. Cent. Secs. Corp.*, 287 U.S. at 25.

50. 7 U.S.C. § 608c (2018).

51. *See* *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577, 581 (1939).

52. *Id.* at 577.

53. *Id.*; *see also* *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (rejecting a challenge to a provision of the Federal Communications Act authorizing the FCC to make licensing decisions in the “public interest, convenience, or necessity” on the ground that the Commission was “not left at large in performing this duty” and asserting that “[the public interest] criterion is not to be interpreted so as setting up a standard so indefinite as to confer an unlimited power,” but rather “by its context, by the nature of radio transmission and reception, by the scope, character and quality of services” (citing *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933)).

Second, apart from statutory context, the Court has often remarked that the “public interest” is no less discernible or definite a standard than other commonly used legal standards that delegate decision-making power to agencies. Examples of such standards include “just and reasonable”;⁵⁴ “public convenience and necessity”;⁵⁵ “reasonableness”;⁵⁶ or “discrimination.”⁵⁷ To require more of the public interest standard “would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process.”⁵⁸

Finally, courts have recognized the important role that public interest standards play in the administrative process, facilitating regulation in complex areas where implementation demands expertise and flexibility. For example, in rejecting a challenge to one of the many public interest standards in the Federal Communications Act, Justice Frankfurter acknowledged the standard’s vagueness but opined that it was “as concrete as the complicated factors for judgment in such a field of delegated authority permit.”⁵⁹ In fact, he described the standard as a “supple instrument”⁶⁰ for implementing policy. The Court has also noted that the statutes in which public interest standards appear are implemented by expert regulators who are capable of carrying out statutory policies and purposes based on the criteria Congress has supplied.⁶¹

Note that none of these challenges to the constitutionality of statutory public interest delegations was decided using the “intelligible principle” standard—the lodestar of contemporary nondelegation doctrine.⁶² Indeed, while decisions rejecting these constitutional challenges rest on foundational nondelegation principles regarding the appropriate exercise of legislative and executive power, they do not address whether the “public interest” is a sufficiently intelligible principle to cabin agency discretion. Instead, they take a more holistic approach to nondelegation, similar to that advocated by Cary Coglianese.⁶³ This approach considers a range of different factors to assess the “shape and size”⁶⁴ of the authority agencies actually exercise under their public interest delegations. The study presented in Part III aligns with this methodology by providing concrete evidence of the “shape and size” of agency authority under different statutory public interest standards.

54. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

55. *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 25 (1932).

56. *Id.*

57. *Id.*

58. *Sunshine Anthracite Coal Co.*, 310 U.S. at 398.

59. *Fed. Comm’n. v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

60. *Id.*

61. *Sunshine Anthracite Coal Co.*, 310 U.S. at 398.

62. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee’s use of discretion.”).

63. See Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1875 (2019).

64. *Id.*

II. Theorizing the Public Interest

As a foundation for the empirical study, this Part canvasses the universe of meanings that agencies might ascribe to the public interest. Scholars have grappled more strenuously than courts and government officials with the question of what the public interest means. While many scholars are deeply critical of the public interest as a concept, others have made serious attempts to define it and to understand the work it does in the public administration of delegated authority. This Part thus reviews scholarly theories and critiques of the public interest in order to develop a menu of possible meanings that agencies might adopt and to identify the potential dangers presented when agencies attempt to regulate in the public interest. This menu structures the coding scheme used to analyze the case studies presented in Part III.

A. Theories of the Public Interest

Scholarly attention to the public interest as a criterion for government decision making has waxed and waned over the past century. The greatest burst of energy around the construct came in the New Deal and post-World War II era. During this time, legal scholars and political scientists seized on it as a lens to understand expanding administrative government as well as the role of the state and liberal democracy in an era of rising fascism. But these inquiries withered in the face of mounting critiques by political scientists and economists that “there is no such thing as ‘the public interest’; there are only private interests—of individuals, groups, classes—which maneuver to obtain the greatest amount of public influence and public power, each of which discerns ‘the public interest’ in its own image.”⁶⁵

The 1965 launch of *The Public Interest* magazine signaled a renewed interest in the construct, with founding editors Daniel Bell and Irving Kristol building the publication’s mission around a search for the term’s meaning. “Whether there is a meaning to be ascribed to the phrase ‘the public interest,’ and if so what this is,” they wrote, “is a matter that will be discussed in our pages—though we suspect it is not likely to be finally settled there, or anywhere for that matter.”⁶⁶ Alas, it was not settled before economic critiques of regulation and the regulatory reform movement of the 1970s and 1980s again sidelined the construct. Economists styled their project as a reaction to the pathologies of “the public interest theory of regulation”⁶⁷ and regulatory reformers insisted that efficiency (operationalized as cost-benefit analysis) should replace public interest (and other non-economic values) as the touchstone of agency decision

65. Daniel Bell & Irving Kristol, *What Is the Public Interest?*, 54 NAT’L AFFS. 3, 5 (1965), https://www.nationalaffairs.com/public_interest/detail/editorial-what-is-the-public-interest [<https://perma.cc/PZ6G-ZLHP>]. The publication was originally published in a magazine called *The Public Interest*.

66. *Id.*

67. Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974).

making.⁶⁸ “Indeed, the last half century or so has witnessed a sustained effort on the part of law and economics commentary to undermine and undo” the idea of regulation in the public interest.⁶⁹

This “undoing” of the public interest construct, and the efficiency paradigm it unleashed, has largely persisted through today. Still, the public interest continues to reassert itself in legal and policy conversations. In 2007, for instance, the journal *Daedalus* devoted a special issue to the public interest. In his introductory essay, E.J. Dionne, Jr., explained that there was “a thirst for a new politics organized around the public interest and the common good”⁷⁰ following the disorienting and galvanizing impacts of the 9/11 terrorist attacks and the wars in Iraq and Afghanistan. He saw these upheavals as punctuating several decades of neoliberal governance: “at the end of a long celebration of private pleasure and private striving, there is much evidence of a return to the public realm and a growing concern for public things.”⁷¹ This growing concern animates current scholarship advocating more values-based government decision making.

Although scholarly debate about the public interest has ebbed and flowed over the last century, calls to regulate in the public interest (and statutes requiring administrators to do so) endure—as do attacks on them. The theoretical arguments for and against public interest-oriented administration get endlessly recycled, so it is useful to review them here.

What does scholarship tell us about the meaning of the public interest? Definitions fall into five main categories: (1) those that ascribe identifiable, substantive content to the public interest; (2) those that see the public interest as the aggregation of private interests; (3) those that see the public interest manifest through observance of legitimate procedures; (4) those that see the public interest as serving important sociological or cognitive functions such as constituting policymakers as responsible and accountable subjects; and (5) hybrid approaches that either combine various elements of the previous four, or that cede the construct’s necessity in administrative governance even if they cannot pinpoint a precise definition. Each is elaborated briefly below.

1. Substantive Theories

Substantive theories of the public interest date at least to Plato and Aristotle, who believed in an objective, timeless, and universal good grounded in ultimate truths about human nature and the universe.⁷² These truths were discernable

68. See ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 38 (2022); Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 639-43 (2012).

69. NOVAK, *supra* note 12, at 112.

70. E.J. Dionne Jr., *Why the Public Interest Matters Now*, 136 DAEDALUS 5, 6 (2007).

71. *Id.*

72. See VIRGINIA HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS 219 (1970); R. E. FLATHMAN, THE PUBLIC INTEREST: AN ESSAY CONCERNING THE NORMATIVE DISCOURSE OF POLITICS 53 (1966).

through the application of human reason to “the rational order of justice.”⁷³ These claims form the basis of natural law theories—from Aquinas⁷⁴ to common good constitutionalism—that conceptualize the common good as “the flourishing of a well-ordered political community.”⁷⁵ Such human flourishing entails promoting values of “peace, justice, and abundance”⁷⁶ or, in modern terms, “health, safety, and economic security.”⁷⁷

Substantive values are not solely the province of natural law. Others have theorized that the public interest is grounded in “shared communal and societal values”⁷⁸ and that it is “not merely what the consensus of society’s individual members wished, but a substantive conception of the moral good that transcend[s] individual interests.”⁷⁹ Indeed, the promotion of human flourishing in community grounds several contemporary scholarly projects devoted to advancing values-based administrative decision making. For instance, Emerson’s duty of public care would require administrative decisionmakers to deploy their authority “to invest in the welfare of individuals [and] to provide those institutions, services, and protections that are necessary to people’s moral and political agency but which they cannot obtain on their own initiative.”⁸⁰ Rahman’s conception of “policymaking as power-building” demands that administrators design policies that redistribute political power among interest groups to better realize values of democracy and inclusion.⁸¹ And in the context of water rights allocation, Mark Squillace argues that agencies “have an affirmative duty to protect the people’s common heritage of streams, lakes, marshlands and tidelands.”⁸² Despite variation in substantive conceptions of the public interest, what unites substantive theories—and distinguishes them from aggregationist theories discussed below—is their insistence that the public interest is distinct from purely private interests⁸³ and that it comprises some identifiable set of communally shared values that exist “beyond the market.”⁸⁴

73. Gerhart Niemeyer, *Public Interest and Private Utility*, in 5 NOMOS: THE PUBLIC INTEREST 1, 4 (Carl J. Friedrich ed., 1962).

74. See ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, pt. I-II, art. 2 http://www.documentacatholicaomnia.eu/03d/1225-1274,_Thomas_Aquinas,_Summa_Theologiae_%5B1%5D,_EN.pdf [<https://perma.cc/93DV-XXGE>].

75. VERMEULE, *supra* note 16, at 7.

76. *Id.*

77. *Id.*

78. Mark Squillace, *Restoring the Public Interest in Western Water Law*, 2020 UTAH L. REV. 627, 633.

79. GREGORY S. ALEXANDER, COMMODITY & PROPERTY 29 (1997).

80. Emerson, *supra* note 14, at 38.

81. K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L. J. 315, 315-16 (2018).

82. Squillace, *supra* note 78, at 675.

83. VERMEULE, *supra* note 16, at 7.

84. ANDREW GAMBLE & TONY WRIGHT, *Introduction*, in RESTATING THE STATE? 6 (Andrew Gamble & Tony Wright eds., 2004) (contending that the public interest provides a source of market-delimiting values that ensure the preservation of ideals which “cannot be reduced to a financial calculus”); see also MICHAEL J. SANDEL, THE TYRANNY OF MERIT: CAN WE FIND THE COMMON GOOD? 208-09

2. Aggregationist Theories

Jeremy Bentham posited a straightforward formula for determining the interest of the community: it “is the sum of the interests of the members who compose it.”⁸⁵ While many utilitarian thinkers take this maxim to be a deep critique of the public interest, aggregationists see it as a useful methodology for operationalizing the public interest⁸⁶—typically as the maximization of the aggregate of individual interests.⁸⁷ This welfare-economics understanding of the public interest as utility maximization⁸⁸ undergirds cost-benefit analysis and many common contemporary approaches to public administration.⁸⁹

3. Proceduralist Theories

Proceduralist theories see the public interest as the product of legitimate political processes. Thin versions of proceduralism view political processes as an effective methodology for aggregating individual interests or balancing group interests, thus facilitating the measurement of the public interest. From this

(2020) (“According to the civic ideal, the common good is not simply about adding up preferences or maximizing consumer welfare. It is about reflecting critically on our preferences—ideally, elevating and improving them—so that we can live worthwhile and flourishing lives.”); Clarke E. Cochran, *Political Science and “The Public Interest”*, 36 J. POL. 327, 353 (1974) (arguing that if the public interest is to have any meaning, it “must refer to normative judgments and to the common human needs of men in society, needs which are more basic and essential than their temporary wants or desires”).

85. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11 (J. H. Burns & H. L. A. Hart eds., 1996) (1789).

86. See Niemeyer, *supra* note 73, at 1-13 (arguing that political theorists such as John Locke, Adam Smith, and John Stuart Mill do not deny the existence of a public interest; rather, they associate it with the satisfaction of private utilities).

87. See Robert Dahl, *Letter to Committee*, in WAYNE A. R. LEYS & CHARNER MARQUIS PERRY, PHILOSOPHY AND THE PUBLIC INTEREST 17 (1959) (“If one rejects the notion that public interest is some sort of amalgamation of private interests, there is little philosophical mileage to be gained from using the term at all.”); see also R. A. Musgrave, *The Public Interest: Efficiency in the Creation and Maintenance of Material Welfare*, in 5 NOMOS: THE PUBLIC INTEREST 107, 110 (Carl J. Friedrich ed., 1962) (explaining that, “where public policy is needed to correct market forces,” welfare economics views an intervention as “efficient, i.e., in the public interest, if *someone* gains while no one loses”) (internal quotations omitted); ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT 222 (1949) (“The society itself is nothing other than the complex of the groups that compose it.”). But see WALTER LIPPMAN, THE PUBLIC PHILOSOPHY 41 (1955) (“I am far from implying that the voters are not entitled to the representation of their particular opinions and interests. But their opinions and interests should be taken for what they are and for no more. They are not—as such—propositions in the public interest.”).

88. See Musgrave, *supra* note 87, at 108 (“The standard of public interest is provided by the results which would be obtained under perfect competition. Policy measures to come closer to these results, therefore, are in the public interest.”); Niemeyer, *supra* note 73, at 1 (“Economic efficiency judged in terms of consumer satisfaction has indeed become the accepted formula for the public interest, so much so that the merit of newly emerging political entities is assessed almost wholly in terms of rising standards of living.”).

89. See, e.g., CASS SUNSTEIN, THE COST-BENEFIT STATE (1996); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008); MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH (2021); Chris Joseph, Thomas I. Gunton & James Hoffele, *Assessing the Public Interest in Environmental Assessment: Lessons from Cost-Benefit Analysis of An Energy Megaproject*, 5 IMPACT ASSESSMENT AND PROJECT APPRAISAL 397 (2020).

perspective, the decisions emerge from legitimate political processes are, by definition, in the public interest.⁹⁰

Thicker versions of proceduralism go further to conceptualize political processes as a means of perfecting rather than merely operationalizing democracy. From this perspective, the public interest emerges from political processes that promote “free social inquiry” and “full and moving communication.”⁹¹ There is no objective metric for these assessments; rather, “in a democracy, the political process creates the public interest in the process of searching for it.”⁹² In civic republican theory, for instance, this search must include “[r]epresentatives of all interests potentially affected by a government action,” and must provide them “meaningful opportunities to engage in discussion about the action.”⁹³ Proceduralist approaches replace the search for substantive values with a focus on “the improvement of the methods and conditions of debate, discussion and persuasion”⁹⁴ that, they argue, constitute the public interest.

4. Constitutive and Cognitive Approaches

Constitutive and cognitive approaches offer a functionalist definition of the public interest as the lodestar that constitutes the parameters of administrative decision making and the identities of public administrators. Some have characterized the public interest as “an organizing concept,”⁹⁵ or a “verbal symbol designed to introduce unity, order, and objectivity into administration.”⁹⁶ The concept operates on three levels to achieve this. First, it suggests the range

90. See HOWARD R. SMITH, *DEMOCRACY AND THE PUBLIC INTEREST* 146-47 (1960); S.I. BENN & R.S. PETERS, *SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE* 273 (1959) (“The prescription ‘seek the common good’ is not of the same type as ‘maintain full employment.’ Whereas the latter is a counsel of substance, the former is one of procedure.”); LEYS & PERRY, *supra* note 87, at 26 (explaining that procedural views “point toward a procedural or constitutional doctrine about public interest, a doctrine to the general effect that public interest is specified and determined by the governmental processes by which policy is formed.”); EMMETTE S. REDFORD, *IDEAL AND PRACTICE IN PUBLIC ADMINISTRATION* 113 (1958) (“[One] approach [to discerning the public interest] is to look at the need for machinery for representation of interests and for weighing and deciding issues. There is a public interest in the availability of adequate organization and process, measured by the needs and ideals of society, for representing claims and resolving issues.”).

91. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 184 (1927).

92. Daniel A. Farber, *Environmentalism, Economics, and the Public Interest*, 41 *STAN. L. REV.* 1021, 1042 (1989) (reviewing MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (1988)); see also Carol W. Lewis, *In Pursuit of the Public Interest*, 66 *PUB. ADMIN. REV.* 694, 696 (2006) (“As a public service duty, the public interest is conceptualized more fruitfully as a process, not as an objectively identifiable end-point. An elusive and sweeping obligation, it is a never-ending process that is made meaningful more by practice than by product.”).

93. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511, 1530 (1992).

94. DEWEY, *supra* note 91, at 207.

95. Peter F. Drucker, *Letter to Committee*, in LEYS & PERRY, *supra* note 87, at 31; see also HERRING, *supra* note 42, at 23 (“The public interest is the standard that guides the administrator in executing the law. This is the verbal symbol designed to introduce unity, order, and objectivity into administration.”).

96. HERRING, *supra* note 42, at 23.

of considerations relevant to a particular decision (and indicates that the range is not infinite).⁹⁷ Second, it shapes the way administrators exercise their discretion⁹⁸ by training the decision-making lens on “broad interests as opposed to narrow, the more inclusive versus the limited.”⁹⁹ Third, public interest standards force reasoned decision making grounded in transparent articulations of value. Public interest justifications cannot be supported by mere assertions of private preference. Rather, they require reasoned discourse that transcends the interests of private individuals or groups to “relate the anticipated effects of a policy to community values and to test that relation by formal principles.”¹⁰⁰ In sum, public interest standards force decisionmakers to articulate their vision of the good and to justify their decisions in terms of that vision.¹⁰¹

A related set of theories argues that the idea of the public interest organizes the roles, identities, and cognition of public administrators. The public interest is said to have a “psychological value for each administrator,”¹⁰² reminding them

97. See Peter F. Drucker, *Letter to Committee*, in LEYS & PERRY, *supra* note 87, at 31.

98. See Thomas J. Barth, *The Public Interest and Administrative Discretion*, 22 AMER. REV. PUB. ADMIN. 289, 292-99 (1992).

99. Cochran, *supra* note 84, at 347. This orientation is thought to be an important corrective for the pathologies of interest-group politics, reminding administrators to “look for common and enduring interests” rather than succumbing to strong interests able to dominate the administrative process. See Emmette S. Redford, *The Protection of the Public Interest with Special Reference to Administrative Regulation*, 48 AM. POL. SCI. REV. 1103, 1108 (1954).

100. FLATHMAN, *supra* note 72, at 82; see also Long, *supra* note 42, at 177 (suggesting that the public interest “takes the form of a structured argument in which the agreed impacts of policy on the critical dimensions of the lives of the relevant public are weighted and . . . ‘good reasons’ are given for maintaining that a particular policy serves the public interest”); C. T. Goodsell, *Public Administration and the Public Interest*, in REFOUNDING PUBLIC ADMINISTRATION 96, 100 (1990) (noting that the public interest standard “requires the official while defending a position to articulate its value base more clearly than would otherwise be the case”).

101. Some commentators have argued that such a standard is constitutionally required. See, e.g., Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public*, *Public Law*, 54 TUL. L. REV. 849, 876 (1979) (arguing that the “citizen has a constitutional right to demand that public law be public-regarding”); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695 (1984) (asserting that the government may not act purely on naked political preference, but must “invoke some public value to justify its conduct”). This imperative to frame policy decisions and demands in terms of community values is said to check the discretion of public officials, see Anthony Downs, *The Public Interest: Its Meaning in a Democracy*, 29 SOC. RSCH 1, 4 (1962) (noting that public interest standards can serve “as a guide to and a check on public officials who are faced with decisions regarding public policy but have no unequivocal instructions from the electorate or their superiors regarding what action to take”), and to encourage consensus, see Goodsell, *supra* note 100, at 99; Gerhard Colm, *In Defense of the Public Interest*, 27 SOC. RSCH. 295, 300 (1960) (“[T]he public interest is the life hypothesis of a pluralistic society—enabling people with different religions, different philosophical convictions, or different subconscious value systems to have a common ground for promoting their various ultimate values.”).

102. Cochran, *supra* note 84, at 344 (arguing that the public interest “has a psychological value for each administrator that colors the balance which results from group conflict”); see also Goodsell, *supra* note 100, at 103 (“Obviously mere utterance of a phrase does not determine commendable behavior or enforce desirable values. The contribution is, rather, one of establishing a normative frame of reference, of subtly conditioning the terms of public policy discussion, and of giving higher-order purposiveness a more elevated position of attention than it would otherwise occupy.”); Barth, *supra* note 98 (maintaining that the concept of public interest “has powerful symbolic and instrumental value for guiding the principled exercise of administrative discretion”).

of their public-facing duties and fostering habits of public responsiveness.¹⁰³ It also helps surface the interests of unorganized or underrepresented constituencies, acting as a “hair shirt”¹⁰⁴ that “has offered many a public servant and citizen an uncomfortable and persistent reminder” of these interests.¹⁰⁵ In this way, the public interest serves as a kind of proto-“nudge” toward integrity, constraint, and regularity in public administration.¹⁰⁶

5. Hybrid Approaches and Resignation

More recent scholarship has synthesized these theories into hybrid approaches blending various dimensions of the public interest.¹⁰⁷ Finally, some theorists have resigned themselves to the view that whatever the definition of the public interest and whatever its conceptual flaws, it is “indispensable” to a system of well-functioning administrative government.¹⁰⁸ This is so because it guides the discretion of government officials and defines the appropriate nature of their roles in a democratic polity.¹⁰⁹ It also fosters candor about the values underlying government policies and motivating government decisions.¹¹⁰ As one commentator acquiesced, “[w]e are free to abandon the concept [of the public interest], but if we do so we will simply have to wrestle with the problems under some other heading.”¹¹¹

103. See Goodsell, *supra* note 100, at 99 (claiming that the public interest standard fosters two orientations in public officials that are important for democracy: “(1) a habit of responsiveness to the public by policymakers and (2) the habit of making policy within a built consensus in accord with the preferred method and accepted rate of political change”).

104. LEYS & PERRY, *supra* note 87, at 8.

105. Frank J. Sorauf, *Public Interest Reconsidered*, J. POL. 616, 639 (1957).

106. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008) (defining a “nudge” as an “aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives”).

107. See Goodsell, *supra* note 100, at 99 (identifying six ideals served by employing a public interest framework for policy analysis: (1) adherence to law and basic precepts of moral behavior such as honesty and integrity; (2) political responsiveness to the preferences of citizens; (3) commitment to forging political consensus among competing groups; (4) concern for logic, demonstrated by reasoned justification for decisions; (5) attention to the future effects of policy decisions on all affected constituencies; and (6) awareness of the needs of powerless groups whose interests are not well represented in the policymaking process); see also Barth, *supra* note 98, at 291-92 (endorsing Goodsell’s approach); Wayne R. Leys, *The Relevance and Generality of “The Public Interest,”* in 5 *NOMOS: THE PUBLIC INTEREST* 237, 256 (Carl J. Friedrich ed., 1962) (arguing that the public interest can be distilled into three categories: utility maximization, due process, and good-faith desire to avoid destructive social conflict).

108. HELD, *supra* note 72, at 18.

109. See Colm, *supra* note 101, at 306-07 (1960) (“[I]t is difficult to imagine that politicians, statesmen, judges, and officials concerned with the formulation of government policies could do without this concept.”).

110. See Gerhard Colm, *The Public Interest: Essential Key to Public Policy*, in 5 *NOMOS: THE PUBLIC INTEREST* 115, 117 (Carl J. Friedrich ed., 1962) (“[W]e can deal more adequately with problems of economic and social policies, public finance, and judicial procedures if we face up squarely to the meaning of the term public interest than if we deny this concept or let it in only by the back door.”).

111. FLATHMAN, *supra* note 72, at 13.

B. Critiques of the Public Interest

Critiques of the public interest have four distinct but related components. First, and most existentially, is the critique that there is no such thing as the public interest because what scholars and policymakers misleadingly characterize as the “public interest” is nothing more than the aggregation of private interests. Second, even if the public interest is a coherent concept, it lacks any discernible substantive content to guide decision making. Third, this indeterminacy enables those empowered to make decisions in the public interest to surreptitiously pursue their own private, self-interested ends. Fourth, this kind of unchecked self-aggrandizement by government officials leads to tyranny.

The view that the public interest simply does not exist is grounded in utilitarian theory and elaborated by public choice theorists. According to Bentham:

“The interest of the community” is one of the most general expressions in the terminology of morals When it has meaning, it is this. The community is a fictitious body composed of the individuals who are thought of as being as it were its members. Then what is the interest of the community? It is the sum of the interests of the members who compose it.¹¹²

This theoretical orientation suggests that nothing is to be gained from theorizing the public interest as an independent construct.¹¹³ Rather, the unit of analysis should be the individuals (and groups of individuals) that comprise what some misguidedly refer to as the public.¹¹⁴

Even if one allows that the public interest is a coherent construct, apart from the individuals and groups that comprise it, critics charge that it is impossible to discern what it means. The public interest is “a vague, undelineated symbol.”¹¹⁵ It is “not self-defining.”¹¹⁶ Although some have argued that the difficulty of pinning down a concrete definition of the public interest is simply one more

112. BENTHAM, *supra* note 85, at 2-3.

113. See Merle Fainsod, *Some Reflections on the Nature of the Regulatory Process*, in PUBLIC POLICY 298 (Carl J. Friedrich & Edward S. Mason eds., 1940) (“The idea of public interest becomes a fiction used to describe an amalgam which is shaped and reshaped in the furnace of their conflicts.”); LEYS & PERRY, *supra* note 87, at 17 (“[I]f one rejects the notion that public interest is some sort of amalgamation of private interests, there is little philosophical mileage to be gained from using the term at all.”); GLENDON SCHUBERT, THE PUBLIC INTEREST: A CRITIQUE OF THE THEORY OF A POLITICAL CONCEPT 223 (1960) (arguing that “‘the public interest’ neither adds to nor detracts from the theory and methods presently available for analyzing political behavior”).

114. See Cochran, *supra* note 84, at 332-33 (“The public interest does not exist, then, because there is no public and because there are no standards to distinguish altruistic from selfish interests. All interests are alike the preferences of groups.”); SMITH, *supra* note 90, at 25 (“[T]he concept of a public interest is insisted upon precisely because (as applied to particular public policies) there is no such thing.”).

115. Miller, *supra* note 41, at 187.

116. PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 129 (2014).

chapter in the well-rehearsed debate over standards versus rules,¹¹⁷ others contend that the ambiguity of the public interest presents more than your garden-variety indeterminacy problem. The consequences of public interest indeterminacy, they assert, are especially dire because the lack of a discernible definition makes it “a vessel into which public officers may pour what they wish.”¹¹⁸

This creates problems of unconstrained administrative discretion—which, for many, is problem enough. But deep critiques of the public interest go further, suggesting that it disguises the particularized private interests, backed by coercive state power, that are ultimately behind administrative decisions, lulling the populace into a complacent stupor that disables democratic accountability and leads to tyranny.¹¹⁹ One commentator describes the public interest as “one of society’s most effective analgesics”¹²⁰ and laments that “[t]he most discouraging aspect of totalitarianism is not the power-lust of its leaders, but the ease with which people adjust to losses in political freedom when that loss is explained in terms of public necessity.”¹²¹

III. Empirical Study: Implementation of Statutory Public Interest Standards

Drawing on conceptions and critiques of the public interest summarized above, this study explores how agencies define the public interest, what factors agencies consider in determining which outcomes are in the public interest, what types of arguments parties make to persuade agencies that their private claims are in the public interest, and which private claims about the public interest

117. See Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 568 (1979) (arguing that public interest standards raise a classic “standard-setting problem”: “there are too many standards, without clear rules how they apply to individual cases or how they are to be weighed”); FLATHMAN, *supra* note 72, at 13 (“Public interest is a normative standard, and it raises the whole panoply of problems associated with standards in general.”).

118. Miller, *supra* note 41, at 187 (“The net result is that the public interest today is what a given official or agency says it is”); ROBERT DAHL & CHARLES LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 501 (1963) (“[The public interest] is usually left totally undefined. Rarely can it be read to mean the preferences of the greater number. Often enough a precise examination would show that it can mean nothing more than whatever happens to be the speaker’s own view as to a desirable public policy.”); see also SCHUCK, *supra* note 116, at 129-30 (“Even the most scrupulously public-regarding citizens, not to mention the many more narrowly selfish ones, tend to view the public interest through their own particular lenses, investing their own preferences with broader justifications.”); Frank Sorauf, *The Conceptual Muddle*, in 5 NOMOS: THE PUBLIC INTEREST 183, 188 (Carl J. Friedrich ed., 1962) (“At its most primitive level in political debate public interest serves as little more than rationalization for some particular group’s interests.”); Cochran, *supra* note 84, at 332 (“[I]nvolving the public interest is merely a strategy which groups pursue in promoting their own interests.”).

119. See SMITH, *supra* note 90, at 25 (“Here, then, is the paradox of democracy. Because there is no set of policies equally in the interest of all the people, and because the ideological dilemma requiring that power be shared by individuals and groups who do not desire to share it makes it necessary that preferred policies nevertheless be supported in the name of the entire community, the idea of a common good as an element in the myth of democracy performs the function of disguising the fact that the decisions made are ultimately sanctioned by power.”).

120. Stephen K. Bailey, *The Public Interest: Some Operational Dilemmas*, in 5 NOMOS: THE PUBLIC INTEREST 96, 97 (Carl J. Friedrich ed., 1962).

121. *Id.*

agencies tend to find most persuasive. To address these questions, I conduct in-depth case studies of four different agencies administering statutory public interest standards. I selected these case studies based on three criteria. First, I selected public interest standards that are outcome-determinative, meaning that the “public interest” criterion (rather than some other more specific statutory standard) is the decisive factor in the agency’s decision. Second, I selected public interest standards that are actively litigated to identify cases that include explicit discussion—by parties and by agency officials—of what outcomes are in the public interest and why. Third, I focused on longstanding public interest standards to allow for investigation of trends over time.

These criteria skew the sample toward agency adjudications in licensing and permitting proceedings. This is a limitation of the study, but it is a key element of the study design because it identifies contexts in which agencies explicitly articulate their understanding of the public interest. This provides a unique window into agencies’ thinking about the public interest that is inaccessible in other settings such as rulemaking. Although many agencies are authorized to engage in rulemaking in the public interest, such standards are not determinative of what rule is ultimately adopted because they are typically embedded in statutory authorizations that include more specific and concrete standards that drive rulemaking outcomes.¹²² Agencies tend to justify the rules they promulgate based on these more specific and concrete standards rather than on the broader ground that the rule advances the public interest. Although agencies with public interest rulemaking authority commonly cite to this authority and make conclusory statements that their rules are in the public interest, they neither define what public interest means nor explain why a particular rule meets this standard.¹²³ Thus, because rulemakings undertaken

122. See, e.g., 49 U.S.C. § 44701(d)(1)(A) (2018) (requiring the Federal Aviation Administration (FAA) Administrator to “consider the duty of an air carrier to provide service with the highest possible degree of safety *in the public interest*” when “prescribing a regulation or standard under subsection (a) or (b) of this section” (emphasis added)). Not only is this public interest standard qualified by the primary command in this same provision to consider the carrier’s duty to provide service with the highest possible degree of safety, but it also applies to rulemakings under 49 U.S.C. § 44701(a)-(b) (2018), which contain their own extensive and detailed requirements.

123. I conducted an extensive review of final rules promulgated by two prolific rulemaking agencies under statutory public interest authority: (1) the Federal Aviation Administration under 49 U.S.C. § 44701(d)(1)(A) (2018), see *supra* note 122, and (2) the SEC, which is authorized by Section 17A of the Exchange Act “to adopt rules as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.” Standards for Covered Clearing Agencies, 81 Fed. Reg. 70786, 70788 (Oct. 13, 2016). I did not find any rules promulgated by these agencies that explicitly define the public interest or explicitly justify why the rule adopted is in the public interest. The FAA rule, Airworthiness Directives; Rockwell Collins, Inc. Flight Management Systems, 85 Fed. Reg. 30597 (May 20, 2020), is typical. In that rule, the agency stated: “The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described previously.” *Id.* at 30599. Nowhere does the rule define the term “public interest” or explain why this rule is in the public interest. Similarly illustrative is SEC rule, Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019). There, the agency stated: “We believe it is in the public interest and consistent with the protection of investors to permit such flexibility in the delivery of information pursuant to the Disclosure Obligation.” *Id.* at 33348. This rule simply states that it is in the public interest without defining public interest or discussing why.

pursuant to statutory public interest authority provide little direct insight into the promulgating agency's understanding of the public interest, they are not included in this study.¹²⁴

I identified the following statutory schemes meeting these criteria: (1) the Interstate Commerce Act (ICA),¹²⁵ administered by the Interstate Commerce Commission (ICC) and later by the Surface Transportation Board (STB); (2) the Federal Communications Act,¹²⁶ administered by the Federal Communications Commission (FCC); (3) the Federal Water Power Act,¹²⁷ administered by the Federal Energy Regulatory Commission (FERC); and (4) the California Water Commission Act,¹²⁸ administered by the California State Water Resources Control Board (the Board). The public interest standards in these statutes date to the early twentieth century and regulate either merger review in heavily regulated industries or natural resource allocation.

Merger review in these highly regulated contexts is a fertile site for understanding the meaning of public interest regulation. As William Novak explains, regulatory activity at the intersection of public utility and antitrust historically has been concerned with concentrations of private economic power and their threat to public sovereignty,¹²⁹ not merely “bigness” or consumer welfare.¹³⁰ As such, these case studies are well-suited to reveal agencies' understanding of the larger public interest issues at stake. At the same time, the merger review context necessarily skews discussion of public interest toward concerns about efficiency and competition. But it is important to recognize (as all three federal agencies explicitly do) that public interest merger review departs from traditional antitrust doctrine and entails a broader set of considerations—beyond efficient markets—that the sectoral regulators claim to be uniquely situated to apply. Their public interest analysis should reflect these considerations.

I include a state-level case study for four reasons. First, many public interest standards are implemented at the state level, and recent scholarship demonstrates that nondelegation concerns are taken quite seriously in many states.¹³¹ Second,

124. Future research using different methodologies could theorize and explore patterns in public interest rulemakings. The agency's view of the public interest might be implicit in the explicit justifications it makes for the rule. Public interest arguments might also be contained in comments submitted on proposed rules. It would be noteworthy if agencies fail to address public comments about why a proposed rule is not in the public interest. However, such questions fall outside the scope of the present study.

125. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

126. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

127. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§ 791a-828c) (renamed Federal Power Act (FPA) by Public Utility Act of 1935, ch. 687, 49 Stat. 803, 838 (codified as amended at 16 U.S.C. §§ 79a-79z-6 and in scattered sections of 16 U.S.C.)).

128. The Water Commission Act of 1913, 1913 Cal. Stat. 1012.

129. See NOVAK, *supra* note 12, at 194.

130. *Id.* at 195.

131. See Randolph J. May, Opinion, *The Nondelegation Doctrine is Alive and Well in the States*, REG. REV. (Oct. 15, 2020), <https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive>.

federal nondelegation doctrine long has been informed by perspectives from the states.¹³² Third, administrative law scholarship is frequently informed and enriched by engagement with state regulatory practices.¹³³ Fourth, including a state case study provides a mechanism to assess whether my findings about agency behavior in the federal case studies are driven by *in terrorem* effects—specifically, the fear of reversal by federal courts—or by institutional characteristics of administrative agencies.

California offers a particularly compelling case study to conduct this analysis. Notably, California is recognized as the vanguard of states limiting private water rights to protect public values.¹³⁴ For this reason, it is the most likely to adopt an expansive conception of the public interest. While this makes California unrepresentative, it also means that California is a useful edge case because it can be assumed that other state water agencies interpret their public interest mandates more modestly. In addition, unlike many other state water agencies, the California State Water Resources Control Board routinely addresses the public interest explicitly in its consideration of water rights applications.¹³⁵ Nearly all western states have statutory or constitutional provisions requiring that water be allocated in the public interest, but most states award water rights without ever considering the public interest.¹³⁶ Finally, because of its size, California provides a large pool of cases for analysis.

Within each of these regulatory domains, I analyze a sample of adjudicatory proceedings under the relevant public interest standard.¹³⁷ I use qualitative coding methodology, which is commonly employed by social scientists to systematically organize text data based on content categories, facilitating the identification of patterns across a large body of texts.¹³⁸ The key categories I code for include: (1) explicit definitions of the public interest stated by the agency; (2) explicit claims made by the agency about the scope of its discretion under the public interest standard; (3) justifications made by parties and agencies about why a particular outcome is—or is not—in the public interest; (4) the

well-states/ [https://perma.cc/3S7D-CFUK] (arguing that many states have robust nondelegation doctrines).

132. For example, in *Field v. Clark*, 143 U.S. 649, 694-95 (1892), a foundational nondelegation case, the U.S. Supreme Court endorsed the Supreme Court of Ohio's approach to the statutory delegation of discretion to the executive.

133. See, e.g., Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018).

134. See Squillace, *supra* note 78, at 662-65; Grant, *Public Interest Review of Water Right Allocation and Transfer in the West*, *supra* note 28, at 690.

135. *Id.* at 658 (“[O]nly two states—Washington and California—appear to address the public interest routinely in the consideration of water rights applications . . .”).

136. *Id.* (“[S]tates frequently award water rights without ever considering the public interest, even where the law appears to require it.”).

137. Case selection and coding methodologies are described in a Methodological Appendix to this Article.

138. See Maryam Salehijam, *The Value of Systematic Content Analysis in Legal Research*, 23 TILBURG L. REV. 34 (2018). I describe my methodology in greater detail in a Methodological Appendix.

agency's treatment of these public interest justifications (i.e., whether it accepted them, rejected them, or raised them itself).

The precise content of the justifications varies across regulatory contexts, but I code for a core nucleus of common constructs in each domain, drawn from the literature reviewed in Part II. These include substantive values (e.g., the protection of communities, the environment, workers, national security, or the preservation of firms that would fail under existing market conditions), efficiency claims (e.g., basic economic constructs such as costs, prices, quality, competition, and growth as well as arguments about net costs and benefits or cost-benefit analysis), and procedural arguments (e.g., arguments about open access to the proceedings, support or buy-in by stakeholders, and parties' willingness to accommodate one another's interests). In the category of substantive values, I also indicate whether these values are required considerations under the agency's authorizing legislation or whether they are extra-statutory.

A. ICC Implementation of the Interstate Commerce Act

1. Statutory Context

The Interstate Commerce Commission (ICC) was created by the Interstate Commerce Act (ICA) of 1887 to regulate the railroad industry. Initially, the ICC was an investigative body charged primarily with monitoring railroad rates, but Congress gradually expanded its power to more actively regulate railroads.¹³⁹ The Transportation Act of 1920 gave the ICC the authority to regulate railroad mergers under a public interest standard:

Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engages in the transportation of passengers or property subject to this Act, that the acquisition . . . by one of such carriers of the control of any other such carrier or carriers . . . will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.¹⁴⁰

Subsequent amendments to the ICA refined this language and added specific factors to be considered in making public interest determinations. The Emergency Railroad Transportation Act of 1933 required the ICC to develop a master plan for consolidation of the nation's railways and required the agency to consider as part of its public interest analysis of proposed transactions whether

139. JAMES B. BURNS, *RAILROAD MERGERS AND THE LANGUAGE OF UNIFICATION* 2 (1998).

140. Transportation Act of 1920, 49 U.S.C. § 5(2) (1925-26) (repealed 1933).

they would advance this plan.¹⁴¹ Within a few years, the “master plan” approach was seen as a failure and Congress passed the Transportation Act of 1940,¹⁴² relieving the ICC of its duty to create a master plan and to base public interest determinations on the plan.¹⁴³ Instead, the Transportation Act of 1940 added four factors for the ICC to consider in making public interest determinations:

- (1) The effect of the proposed transaction upon adequate transportation service to the public;
- (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction;
- (3) the total fixed charges resulting from the proposed transaction; and
- (4) the interest of the carrier employees affected.¹⁴⁴

The next substantive change to the ICC’s public interest authority came in the Staggers Rail Act of 1980,¹⁴⁵ which sought to minimize the need for ICC regulation of the railroads and rely more on the market to maintain reasonable rates and effective service.¹⁴⁶ This statute added a fifth factor for the agency’s consideration in making public interest determinations: “whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.”¹⁴⁷ Courts consistently have held that while the statute lists several factors for consideration, “[t]he Act’s single and essential standard of approval is that the Commission find the [transaction] to be ‘consistent with the public interest.’”¹⁴⁸

141. Specifically, the statute provides:

If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211 (repealing 49 U.S.C. § 5(2) (1925-26)) (codified at 49 U.S.C. § 5(4) (1934)) repealed 1940).

142. Transportation Act of 1940, ch. 722, 54 Stat. 898 (repealing 49 U.S.C. § 5(4) (1934)) (codified at 49 U.S.C. § 5(2)(b)-(c)).

143. The 1940 Act embodied Congress’ intent that railway consolidation be driven by “carrier-instituted, voluntary plans of merger or consolidation provided that the plans met the public interest test” *Seaboard Air Line R.R. Co.*, 320 I.C.C. 122, 127 (1963).

144. Transportation Act of 1940, ch. 722, 54 Stat. 898 (repealing 49 U.S.C. § 5(4) (1934)) (codified at 49 U.S.C. § 5(2)(b)-(c)).

145. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 228, 94 Stat. 1895, 1931-32 (codified as amended at 49 U.S.C. § 11324).

146. *Guilford Transp. Indus., Inc.*, 366 I.C.C. 294, 332 (1982).

147. Staggers Rail Act § 228(a)(2).

148. *Mo.-Kan.-Tex. R.R. Co. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *accord Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. 486, 498-99 (1968) (“Commission is to approve [merger review] proposals, pursuant to the terms of § 5 (2) (b) of that Act, when they are made upon just and reasonable terms and are ‘consistent with the public interest.’”).

Although there have been no changes to the statutory language defining the ICC's public interest authority after 1980, two subsequent developments bear noting. The broadly deregulatory ICC Termination Act of 1995¹⁴⁹ recodified the public interest provision from 49 U.S.C. § 11344 to 49 U.S.C. § 11324, where it remains, and renamed the administering agency the Surface Transportation Board (STB). In 2001, prompted by congressional concerns that the railroad industry was already overly consolidated,¹⁵⁰ the STB promulgated rules raising the bar for public interest approval to require a showing that the merger would yield affirmative competitive benefits—rather than merely avoid causing competitive harm. Since this change, there have been no mergers of large (Class I) railroads. For this reason, in my discussion of findings below, I refer to the agency by the name of its predecessor, the ICC.

2. Findings

The findings discussed in this section are based on a sample of thirty-five (35) cases between 1923 and 1999.

(i) Definition of Public Interest

Since the 1950s, the ICC has been explicit and broadly consistent in defining the public interest and articulating the factors that drive public interest determinations. The ICC's understanding of the public interest is anchored squarely in the ICA. In almost all cases decided after the enactment of the Transportation Act of 1940, the ICC defines the public interest by reference to the criteria that it added to the ICA: “the effect of the proposed transaction on the adequacy of transportation to the public” (mentioned in 28 cases); “the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction” (mentioned in 27 cases);¹⁵¹ “the total fixed charges that result from the proposed transaction” (mentioned in 26

149. Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. § 11324).

150. Due to the agency's historically permissive approach to public interest merger review, by the end of the twentieth century, there were only seven remaining Class I railroads, down from 410 in 1955 (Class I railroads are the largest railroads as determined by revenue thresholds set by the ICC). When a merger was proposed in 1999 by two of the remaining Class I railroads, “Congress expressed its concern and asked the STB to revisit its [merger review] policy.” Francis P. Mulvey, *Surface Transportation Board: Its Creation and Role in a Deregulated Environment*, 315 TR NEWS 28, 30 (2018).

151. Some early cases do not explicitly cite the inclusion of other railroads as a public interest consideration but nonetheless consider whether it would be in the public interest to include other railroads in the transaction, *see e.g.*, *Detroit, Toledo, & Ironton R.R. Co.*, 275 I.C.C. 455, 475 (1950), or note that no other railroad has sought inclusion in the transaction, *see e.g.*, *Wheeling & Lake Erie Ry. Co.*, 249 I.C.C. 490, 494 (1941).

cases);¹⁵² and “the interest of carrier employees affected by the proposed transaction” (mentioned in 26 cases).¹⁵³

The Staggers Act of 1980 added competition as an explicit public interest consideration, and the ICC cites this factor in every post-1980 case,¹⁵⁴ but this statute merely codified the ICC’s longstanding practice of considering the competitive impacts of transactions as part of its public interest analysis. From at least as early as 1923, the ICC indicated that cases where a carrier seeks to acquire control of a competing line “should be influenced by consideration of the evils which the Sherman [antitrust] law was designed to prevent.”¹⁵⁵ The agency specified competition as a pivotal factor in public interest determinations in nine out of the nineteen pre-1980 cases and, whether specified or not, the agency actually considered the competitive impacts of proposed transactions in seventeen of those cases.¹⁵⁶

From the very beginning, however, the ICC made clear that while competitive considerations are relevant to public interest determinations, the public interest standard is distinct from antitrust law. As the ICC explained,

The Commission is not obligated to measure proposals for consolidation by the standards of the antitrust laws and need not—and, indeed, should not—sit as an antitrust court in determining compliance with the Clayton Act. The Commission, after all, is empowered to disapprove mergers which would comply with antitrust notions, and perhaps more importantly, approve mergers even if they would be inconsistent with the antitrust laws.¹⁵⁷

152. Some early cases do not explicitly cite fixed charges as a public interest consideration but nonetheless consider whether the proposed transaction is likely to raise the applicants’ total fixed charges and whether this would be consistent with the public interest. *See, e.g., Detroit, Toledo, & Ironton R.R. Co.*, 275 I.C.C. at 493; *Pere Marquette Ry. Co.*, 267 I.C.C. 207, 253 (1947).

153. Some early cases do not explicitly cite employee interests as a public interest consideration but nonetheless consider how the proposed transaction will affect employees and adopt conditions to mitigate negative effects. *See, e.g., Detroit, Toledo, & Ironton R.R. Co.*, 275 I.C.C. at 487; *Pere Marquette Ry. Co.*, 267 I.C.C. at 253.

154. *See Canadian Nat’l Ry. Co.*, 4 S.T.B. 122, 139 (1999); *CSX Corp. & CSX Transp., Inc.* 3 S.T.B. 196, 245 (1998); *Union Pac. Corp.*, 1 S.T.B. 233, 274 (1996); *Burlington N. Inc.*, 10 I.C.C.2d 661, 723 (1995); *Union Pac. Corp.*, 4 I.C.C.2d 409, 426 (1988); *Rio Grande Indus., Inc.* 4 I.C.C.2d 834, 852 (1988); *Santa Fe S. Pac. Corp.*, 2 I.C.C.2d 709, 722 (1986); *Union Pac. Corp.*, 366 I.C.C. 459, 483 (1982); *Norfolk S. Corp.*, 366 I.C.C. 173, 190 (1982); *Guilford Transp. Indus., Inc.*, 366 I.C.C. 396, 400 (1982); *Guilford Transp. Indus., Inc.*, 366 I.C.C. 294, 332 (1982); *CSX Corp.*, 363 I.C.C. 521, 549 (1980); *Burlington N., Inc.*, 360 I.C.C. 788, 932-33 (1980).

155. *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. 508, 516 (1923).

156. The two cases that did not address competition involved transactions whose competitive impacts were not challenged and which focused primarily on the fairness of deal terms to stockholders. *See Wheeling & Lake Erie Ry. Co.*, 249 I.C.C. 490, 493-94 (1941); *Del., Lackawanna, & W. R.R. Co.*, 257 I.C.C. 91, 121(1944).

157. *Burlington N., Inc.*, 360 I.C.C. at 932. In the first case decided by the ICC under the Transportation Act of 1920, the ICC was asked to approve a merger that the U.S. Supreme Court had recently rejected under the Sherman Act. *See United States v. S. Pac. Co.*, 259 U.S. 214, 232-33 (1922) (holding that control of the Central Pacific Railway Company by the Southern Pacific Railway Company violates the Sherman Act and directing termination of existing control and separation of the properties). The case presented squarely the threshold issue of whether the Transportation Act of 1920, authorizing the ICC to permit the acquisition of control of one carrier by another whenever it found the transaction to

The ICC frequently elaborated the statutory factors—for instance, identifying lower costs and rates as evidence of efficiency-enhancing competition.¹⁵⁸ These elaborations were typically grounded in the ICA or other applicable statutes, or in U.S. Supreme Court case law interpreting the ICA. For example, the five cases explaining that employee interests include fair wages and working conditions¹⁵⁹ took this language from the ICA’s preamble, which lays out the broad purposes of national rail transportation policy.¹⁶⁰ In addition, the ICC began considering the environmental impacts of proposed transactions following the enactment of the National Environmental Policy Act (NEPA),¹⁶¹ which requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions on applications. In thirteen cases, the agency quoted *United States v. Lowden* to explain that adequate transportation service entails “essential conditions of economy and efficiency and . . . appropriate provision and best use of transportation facilities.”¹⁶²

Cost-benefit analysis has been integral to the ICC’s understanding of the public interest. This understanding appears to be grounded in the distinction between antitrust doctrine and public interest merger review, since only the latter considers the “public benefits to be derived from common control of competing carriers, which would be immaterial in a prosecution under the Sherman Act.”¹⁶³ In seventeen (17) different cases, the agency repeats some version of the following formulation: “In determining the public interest, we balance the benefits of the merger against any harm to competition, essential service(s), labor, and the environment that cannot be mitigated by conditions.”¹⁶⁴ Still, the ICC has not taken a rigid aggregationist approach to cost-benefit analysis and has repeatedly acknowledged its obligation to look beyond the private interests

be in the public interest, superseded the requirements of the Sherman Act. The ICC found that the Transportation Act’s “provisions constitute a radical change in the legislative policy of Congress, in respect of the application of the Sherman law to the railroads of the country, and that they evidence a recognition on the part of Congress . . . that there may be combinations of railroads that are in the public interest, which are legally impossible under existing antitrust legislation.” *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. at 511.

158. Cases indicating that lower costs are in the public interest include: *CSX Corp. & CSX Transp., Inc.*, 3 S.T.B. at 245-46, 249; *Burlington N. Inc.*, 10 I.C.C.2d. at 724-25, 740-41; *Norfolk & W. Ry. Co.*, 360 I.C.C. 498, 509, 514 (1979). Cases indicating that lower rates for consumers are in the public interest include: *Canadian Nat’l Ry. Co.*, 4 S.T.B. at 139-40, 144; *Union Pac. Corp.*, 4 I.C.C.2d at 428-29; *Rio Grande Indus., Inc.*, 4 I.C.C.2d at 875; *Santa Fe S. Pac. Corp.*, 2 I.C.C.2d at 725; *Union Pac. Corp.*, 366 I.C.C. at 488; *Norfolk S. Corp.*, 366 I.C.C. at 193-94; *CSX Corp.*, 363 I.C.C. at 551-52; *Burlington N., Inc.*, 360 I.C.C. at 931-32.

159. *Union Pac. Corp.*, 366 I.C.C. at 484; *Norfolk S. Corp.*, 366 I.C.C. at 190; *Guilford Transp. Indus., Inc.*, 366 I.C.C. at 332; *CSX Corp.*, 363 I.C.C. at 549; *Burlington N., Inc.*, 360 I.C.C. at 932.

160. See 49 U.S.C. § 10101(11) (2018) (declaring that, “in regulating the railroad industry, it is the policy of the United States Government . . . to encourage fair wages and suitable working conditions in the railroad industry”).

161. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321-4370m-12).

162. 308 U.S. 225, 230 (1939) (citing *Texas v. United States*, 292 U.S. 522, 531 (1934); and then *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932)).

163. *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. 508, 516 (1923).

164. *Canadian Nat’l Ry. Co.*, 4 S.T.B. 122, 139 (1999).

asserted by parties to the transaction in assessing the public interest. As the agency has explained:

Of course, proposed consolidations are likely to result in benefits to the corporate entities seeking our approval. However, these private benefits, in the form of increased revenues, do not necessarily reflect public benefits, so we must distinguish purely private benefits from those which will also inure to the benefit of the public.¹⁶⁵

Indeed, the agency has suggested that private claims about the public interest must be viewed with skepticism because the private interests of the transacting parties—for instance, an increase in market power that would enable rate increases—might be at odds with the public interest.¹⁶⁶

There were few significant shifts over time in the agency's definition of the public interest standard, and they were prompted by statutory amendments to the ICA, vetted via notice and comment, and formally adopted in regulations. A series of statutes adopted beginning in the late 1970s urged the rationalization of the nation's rail service and greater reliance on the market rather than federal regulation to maintain high-quality service and reasonable rates.¹⁶⁷ The ICC responded to these developments by adopting a *General Policy Statement on*

165. Union Pac. Corp., 366 I.C.C. 459, 487 (1982); *see also* Union Pac. Corp., 4 I.C.C.2d 409, 470 (1988) (“Our conclusion is not based on mere shipper preference.”); Norfolk S. Corp., 366 I.C.C. 173, 192 (1982) (“[W]e are required to look beyond the separate concerns of the parties and independently determine whether the proposed consolidation is ‘consistent with the public interest’ as defined above.”); Guilford Transp. Indus., Inc., 366 I.C.C. 294, 335 (1982) (“Our estimation of the benefits to be derived from the acquisition of control must carefully distinguish between public and private benefits.”); CSX Corp., 363 I.C.C. 521, 549 (1980) (“Although formal opposition to this consolidation proposal is now quite limited, we still must look beyond the private concerns of the parties and make our own analysis of the merits of the case in conformity with the applicable criteria.”).

166. In CSX Corp., 363 I.C.C. 521, 551-52 (1980), the ICC lays out three possible relationships between public and private interests and indicates which present the greatest concern. First, public and private interests are aligned in some areas, such as cost reductions and service improvements. Second, some private interests—such as traffic diversion from competitors—might be neutral or ambiguous from the standpoint of the public interest. Third, some private gains are public losses, as in the case of increased profits made possible through consolidation of market power. *See also* Guilford Transp. Indus., Inc., 366 I.C.C. at 335 (“Every consolidation is expected to generate benefits for the applicants or they would not enter into the transaction. Yet some of these private benefits may harm the public interest.”); Union Pac. Corp., 1 S.T.B. 233, 364 (1996). (“Benefits to the combining carriers that are the result of increased market power, such as the ability to increase rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction.”); Burlington N. Inc., 10 I.C.C.2d. 661, 724 (1995) (“Public benefits may be defined as efficiency gains that may or may not be shared with shippers and which include cost reductions and service improvements.”); Santa Fe S. Pac. Corp., 2 I.C.C.2d 709, 725 (1986) (“Benefits such as increased revenues to the merging entities do not necessarily reflect benefits to the public, so we must distinguish purely private benefits from those that will also benefit the public.”).

167. *See* Regional Rail Reorganization Act of 1973 (3R Act), Pub. L. No. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. § 701-797m); Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. § 801-856); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended at 49 U.S.C. § 11344).

Railroad Consolidation Procedures, first proposed in 1978,¹⁶⁸ revised based on comments in 1980,¹⁶⁹ and issued as a final rule in 1981.¹⁷⁰

The Policy Statement clarified several issues relating to the application of the public interest standard. First, it laid out the analytical framework for making public interest determinations: “In determining whether a transaction is in the public interest, the Commission performs a balancing test. It weighs the potential benefits to applicants and the public against the potential harm to the public.”¹⁷¹ Second, it underlined the distinction between private harms to competing carriers facing a loss of market share from the proposed transaction and harms to the public interest: “Consolidations often result in shifts of market patterns. Sometimes the carrier losing its share of the market may not be able to withstand the loss of traffic. In assessing the probable impacts, the Commission’s concern is the preservation of essential services, not the survival of particular carriers.”¹⁷² Third, it raised the bar for attaching carrier-protective conditions to transactions, establishing a presumption against such conditions unless necessary to protect essential services directly impaired by the transaction.¹⁷³ Finally, the Policy Statement articulated a strong presumption against imposing labor-protective conditions beyond those required by statute.¹⁷⁴ The ICC cited these Policy Statement factors routinely in subsequent adjudications.

(ii) Scope of Public Interest Discretion

ICC decisions rarely discuss the scope of the agency’s public interest authority. The ICC asserted broad, discretionary authority under the public interest standard in only three (3) out of the thirty-five (35) cases in the sample.¹⁷⁵

168. *Railroad Consolidation Procedures*, 359 I.C.C. 195 (1978).

169. *Railroad Acquisition Control, Merger, Consolidation Project, Trackage Rights and Lease Procedures*; *Railroad Consolidation Procedures, General Policy Statement*, 45 Fed. Reg. 61335 (Sept. 16, 1980).

170. *Railroad Consolidation Procedures, General Policy Statement*, 363 I.C.C. 784 (1981) (discussing the rule, which can now be found at 49 C.F.R. § 1180.1 (2021)).

171. *Id.* at 792.

172. *Id.*

173. *Id.*

174. *Id.* at 793. The ICC has long interpreted its public interest merger review authority to include the authority to condition its merger approval on the inclusion of labor-protective conditions to protect adversely affected employees—for example, requirements to retain employees, maintain their seniority and compensation levels following the merger, or provide severance packages to employees dismissed as a result of the merger. Prior to the Policy Statement, the ICC had developed various packages of labor-protective conditions to be applied based on whether certain criteria were met. The Policy Statement made clarified that “absent a negotiated agreement, the Commission will provide for protection at the level mandated by law (49 U.S.C. 11347), unless it can be shown that because of unusual circumstances more stringent protection is necessary to provide employees with a fair and equitable arrangement.” *Id.*

175. *See* *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. 508, 516 (1923) (“Under paragraph (2) we are given broad power to consider the questions of public interest involved in an acquisition of control by one carrier of another”); *Pere Marquette Ry. Co.* 267 I.C.C. 207, 246 (1947) (“[T]he authority conferred on us by section 5 of the act is exclusive, primary, and plenary.”); *Seaboard Air Line R.R. Co.*, 320 I.C.C. 122, 131 (1963) (“Under paragraph (2) we are given broad power to consider the questions of public interest involved in an acquisition of control by one carrier of another”).

More often, the agency explicitly recognized that its decision-making authority was constrained either by statute (8)¹⁷⁶ or by case law (6).¹⁷⁷ For instance, in *Southern-Central of Georgia* (December 7, 1962), the agency stated: “We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated”¹⁷⁸

(iii) Public Interest Justifications

The most common justifications, both in favor of and in opposition to proposed transactions, address efficiency issues (see Table 2 below). Nearly one-third of the cases in the sample (11) turned on the agency’s balancing of the costs and benefits of the proposed transaction.¹⁷⁹ Of the other efficiency justifications proffered, almost a third (56) concerned the competitive impact of the consolidation, one-quarter (44) addressed service-quality enhancements created by consolidation, and one in five (35) noted the cost savings realized through consolidation. The ICC was broadly sympathetic to pro-competitive arguments, rejecting only one out of twenty-six (1/26) pro-competitive justifications but rejecting most concerns raised about the anti-competitive effects of consolidations (17/27). It does not appear to have mattered who raised the

176. See *CSX Corp. & CSX Transp., Inc.* 3 S.T.B. 196, 264 (1998) (“The statute specifically limits our rate regulation in situations [such as that presented here], and the statute also directs that we conduct our costing in accordance with GAAP to the maximum extent practicable. . . . The relief that protestants are requesting would seem to contravene these specific statutory directives.”); *Norfolk S. Corp.*, 366 I.C.C. 173, 190 (1982) (“We are also guided in our consideration of rail consolidations, and in our regulation of the rail industry generally, by the stated policies of recent rail reform legislation and particularly by the Rail Transportation Policy of 49 U.S.C. 10101a.”); *Guilford Transp. Indus., Inc.*, 366 I.C.C. 294, 332 (1982) (same); *CSX Corp.*, 363 I.C.C. 521, 549 (1980) (stating that the agency must consider applicable statutory language in its public interest analysis); *Great N. Pac. & Burlington Lines Inc.*, 331 I.C.C. 228, 247 (1967) (stating that the agency “must look for standards in passing on a voluntary merger only to the Interstate Commerce Act”); *Pa. R.R. Co.*, 327 I.C.C. 475, 503 (1966) (explaining that the agency’s task is “to enforce the Interstate Commerce Act and other legislation which deals with transportation facilities”); *Chesapeake & Ohio Ry. Co.*, 317 I.C.C. 261, 285 (1962) (“As a condition of our approval, we may not impose a more burdensome requirement than that imposed by the statute.”); *S. Ry. Co.*, 317 I.C.C. 557, 568 (1962) (“We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated”).

177. *Control of Cent. Pac. by S. Pacific*, 76 I.C.C. at 515 (“It is certain that we must recognize the finality of a court decree upon the questions with which it deals.”); *Pere Marquette Ry. Co.*, 267 I.C.C. at 248 (finding that questions relating to the claims of dissenting shareholders are reserved to the courts); *Seaboard Air Line R.R. Co.*, 320 I.C.C. at 166-67 (deferring to a Supreme Court decision that deemphasized the importance of competition in the railroad industry and recognized as the objectives of the national transportation policy as the touchstone of public interest analysis); *Chesapeake & Ohio Ry. Co.*, 317 I.C.C. at 285 (adopting the Supreme Court’s interpretation of “public interest” as “merely one of compatibility”); *Ill. Cent. Gulf R.R. Co.*, 338 I.C.C. at 834 (making a public interest determination “within the framework laid down for us in the national transportation policy, as said policy has been construed by the Supreme Court”); *CSX Corp.*, 363 I.C.C. at 549 (stating that the agency must consider prior case law in its public interest analysis).

178. *S. Ry. Co.*, 317 I.C.C. at 568.

179. See *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 283-84; *Seaboard Air Line R.R. Co.*, 320 I.C.C. at 167; *Union Pac. Corp.*, 1 S.T.B. 233, 287 (1996); *Santa Fe S. Pac. Corp.*, 2 I.C.C.2d 709, 726 (1986); *Burlington N., Inc.*, 360 I.C.C. 788, 935 (1980); *Norfolk & W. Ry. Co.*, 360 I.C.C. 498, 516 (1979); *Burlington N. Inc.*, 354 I.C.C. 458, 507 (1977); *Chi. & N. W. Ry. Co.*, 347 I.C.C. 556, 593 (1974); *Ill. Cent. Gulf R.R. Co.*, 338 I.C.C. at 875; *Louisville & Nashville R.R. Co.*, 295 I.C.C. 457, 503 (1957); *Chesapeake & Ohio Ry. Co.* 317 I.C.C. 261, 281 (1962).

objections. The ICC rejected government concerns about anti-competitive effects at about the same rate as it rejected competitors' concerns about their own fate following the merger.¹⁸⁰

Table 2. Frequency of Justification Types in ICC Decisions

<i>Justification Types</i>	<i>Counts</i>
Efficiency	199
Substantive values: Statutory	74
• Railroad Viability	30
• Labor	26
• Community impacts from loss of service	9
• Environmental	9
Procedural	60
Substantive values: Non-statutory	14
• Other community impacts	13
• National defense	1

Procedural justifications were common but not definitive in the ICC's public interest analyses. To bolster its public interest determination, the ICC routinely cited the applicant's willingness to accommodate the concerns of protestants,¹⁸¹ buy-in by key stakeholders,¹⁸² or the lack of objection from stakeholders or state regulatory bodies.¹⁸³

The substantive values considered by the agency were primarily those specified by the ICA (or other federal statutes), including labor protections,

180. The ICC rejected 8/12 anti-competitive arguments made by competitors and 7/10 anti-competitive arguments made by state, local, and federal government agencies.

181. See *Canadian Nat'l Ry. Co.*, 4 S.T.B. 122, 134-38 (1999); *Union Pac. Corp.*, 1 S.T.B. at 291; *Union Pac. Corp.*, 4 I.C.C.2d. 409, 417 (1988); *Rio Grande Indus., Inc.*, 4 I.C.C.2d. 834, 948 (1988); *Norfolk S. Corp.*, 366 I.C.C. at 176; *CSX Corp.*, 363 I.C.C. at 529; *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 276-77; *Pa. R.R. Co.*, 327 I.C.C. 475, 545 (1966); *Norfolk & W. Ry. Co.*, 324 I.C.C. 1, 6-7 (1964); *Seaboard Air Line R.R. Co.*, 320 I.C.C. at 186; *Norfolk & W. Ry. Co.*, 307 I.C.C. 401, 439 (1959); *Pere Marquette Ry. Co.*, 267 I.C.C. 207, 247 (1947); *S. Ry. Co.*, 317 I.C.C. at 563; *Detroit, Toledo, & Ironton R.R. Co.*, 275 I.C.C. 455, 489 (1950); *Gulf, Mobile, & Ohio R.R. Co.*, 261 I.C.C. 405, 434 (1945); *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. 508, 520 (1923).

182. See *Canadian Nat'l Ry. Co.*, 4 S.T.B. at 125; *Toledo, Peoria, & W. R.R. Co.*, 295 I.C.C. 523, 544 (1957); *Union Pac. Corp.*, 1 S.T.B. at 450; *Burlington N. Inc.*, 10 I.C.C.2d. 661, 742 (1995); *Norfolk S. Corp.*, 366 I.C.C. at 177; *Guilford Transp. Indus., Inc.*, 366 I.C.C. 294, 297 (1982); *CSX Corp.*, 363 I.C.C. at 532; *Burlington N. Inc.*, 360 I.C.C. 788, 935 (1980); *Burlington N. Inc.*, 354 I.C.C. 458, 490 (1977); *Ill. Cent. Gulf R.R. Co.*, 338 I.C.C. at 816; *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 274; *Pa. R.R. Co.*, 327 I.C.C. at 482; *Norfolk & W. Ry. Co.*, 324 I.C.C. at 15; *Seaboard Air Line R.R. Co.*, 320 I.C.C. at 159; *S. Ry. Co.*, 317 I.C.C. at 560, 571; *Pere Marquette Ry. Co.*, 267 I.C.C. at 215-16; *Gulf, Mobile, & Ohio R.R. Co.*, 261 I.C.C. at 433; *Norfolk & W. Ry. Co.*, 307 I.C.C. at 414, 417, 438 (1959); *Louisville & Nashville R.R. Co.*, 295 I.C.C. at 479; *Del., Lackawanna, & W. R.R. Co.*, 257 I.C.C. 91, 121(1944); *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. at 521.

183. See *CSX Corp.*, 363 I.C.C. at 536; *Norfolk & W. Ry. Co.*, 324 I.C.C. at 14; *Detroit, Toledo, & Ironton R.R. Co.*, 275 I.C.C. at 488; *Gulf, Mobile, & Ohio R.R. Co.*, 261 I.C.C. at 435; *Chesapeake & Ohio Ry. Co.*, 317 I.C.C. 261, 280 (1962); *Norfolk & W. Ry. Co.*, 307 I.C.C. at 403; *Louisville & Nashville R.R. Co.*, 295 I.C.C. at 488; *Wheeling & Lake Erie Ry. Co.*, 249 I.C.C. 490, 490 (1941).

environmental issues, the impact on other railroads not included in the transaction, and the adequacy of public access to transportation services. Consideration of labor issues tended to be *pro forma*, following the statutory requirement to consider “the interest of the carrier employees affected”¹⁸⁴ and imposing conditions prescribed by statute or regulation as indicated under the circumstances. Environmental issues received similar treatment. Environmental arguments arise only in cases decided after the enactment in 1970 of NEPA,¹⁸⁵ which requires federal agencies to assess the environmental impacts of their proposed actions before making decisions (including on license and permit applications). In every case, the Commission found that the proposed transaction would have no significant adverse environmental consequences.¹⁸⁶

Two other types of substantive values came into play with notable frequency. First, the viability of the railroad industry or of certain carriers was a driving concern in many cases. Based on its statutory authority to consider the effects of transactions on other railroads, the ICC frequently (30 times) espoused the substantive value of preserving railroad carriers even (indeed, especially) when their viability was threatened by market forces. The following passage, taken from the ICC’s decision in *Guilford Transportation Industries, Inc.*, is illustrative: “The primary public benefit of the proposed transaction is the lifeline it will provide to the ailing D&H [Railroad]. Absent this consolidation, it is unlikely that D&H could continue to operate in light of its continuing losses and negative cash flow.”¹⁸⁷

Second, parties and the agency occasionally ventured beyond strict consideration of statutory “loss of service” considerations to appraise the harms or benefits the proposed transaction would have on affected communities. In ten (10) cases, applicants and the agency bolstered support for applications with claims that the proposed transaction would benefit communities by increasing economic growth and development. By contrast, state and local governments, community groups, and local chambers of commerce occasionally intervened to

184. Transportation Act of 1940, ch. 722, 54 Stat. 898 (repealing 49 U.S.C. § 5(4) (1934)) (codified at 49 U.S.C. § 5(2)(b)-(c)).

185. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370m-12).

186. See *Rio Grande Indus., Inc.*, 4 I.C.C.2d. at 945; *Guilford Transp. Indus., Inc.*, 366 I.C.C. 396, 422 (1982); *Guilford Transp. Indus., Inc.*, 366 I.C.C. at 346-47; *CSX Corp.*, 363 I.C.C. at 584; *Burlington N. Inc.*, 360 I.C.C. at 930; *Norfolk & W. Ry. Co.*, 360 I.C.C. 498, 515 (1979); *Burlington N. Inc.*, 354 I.C.C. at 461 n.3; *Chi. & N. W. Ry. Co.*, 347 I.C.C. 556, 651 (1974).

187. *Guilford Transp. Indus., Inc.*, 366 I.C.C. at 400-01; see *Toledo, Peoria, & W. R.R. Co.*, 295 I.C.C. at 533; *Rio Grande Indus., Inc.*, 4 I.C.C.2d. at 876; *Santa Fe S. Pac. Corp.*, 2 I.C.C.2d. 709, 715 (1986); *Union Pac. Corp.*, 366 I.C.C. 462, 501 (1982); *Norfolk S. Corp.*, 366 I.C.C. 173, 213-14 (1982); *Guilford Transp. Indus., Inc.*, 366 I.C.C. at 296, 309-10, 336; *CSX Corp.*, 363 I.C.C. at 552; *Burlington N. Inc.*, 360 I.C.C. at 845, 938-39; *Norfolk & W. Ry. Co.*, 360 I.C.C. at 525; *Chi. & N. W. Ry. Co.*, 347 I.C.C. at 595; *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 260; *Chesapeake & Ohio Ry. Co.*, 328 I.C.C. 684, 691 (1967); *Pa. R.R. Co.*, 327 I.C.C. 475, 496 (1966); *Mo. Pac. R.R. Co.*, 327 I.C.C. 279, 323 (1965); *Seaboard Air Line R.R. Co.*, 320 I.C.C. at 150; *S. Ry. Co.*, 317 I.C.C. at 562-63; *Norfolk & W. Ry. Co.*, 307 I.C.C. at 415-16; *Louisville & Nashville R.R. Co.*, 295 I.C.C. 457, 468, 475 (1957); *Pere Marquette Ry. Co.*, 267 I.C.C. at 253; *Chesapeake & Ohio Ry. Co.*, 317 I.C.C. at 275; *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. at 513, 519.

protest applications based on the harms that the proposed transactions would cause to their communities, such as thwarting community economic growth,¹⁸⁸ isolating geographic regions,¹⁸⁹ and disrupting the social fabric.¹⁹⁰ Importantly, both protestants and the ICC recognized that these arguments transcended individual interests and sounded in the register of the common good of the community as a whole. The ICC's analysis in *Great Northern Pacific & Burlington Lines, Inc.* illustrates this point well:

Certain additional matters merit attention. One is the issue of economic effect or impact of the unification on various communities in which . . . there would be loss of job opportunities or tax revenues due to elimination or transfer of railroad facilities and services, and rerouting of traffic over the shortest or most economical routes of the combined railroad in lieu of the present routes over the separate applicants' lines. The impact upon employees and upon other railroads in the territory has already been discussed. *The impact upon the communities themselves* forms the basis for much of the opposition to the unification by such States as Minnesota and Washington, and by such communities as Auburn, Sumner and Minneapolis, and by the interests in such communities as Livingston, Spokane and Seattle.¹⁹¹

Protestants in another case similarly distinguished the impacts of the proposed merger on employees themselves (which the ICC is statutorily required to consider) from “the adverse effects upon the families of employees [and] the communities in which they live,”¹⁹² arguing that the latter should be a definitive factor in the public interest determination. Although the ICC appears to have recognized these arguments as valid public interest considerations, it rejected all

188. See *Union Pac. Corp.*, 1 S.T.B. 233, 496 (1996) (discussing the vigorous opposition to the consolidation by shippers, individuals, and communities, who “argue that the abandonment of the line would have devastating economic effect based on lost rail service and lost tax revenues”); *Pa. R.R. Co.*, 327 I.C.C. at 483 (summarizing the argument made by various state and local government intervenors that the merger is “the greatest threat facing Pennsylvania today: the worst threat since the opening of the Erie Canal in 1825, one that can only result in virtually crippling the Port of Erie and seriously handicapping the Port of Philadelphia”).

189. See *Louisville & Nashville R.R. Co.*, 295 I.C.C. at 500 (summarizing protestant’s argument that the proposed merger would “reduce the city of Nashville to the status of a one-trunkline railroad town”); *Chesapeake & Ohio Ry. Co.*, 328 I.C.C. at 692 (“Various protestants questioned whether sufficient railroad capacity would remain, after consummation of the coordinations proposed herein, to assure that the needs of the shipping public would be adequately met.”); *Norfolk & W. Ry. Co.*, 324 I.C.C. 1, 15-16 (1964) (describing opposition by the Charleston, Illinois, Chamber of Commerce and the Four Cities Citizens Committee on the basis that “the unification transactions would result in the . . . elimination of the Nickel Plate’s division serving the four communities represented by the protestants, with the consequent loss of business and taxes by the communities and the loss of employment by their residents”); *Control of Cent. Pac. by S. Pac.*, 76 I.C.C. at 515 (summarizing the argument by protesting states and local interests that “traffic would be diverted” by the proposed merger “to the prejudice of their respective communities”).

190. In *Chesapeake & Ohio Ry. Co.*, protestants argued that, beyond the adverse effects on employees themselves, the Commission should consider “the adverse effects upon the families of employees, the communities in which they live,” which “virtually compel denial of the application.” 317 I.C.C. at 285.

191. *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 283 (emphasis added).

192. *Chesapeake & Ohio Ry. Co.*, 317 I.C.C. at 285.

but one objection based on these types of harms to the community.¹⁹³ Indeed, the Commission often responded to such arguments in the register of efficiency—assuring protestants that economic disturbances would be temporary, and any adverse effects would be offset by positive benefits.¹⁹⁴ Raising community-based harms had little impact on the likelihood that the agency would impose robust protective conditions.

In sum, across nearly a century implementing its public interest mandate, the ICC grounded its understanding of that authority in the ICA and judicial interpretations of the statute. Its public interest determinations focused on efficiency-related factors rather than other substantive values, even though most of those values are statutorily required considerations.

B. FCC Implementation of Communications Act Merger Review

1. Statutory Context

The Federal Communications Commission (FCC) is perhaps the most notorious implementer of any statutory public interest standard on the books. The agency was created by the Federal Communications Act of 1934 to replace the Federal Radio Commission.¹⁹⁵ That organic statute contained no fewer than eighty different public interest standards.

The most well-known and controversial of these provide the criteria by which the FCC allocates licenses and authorizations for broadcast radio and television, wireless, satellite, and landline telephone service. For instance, sections 307 and 309 of the Communications Act give the FCC authority to grant term-limited licenses for use of a broadcast frequency to applicants who propose service that would advance “the public interest, convenience, and necessity.”¹⁹⁶ As one commentator has noted, “such an open-ended grant of authority is especially odd [because] [t]his agency’s jurisdiction is speech.”¹⁹⁷ Thus, these particular statutory delegations have been actively contested not only because

193. The ICC cited concerns about loss of service to communities as a reason for application denial in only one case, *Burlington Northern Inc.*, in which the Commission was adjudicating between competing merger proposals and rejected one, in part, on the basis that it would harm numerous small communities that “have long enjoyed and heavily rely upon” their “fortuitous location, rather than the volume of traffic they generate.” 354 I.C.C. 458, 501 (1977). The Commission found that that benefit “should not be taken away, absent compelling reason.” *Id.*

194. See *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 283 (1967). The ICC details the benefits it sees for communities in cases such as: *Great N. Pac. & Burlington Lines, Inc.*, 331 I.C.C. at 268 (describing how “various communities, particularly Spokane, would benefit by elimination of or substantial reduction in street hazards and congestion”); *Norfolk & W. Ry. Co.*, 324 I.C.C. at 15 (arguing that “[a]ny new industries attracted would, of course, benefit the communities in which they locate through the additional employment opportunities offered”); *Chesapeake & Ohio Ry. Co.*, 317 I.C.C. at 291 (arguing that the interests of the larger national community that will be enhanced by the merger, which will enhance the carriers’ “ability to meet adequately the needs of commerce and of the national defense”).

195. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

196. Communications Act of 1934, 47 U.S.C. §§ 307, 309 (2018).

197. William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 716 (1989).

they are broad, like other public interest standards, but because they implicate constitutionally protected free speech rights.¹⁹⁸ Because the application of these public interest standards is highly constrained by First Amendment considerations, I do not include them in my sample.

Alongside its authority to regulate broadcasting in the public interest, the FCC also plays a key role in reviewing the combination of communications companies. Section 310 of the Communications Act directs the FCC to review proposed mergers involving the transfer of licenses and authorizations to determine whether the transaction would serve “the public interest, convenience, and necessity.”¹⁹⁹ Section 214 provides parallel authority for review of wireline mergers.²⁰⁰ Before a company may acquire another company holding an FCC license, it must receive Commission approval. According to the Commission, it “reviews applications for the transfer of control and assignment of licenses and authorizations to ensure that the public interest would be served by approving the applications.” This authority is separate and distinct from merger review performed by the Department of Justice and the Federal Trade Commission, which also have jurisdiction over these transactions. As the FCC describes it,

198. See, e.g., *id.*; Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Deregulation*, 60 TEX. L. REV. 207, 208-09 (1982).

199. 47 U.S.C. § 310(d) (2018):

Assignment and transfer of construction permit or station license. No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

200. *Id.* § 214(a) (2018):

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional line or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, operation, or construction and operation, of such additional or extended line.

The merger review provisions track the overall structure of the Communications Act of 1934, in which Title III applies to the regulation of the electromagnetic spectrum, including radio, television, and wireless communication, and Title II applies to the regulation of wireline or common carriers. Although the wording of the public interest standards in Sections 214(a) and 310(d) differ slightly, they have been interpreted by the agency to impose the same “public interest” requirements. See Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 42 n.59 (“[T]he Supreme Court has stated that ‘[t]he phrase “public convenience and necessity” no less than the phrase “public interest” must be given a scope consistent with the broad purpose’ of the statute of which it is a part.” (quoting *Interstate Com. Comm’n v. Ry. Lab. Executives Ass’n*, 315 US 373, 376 (1942))).

unlike other parts of the federal government, the FCC examines not only whether competition would be harmed by approving the license transfer but also whether it would be enhanced. In addition, the FCC examines the likely effects of the transfer on the private sector deployment of advanced services, the diversity of license holders, and the diversity of information sources and services available to the public.²⁰¹

The fact that the agency interprets its public interest mandate to encompass factors other than competition allows for clean identification of the agency's formulation and application of the public interest standard.

2. Findings

The findings discussed in this section are based on a sample of sixty (60) cases decided between 1943 and 2019.²⁰²

(i) Definition of Public Interest

Throughout this time, the FCC has been explicit and broadly consistent in defining the public interest and the factors that go into making public interest determinations. That definition long has been anchored in the “broad aims” of the Communications Act²⁰³ as well as its specific provisions. The Act's broad aims include access, programming diversity, service development, service quality, and competition.²⁰⁴ Specific provisions of the Act require assessment of whether applicants possess the requisite “citizenship, character, and financial, technical, and other qualifications.”²⁰⁵ The emphasis the Commission places on each of these factors has shifted over the years with amendments to the Act—for instance, competition and deregulation took on greater significance following the

201. *Overview of the FCC's Review of Significant Transactions*, FED. COMM'NS COMM'N, (July 10, 2014), <https://www.fcc.gov/reports-research/guides/review-of-significant-transactions> [<https://perma.cc/U5MK-864J>].

202. Further information about the sampling methodology can be found in the Methodological Appendix.

203. *E.g.*, Nynex Corp., 12 F.C.C.R. 19985, 19987, 20002-03 (1997).

204. The Commission indicates that fidelity to statutory provisions and purposes are central to its public interest analysis 133 times in 38 different cases.

205. 47 U.S.C. §§ 308(b), 310(d) (2018). For decisions assessing these qualifications, see Level 3 Commc'ns, Inc., 32 F.C.C.R. 9581, 9587 (2017); Securus Inv. Holdings, LLC, 32 F.C.C.R. 9564, 9570-71 (2017); Charter Commc'ns, Inc., 31 F.C.C.R. 6327, 6339 (2016); AT&T Inc., 30 F.C.C.R. 9131, 9142 (2015); Softbank Corp., 28 F.C.C.R. 9642, 9652 (2013); Frontier Commc'ns Corp., 25 F.C.C.R. 5972, 5979 (2010); Verizon Commc'ns Inc., 23 F.C.C.R. 514, 524 (2008); Celco P'ship, 23 F.C.C.R. 12463, 12477 (2008); Verizon Commc'ns, Inc., 22 F.C.C.R. 6195, 6204 (2007); Guam Cellular & Paging, Inc., 21 F.C.C.R. 13580, 13589 (2006); Midwest Wireless Holdings, LLC, 21 F.C.C.R. 11526, 11536 (2006); Celco P'ship, 27 F.C.C.R. 10698, 10712 (2012); Craig O. McCaw, 9 F.C.C.R. 5836, 5844 (1994); Contel Corp., 6 F.C.C.R. 1003, 1004 (1991); GTE Corp., 94 F.C.C.2d 235, 243 (1983); Cablecom-General, Inc., 87 F.C.C.2d 784, 790-91 (1981); Constellation, LLC, 21 F.C.C.R. 7368, 7381 (2006); Verizon Commc'ns Inc., 20 F.C.C.R. 18433, 18525-26 (2005); SBC Commc'ns Inc., 20 F.C.C.R. 18290, 18379 (2005); Nextel Commc'ns, Inc., 20 F.C.C.R. 13967, 13979 (2005); W. Wireless Corp., 20 F.C.C.R. 13053, 13063 (2005).

Telecommunications Act of 1996²⁰⁶—but the parameters of the agency’s public interest analysis have remained broadly stable over time.

Like the ICC, the FCC has consistently explained that its public interest analysis departs from traditional antitrust doctrine. The Commission explained the distinction—informed by U.S. Supreme Court precedent—in a 1966 decision:

We agree with the [U.S. Department of Justice] Antitrust Division that the standard governing its action and the action of the Commission are significantly different. The Antitrust Division is charged with enforcement of the antitrust laws, 15 U.S.C., section 1, et seq., while the Commission is charged with effectuating the policies of the Communications Act, 47 U.S.C., section 151. Under the Communications Act the standard for Commission action is not simply competition but the wider public interest, and the Supreme Court has instructed this Commission that ‘encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest’ in this field.²⁰⁷

Through the decades, the agency has reiterated that its “competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.”²⁰⁸

While this conception of public interest merger review would appear to invite any manner of considerations, the FCC rarely defined the public interest to stray beyond statutory considerations. It frequently noted that it would view these considerations in light of “technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the

206. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

207. *Am. Broad. Cos., Inc.*, 7 F.C.C.2d 245, 249 (1966).

208. *Level 3 Commc’ns, Inc.*, 32 F.C.C.R. at 9585; *Securus Inv. Holdings, LLC*, 32 F.C.C.R. at 9569; *Charter Commc’ns, Inc.*, 31 F.C.C.R. at 6337; *AT&T Inc.*, 30 F.C.C.R. at 9140; *Softbank Corp.*, 28 F.C.C.R. at 9651; *Frontier Commc’ns Corp.*, 25 F.C.C.R. at 5978; *Verizon Commc’ns Inc.*, 23 F.C.C.R. at 521; *News Corp.*, 23 F.C.C.R. 3265, 3278 (2008); *Cellco P’ship*, 23 F.C.C.R. at 12479; *AT&T Inc.*, 22 F.C.C.R. 5662, 5673 (2007); *Guam Cellular & Paging, Inc.*, 21 F.C.C.R. at 13591; *Midwest Wireless Holdings, LLC*, 21 F.C.C.R. at 11537; *Cellco P’ship*, 27 F.C.C.R. at 10710; *Adelphia Commc’ns Corp.*, 21 F.C.C.R. 8203, 8218 (2006); *Comcast Corp.*, 26 F.C.C.R. 4238, 4248 (2011); *Teleprompter Corp.*, 87 F.C.C.2d 531, 541 (1981); *Combined Commc’ns Corp.*, 72 F.C.C.2d 637, 651 (1979); *Am. Broad. Cos., Inc.*, 9 F.C.C.2d 546, 549 (1967); *Am. Broad. Cos., Inc.*, 7 F.C.C.2d at 249; *Constellation, LLC*, 21 F.C.C.R. at 7379; *Verizon Commc’ns Inc.*, 20 F.C.C.R. at 18444; *SBC Commc’ns Inc.*, 20 F.C.C.R. at 18302; *Nextel Commc’ns, Inc.*, 20 F.C.C.R. at 13977-78; *W. Wireless Corp.*, 20 F.C.C.R. at 13065; *Birmingham Christian Radio, Inc.*, 18 F.C.C.R. 7909, 7913 (2003); *Pressly Enters., LLC*, 17 F.C.C.R. 14079, 14083 (2002); *Great Scott Broad.*, 17 F.C.C.R. 5397, 5402 (2002); *Golden Triangle Radio, Inc.*, 17 F.C.C.R. 5373, 5377 (2002); *Time Warner Inc.*, 16 F.C.C.R. 6547, 6555 (2001); *Nassau Broad. II, LLC*, 17 F.C.C.R. 9001, 9005 (2002); *Voicestream Wireless Corp.*, 15 F.C.C.R. 3341, 3346 (2000); *Solar Broad. Co., Inc.*, 17 F.C.C.R. 5467, 5473 (2002); *AT&T Corp.*, 14 F.C.C.R. 19140, 19147 (1999); *Ameritech Corp.*, 14 F.C.C.R. 14712, 14738 (1999); *Worldcom, Inc.*, 13 F.C.C.R. 18025, 18033-34 (1998); *Nynex Corp.*, 12 F.C.C.R. at 20003.

communications industry.”²⁰⁹ And it occasionally referenced FCC rules or published guidance as the source of public interest considerations such as local radio ownership policy²¹⁰ and horizontal merger analysis.²¹¹ In a handful of cases (6), the Commission indicated that its public interest analysis includes assessing whether the proposed merger will affect the quality of programming and “responsiveness to the local needs of the community.”²¹² Four (4) cases indicate that the public interest demands deference to the Executive Branch when a proposed transaction raises national-security or law-enforcement issues.²¹³

Since 1996, it has been standard for the Commission to define public interest analysis in cost-benefit terms. According to the Commission, transaction review

necessarily is a balancing process that weighs the potential public interest harms against public interest benefits. As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest²¹⁴

The Commission has similarly indicated that it has a responsibility to “maximize the utility that the public derives from the public airwaves.”²¹⁵ The rise in cost-benefit balancing is accompanied by a rise in the Commission’s use of its authority to impose conditions on transactions, as well as explicit claims

209. *W. Wireless Corp.*, 20 F.C.C.R. at 13065; *Charter Commc’ns, Inc.*, 31 F.C.C.R. at 6337; *AT&T Inc.*, 30 F.C.C.R. at 9140; *Frontier Commc’ns Corp.*, 25 F.C.C.R. at 5977; *Verizon Commc’ns Inc.*, 23 F.C.C.R. at 521; *News Corp.*, 23 F.C.C.R. at 3278; *Cellco P’ship*, 23 F.C.C.R. at 12479; *Verizon Commc’ns, Inc.*, 22 F.C.C.R. at 6204; *Nynex Corp.*, 12 F.C.C.R. at 19988; *AT&T Inc.*, 22 F.C.C.R. 5662, 5673 (2007); *Guam Cellular & Paging, Inc.*, 21 F.C.C.R. at 13591; *Midwest Wireless Holdings, LLC*, 21 F.C.C.R. at 11537; *Adelphia Commc’ns Corp.*, 21 F.C.C.R. at 8218; *Comcast Corp.*, 26 F.C.C.R. at 4248; *Am. Broad. Cos., Inc.*, 7 F.C.C.2d at 250; *Paramount Television Prods., Inc.*, 17 F.C.C. 264, 315-16 (1953); *Verizon Commc’ns Inc.*, 20 F.C.C.R. at 18444; *SBC Commc’ns Inc.*, 20 F.C.C.R. at 18302; *Nextel Commc’ns, Inc.*, 20 F.C.C.R. at 13977; *AT&T Corp.*, 14 F.C.C.R. at 19147; *Ameritech Corp.*, 14 F.C.C.R. at 14739.

210. In the following cases, the FCC indicated that its public interest determination would be guided by the standards laid out in the Local Radio Ownership NPRM: *Golden Triangle Radio, Inc.*, 17 F.C.C.R. at 5374; *Birmingham Christian Radio, Inc.*, 18 F.C.C.R. at 7909; 2002-212_ *Pressly Enters., LLC*, 17 F.C.C.R. at 14079; *Great Scott Broad.*, 17 F.C.C.R. at 5401; *Nassau Broad. II, LLC*, 17 F.C.C.R. at 9002; *Solar Broad. Co., Inc.*, 17 F.C.C.R. at 5467-68.

211. In the following cases, the FCC indicated that it would conduct its competition analysis consistent with the 1992 *Horizontal Merger Guidelines*: *AT&T Corp.*, 14 F.C.C.R. at 19149; P.R. Tel. Auth., 14 F.C.C.R. 3122, 3129(1999); *Worldcom, Inc.*, 13 F.C.C.R. at 18032.

212. See *Great Scott Broad.*, 17 F.C.C.R. at 5402-03; *Solar Broad. Co., Inc.*, 17 F.C.C.R. at 5474; *Nassau Broad. II, LLC*, 17 F.C.C.R. at 9006, 9013; *Golden Triangle Radio, Inc.*, 17 F.C.C.R. at 5378; *Pressly Enters., LLC*, 17 F.C.C.R. at 14084; *Birmingham Christian Radio, Inc.*, 18 F.C.C.R. at 7913-14.

213. See *Level 3 Commc’ns, Inc.*, 32 F.C.C.R. at 9608-9609; *Softbank Corp.*, 28 F.C.C.R. at 9693-96; *Cellco P’ship*, 23 F.C.C.R. at 12526-28; *Verizon Commc’ns, Inc.*, 22 F.C.C.R. at 6225-27.

214. *Nynex Corp.*, 12 F.C.C.R. at 19987.

215. *Birmingham Christian Radio, Inc.*, 18 F.C.C.R. at 7913; *Cellco P’ship*, 27 F.C.C.R. 10698, 10716 (2012); *Teleprompter Corp.*, 87 F.C.C.2d 531, 541 (1981); *Pressly Enters., LLC*, 17 F.C.C.R. at 14083; *Great Scott Broad.*, 17 F.C.C.R. at 5402; *Golden Triangle Radio, Inc.*, 17 F.C.C.R. at 5377; *Nassau Broad. II, LLC*, 17 F.C.C.R. at 9005-06; *Solar Broad. Co., Inc.*, 17 F.C.C.R. at 5473-74.

by the Commission that it is in the public interest to impose narrowly tailored, transaction-specific conditions to mitigate the potential harms of a transaction.²¹⁶

(ii) Scope of Public Interest Discretion

The FCC asserted broad, discretionary authority under the public interest standards analyzed here in only ten (10) out of the sixty (60) sample cases. In more than twice as many cases, it explicitly acknowledged that it was bound either by statute (17) or by case law (8). For instance, in several cases, the agency stated: “Despite the Commission’s broad authority, we have held that we will impose conditions only to remedy harms that arise from the transaction . . . and that are fairly related to the Commission’s responsibilities under the Communications Act and related statutes.”²¹⁷ And the Commission has explicitly referenced judicial constraints on its authority, indicating, for example, that its decisions would conform with what “the Supreme Court instructed us long ago”²¹⁸ and must be “guided by the applicable judicial precedents.”²¹⁹

(iii) Public Interest Justifications

The most common justifications, both in favor of and in opposition to proposed transactions, related to their efficiency (see Table 3 below). More than half of the efficiency justifications concerned the competitive impact of the merger. The rest addressed issues such as the transaction’s impact on service efficiency, optimal development of communications resources, the transaction’s implications for carrier costs and consumer rates, and its anticipated effects on technological innovation. The FCC has been broadly sympathetic to pro-competitive arguments, accepting more than 80 percent (22/27). In the five (5)

216. See *Level 3 Commc’ns, Inc.*, 32 F.C.C.R. at 9585-86; *Securus Inv. Holdings, LLC*, 32 F.C.C.R. 9564, 9569 (2017); *Charter Commc’ns, Inc.*, 31 F.C.C.R. 6327, 6338, 6668 (2016); *AT&T Inc.*, 30 F.C.C.R. 9131, 9141 (2015); *Softbank Corp.*, 28 F.C.C.R. at 9652; *Frontier Commc’ns Corp.*, 25 F.C.C.R. 5972, 5978 (2010); *Verizon Commc’ns, Inc.*, 23 F.C.C.R. 514, 521 (2008); *News Corp.*, 23 F.C.C.R. 3265, 3279 (2008); *Cellco P’ship*, 23 F.C.C.R. at 12480; *AT&T Inc.*, 22 F.C.C.R. at 5675; *Guam Cellular & Paging, Inc.*, 21 F.C.C.R. 13580, 13592 (2006); *Midwest Wireless Holdings, LLC*, 21 F.C.C.R. 11526, 11538 (2006); *Cellco P’ship*, 27 F.C.C.R. at 10711; *Adelphia Commc’ns Corp.*, 21 F.C.C.R. 8203, 8219 (2006); *Comcast Corp.*, 26 F.C.C.R. 4238, 4249 (2011); *W. Union Tel. Co.*, 10 F.C.C. 148, 151 (1943); *Constellation, LLC*, 21 F.C.C.R. 7368, 7380 (2006); *Verizon Commc’ns Inc.*, 20 F.C.C.R. 18433, 18445 (2005); *SBC Commc’ns Inc.*, 20 F.C.C.R. 18290, 18302 (2005); *Nextel Commc’ns, Inc.*, 20 F.C.C.R. 13967, 13978 (2005); *W. Wireless Corp.*, 20 F.C.C.R. 13053, 13065 (2005); *Time Warner Inc.*, 16 F.C.C.R. 6547, 6550 (2001); *AT&T Corp.*, 14 F.C.C.R. at 19148; *Ameritech Corp.*, 14 F.C.C.R. 14712, 14740, 14855, 14857 (1999).

217. *Constellation, LLC*, 21 F.C.C.R. at 7380-81; *Level 3 Commc’ns, Inc.*, 32 F.C.C.R. at 9586; *Securus Inv. Holdings, LLC*, 32 F.C.C.R. at 9569; *Frontier Commc’ns Corp.*, 25 F.C.C.R. at 5978-79; *News Corp.*, 23 F.C.C.R. at 3279; *Cellco P’ship*, 23 F.C.C.R. at 12481; *W. Wireless Corp.*, 20 F.C.C.R. at 13066; *Nextel Commc’ns, Inc.*, 20 F.C.C.R. at 13979; *SBC Commc’ns Inc.*, 20 F.C.C.R. at 18302; *Verizon Commc’ns Inc.*, 20 F.C.C.R. at 18445; *Adelphia Commc’ns Corp.*, 21 F.C.C.R. at 8219; *Midwest Wireless Holdings, LLC*, 21 F.C.C.R. at 11539; *Guam Cellular & Paging, Inc.*, 21 F.C.C.R. at 13593; *AT&T Inc.*, 22 F.C.C.R. at 5674-75; *Time Warner Inc.*, 16 F.C.C.R. at 6553; *AT&T Corp.*, 14 F.C.C.R. at 19147; *Nynex Corp.*, 12 F.C.C.R. at 19988.

218. *Am. Broad. Cos., Inc.*, 7 F.C.C.2d 245, 257 (1966).

219. *Craig O. McCaw*, 9 F.C.C.R. 5836, 5845 (1994).

cases where the agency was skeptical of applicants’ pro-competitive arguments, it nonetheless approved the proposed transactions, in some cases without conditions.²²⁰ The FCC has been less hostile to arguments in opposition to transactions based on anti-competitive concerns than other agencies in this study. Although it rejects most of these arguments (60% or 36/60), it endorses as many as 25 percent (15/60) and defers judgement on some due to the existence of ongoing rulemaking proceedings addressing the issues raised.²²¹ Most arguments about the anti-competitive effects of a proposed transaction are made by competitors (60% or 36/60), occasionally supported by consumer advocacy groups or the Department of Justice, which conducts its own independent merger review. The party raising anti-competitive concerns appears to have no bearing on whether the Commission finds them persuasive. It rejected 78 percent of both anti-competitive arguments raised by non-competitors (11/14) and anti-competitive arguments made by competitors (28/36).

Table 3. Frequency of Justification Types in FCC Decisions

<i>Justifications</i>	<i>Counts</i>
Efficiency	168
Substantive values: Statutory	72
• Applicant qualifications	43
• Access to telecommunications services	22
• Content diversity	7
Procedural	59
Substantive values: Non-statutory	46
• Concentration of corporate power	5
• Nondiscrimination and diversity	5
• Firm survival	4
• Access to emergency services	4
• Applicant’s commitment to public service	8
• Employee protections	8
• Integrity of news reporting	1
• National security	11

220. See *Nassau Broad. II, LLC*, 17 F.C.C.R. at 9013 (finding that although the proposed postmerger concentration levels raise potential competitive concerns in the national and regional advertising market, these concerns are mitigated by other market dynamics, and outweighed by the benefits of the proposed transaction to listeners, which is the FCC’s “ultimate concern”); *Birmingham Christian Radio, Inc.*, 18 F.C.C.R. at 7919, 7922 (finding that the proposed merger “makes the emergence of a third viable competitor more difficult in this near-duopoly market” but that this concern is outweighed by the public benefits of the transaction, including maintaining the continued operation of a local station, technical improvements to the station, and programming improvements).

221. See *Gen. Tel. & Elecs. Corp.*, 8 F.C.C.2d 183 (1967); *GTE Corp.*, 94 F.C.C.2d 235, 256 (1983); *AT&T Inc.*, 22 F.C.C.R. at 5713 n.269, 5739-40.

The FCC encountered substantive values-based arguments more frequently than the other agencies in the study. These arguments were mostly statutorily based and related to applicant qualifications and service access, particularly by underserved communities in rural,²²² low-income,²²³ and tribal areas.²²⁴ Statutory arguments about community access to diverse media content were raised in seven (7) cases.²²⁵ The most common values-based arguments without statutory grounding, on the other hand, concerned national-security issues such as cybersecurity, surveillance access, foreign investment, and wartime service provision (raised in 15 percent of cases), with a handful more addressing domestic safety issues relating to emergency response.²²⁶ Occasionally arguments were made in opposition to proposed mergers based on concerns about the concentration of corporate power in media markets, the transaction's racially discriminatory impacts,²²⁷ the transaction's negative impacts on employees, and the applicant's insufficient commitment to public-service broadcasting, such as educational programming,²²⁸ local content,²²⁹ and news and public-affairs programming.²³⁰ Each of these values-based opposition arguments was either raised in dissent or rejected by the Commission.

The Commission never made a *sua sponte* values-based argument—statutory or otherwise—in opposition to a transaction. The Commission explicitly rejected half (12/24) of all community-based opposition arguments

222. See AT&T Inc., 30 F.C.C.R. 9131, 9268 (2015); *Frontier Commc'ns Corp.*, 25 F.C.C.R. at 5973, 5994-95; *Cellco P'ship*, 23 F.C.C.R. at 12508; Verizon Commc'ns, Inc., 22 F.C.C.R. 6195, 6211 (2007); *Midwest Wireless Holdings, LLC*, 21 F.C.C.R. 11526, 11566 (2006); Comcast Corp., 26 F.C.C.R. 4238, 4333 (2011); Alascom, Inc., 11 F.C.C.R. 732, 743 (1995); *SBC Commc'ns Inc.*, 20 F.C.C.R. at 18363; *W. Wireless Corp.*, 20 F.C.C.R. at 13093.

223. See Charter Commc'ns, Inc., 31 F.C.C.R. 6327, 6529 (2016); Softbank Corp., 28 F.C.C.R. 9642, 9672 (2013); *Verizon Commc'ns, Inc.*, 22 F.C.C.R. at 6211; *Comcast Corp.*, 26 F.C.C.R. at 4333; Worldcom, Inc., 13 F.C.C.R. 18025, 18145 (1998).

224. See *Softbank Corp.*, 28 F.C.C.R. at 9676-77.

225. See *Comcast Corp.*, 26 F.C.C.R. at 4312-13; Cap. Cities/ABC, Inc., 11 F.C.C.R. 5841, 5865 (1996); Teleprompter Corp., 87 F.C.C.2d 531, 544 (1981); Combined Commc'ns Corp., F.C.C.2d 637, 654 (1979); E.D. Martin, 16 F.C.C.2d 478, 478-79 (1969); S'holder of Hisp. Broad. Corp., 18 F.C.C.R. 18834, 18857, 18864 (2003); Time Warner Inc., 16 F.C.C.R. 6547, 6593 (2001).

226. See *SBC Commc'ns Inc.*, 20 F.C.C.R. at 18386-87 (noting with approval that the proposed merger would promote coordination of 911 systems); Nextel Commc'ns, Inc., 20 F.C.C.R. 13967, 13974 (2005) (noting that applicants argued that the merger would benefit public safety); *W. Wireless Corp.*, 20 F.C.C.R. at 13138 (statement of Comm'r Michael J. Copps) (expressing concern over the applicants' "admission that they will likely fail to meet . . . [their] E-911 deployment responsibilities," which help locate callers in an emergency); AT&T Corp., 22 F.C.C.R. 5662, 5765-66 (2007) (finding that the merger has the potential to increase applicants' disaster-response capabilities).

227. *In re Solar Broadcasting Co.*, 17 F.C.C.R. 5467, 5485 (2002) (discussing intervenor opposition to the transaction on the ground that it would impede African-American competitors from effectively competing in the market); *In re Applications of Craig O. McCaw and AT&T*, 9 F.C.C.R. 5836, *39 (1994) (describing intervenor opposition the transaction because applicants had made no effort to sell their television stations to minority-owned companies).

228. See *Softbank Corp.*, 28 F.C.C.R. at 9670.

229. See Tribune Media Co., 34 F.C.C.R. 8436, 8453, 8478 (2019); *Comcast Corp.*, 26 F.C.C.R. at 4318; *Teleprompter Corp.*, 87 F.C.C.2d at 536.

230. See *Tribune Media Co.*, 34 F.C.C.R. at 8449; *Teleprompter Corp.*, 87 F.C.C.2d at 536.

made by intervenors,²³¹ accepted only about 17 percent (4/24),²³² and deferred two to parallel rulemaking proceedings. Six were raised in dissenting opinions, which often lamented the harms to the community that would flow from the Commission's merger approvals.²³³ Various different types of intervenors raised community-based arguments, including civil-rights groups, consumer groups, fair-media organizations, government entities, and competitors. None appears to have had any more or less success than the others.

In sum, across nearly a century implementing its public interest mandate, the FCC grounded its understanding of that authority in the Communications Act and judicial interpretations of the statute. Its public interest determinations focused on efficiency-related factors rather than other substantive values, even though most of those values are anchored in statutory purposes or requirements.

C. FERC Implementation of Federal Water Power Act Merger Review

1. Statutory Context

The Federal Power Commission (the Commission), the predecessor agency to FERC,²³⁴ was established and endowed with a public interest mandate in 1920 by the Federal Water Power Act (FPA).²³⁵ Among other things, that organic

231. See *S'holder of Hisp. Broad. Corp.*, 18 F.C.C.R. at 18834; *Time Warner Inc.*, 16 F.C.C.R. at 6593-95 (rejecting commenters' objection that the proposed merger would limit the public's access to a diversity of information sources); *Softbank Corp.*, 28 F.C.C.R. at 9696 (rejecting commenters' objection that the proposed merger raises national-security concerns); *Teleprompter Corp.*, 87 F.C.C.2d at 536; *Worldcom, Inc.*, 13 F.C.C.R. 18025, 18145 (1998); *Tribune Media Co.*, 34 F.C.C.R. 8436; *Combined Commc'ns Corp.*, 72 F.C.C.2d at 654-55 (rejecting objections that the proposed merger would especially harm small communities' access to diverse local media sources); *Cap. Cities/ABC, Inc.*, 11 F.C.C.R. at 5865.

232. See *Comcast Corp.*, 26 F.C.C.R. at 4312-13; *Time Warner Inc.*, 16 F.C.C.R. at 6677 (finding that the merger has the potential to expand consumer access to a range of broadband technologies); *Voicestream Wireless Corp.*, 15 F.C.C.R. at 3362 (agreeing with the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) that the proposed transaction, which would make the merged company subject to foreign control, raises national-security concerns); *Frontier Commc'ns Corp.*, 25 F.C.C.R. 5972, 5994 (finding that the transaction is likely to improve service quality in rural areas).

233. See *S'holder of Hisp. Broad. Corp.*, 18 F.C.C.R. at 18857, 18864 (criticizing the merger approved by the Commission on the ground that it would restrict programming diversity for millions of Spanish-speaking Americans who will now be offered only the single vision of the "aptly named Univision"); *Am. Broad. Cos., Inc.*, 7 F.C.C.2d 245, 329 (1966) (warning that the majority's approval of the merger threatens the integrity of broadcast news—an interest crucial to a free society—because the editorial employees of the broadcasting subsidiary will be pressured to conform programming to the profit-making imperatives of the parent conglomerate); *Tribune Media Co.*, 34 F.C.C.R. at 8445; *W. Union Tel. Co.*, 10 F.C.C. 148, 177 (1943) (arguing that the merger plan had not shown sufficient "compensatory advantages" in light of the potential "decrease the availability of service" that its proposed abandonment of offices that "serve remote communities or substantial areas of cities" could cause).

234. In 1977, the Federal Energy Commission was replaced by FERC, which was established under the Department of Energy Reorganization Act. To avoid confusion, after explaining the statutory context, I refer to the decision-making agency as FERC throughout the sample time frame.

235. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§ 791a-828c). The Federal Water Power Act also contains a public interest standard governing hydropower relicensing decisions. I do not include this section in my analysis because it has been thoroughly analyzed in J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2263-84 (2005).

statute authorized the Commission to investigate the utilization of water resources and the water power industry in any region in which electric power generation was to be developed,²³⁶ and to issue licenses

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the . . . development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States . . .²³⁷

The Federal Water Power Act specified that such licenses should be granted “[w]hensoever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce.”²³⁸ In addition to this core decisional standard, the original Federal Water Power Act authorized the Commission to apply preferences for certain license applications that “utilize in the public interest the navigation and water resources of the region”;²³⁹ waive certain provisions of the act for minor projects “as it may deem to be to the public interest”;²⁴⁰ extend construction deadlines “when not incompatible with the public interests”;²⁴¹ and extend the term of certain contracts “whenever the public interest requires.”²⁴²

In 1935, the Federal Water Power Act was amended by Title II of the Public Utility Act,²⁴³ which authorized the Commission to regulate electric utility companies. Among other things, Title II added to the Federal Water Power Act a public interest standard for approving utility company mergers, which is the focus of this case study. The statute provided: “After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.”²⁴⁴ It also authorized the Commission to attach terms and conditions to the approval of any application “as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.”²⁴⁵ In 1996, FERC adopted by unanimous vote Order No. 592, a policy statement updating and clarifying the “procedures, criteria and policies”²⁴⁶ for determining whether

236. Federal Water Power Act § 4(d).

237. *Id.*

238. *Id.*

239. *Id.* § 7.

240. *Id.* § 10(i).

241. *Id.* § 13.

242. *Id.* § 22.

243. Public Utility Act of 1935, ch. 687, 49 Stat. 803, 838 (codified as amended at 15 U.S.C. §§ 79a-79z-6 and in scattered sections of 16 U.S.C.).

244. *Id.* § 203(a).

245. *Id.* § 203(b).

246. Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement, 61 Fed. Reg. 68595, 68595 (Dec. 18, 1996) (Docket No. RM96-6-000).

mergers in the electric utility industry are consistent with the public interest under Section 203 of the Federal Water Power Act. Specifically, Order No. 592 limited the criteria for public interest review to the merger's impact on rates, regulation, and competition and announced the agency's intention to focus on the competitive effects of proposed mergers.

2. Findings

The findings discussed in this section are based on a sample of ninety-four (94) cases between 1937 and 2020.

(i) Definition of the Public Interest

FERC has been the most transparent and consistent of the agencies studied in defining the public interest and applying public interest criteria. The agency explicitly sets forth the factors it will consider in its public interest analysis in almost all cases, and those factors remain remarkably stable over the sample's eight decades.

In 1966, in *Commonwealth Edison Co.*, FERC identified six factors it would consider in evaluating whether a merger is in the public interest: (1) the effect of the proposed transaction on the applicants' operating costs and rate levels; (2) the contemplated accounting treatment; (3) the reasonableness of the purchase price; (4) whether the acquiring utility has coerced the utility to be acquired into acceptance of the merger; (5) the likely effect of the proposed transaction on the competitive situation; and (6) whether the proposed transaction will impair effective regulation of the affected entities by either FERC or the appropriate state regulatory authorities. These factors and the substantive concerns underlying them had appeared in prior case law,²⁴⁷ and *Commonwealth* synthesized them into a unified set of standards that FERC faithfully applied for the next three decades. FERC explicitly grounded its synthesis in the broad purposes of the Federal Power Act and the Public Utility Act of 1935—specifically, promoting abundant and efficient supply of electric

247. See, e.g., *Pub. Serv. Elec. & Gas Co. of Newark*, 1 F.P.C. 546, 552 (1938) (“The criterion ‘consistent with the public interest’ is necessarily a broad and comprehensive standard embracing consideration of all the statutory purposes which the act was designed to accomplish. We must determine whether the proposed transaction will tend to promote or retard the regional integration of facilities, whether it will tend to stimulate or discourage utilization of power resources, whether it will tend to increase or decrease rates and efficiency of service, whether it will tend to strengthen or weaken the applicant’s financial structure, whether it will improve or injure the position of any class of investors, whether it runs counter to any established precept or principle of law.”); *W. Mass. Elec. Co.*, 3 F.P.C. 345, 352 (1942) (“Savings in operating expenses, however small, should redound ultimately to the benefit of rate payers and investors; and in the absence of adverse factors are sufficient to establish that the proposed merger will beneficially affect the public interest.”).

energy²⁴⁸ and ensuring effective regulatory control of the industry.²⁴⁹ Although *Commonwealth* characterized this list of factors as “nonexclusive,” FERC resisted subsequent efforts by parties to expand the list. For example, in *Southern California Edison Co. and San Diego Gas & Electric*, the agency stated:

We decline to expand our public interest inquiry to include an analysis of any alleged impact of the proposed merger on employees and shareholders. The Commission’s asserted duty to advance the public interest does not constitute a directive to protect employees and shareholders from the effects of the proposed merger.²⁵⁰

After *Commonwealth*, FERC made two modifications to its public interest test. As it became clear over time and in response to changing industry conditions that some of the *Commonwealth* factors carried more weight than others, FERC adopted the *Merger Policy Statement* in 1996 to clarify that it would focus merger review on three factors: the proposed transaction’s effects on competition, rates, and regulation. The agency has applied these factors strictly since 1996. About a decade later, FERC added one additional factor—cross-subsidization—in response to the EPAct of 2005,²⁵¹ which amended the Federal Power Act to require that applicants demonstrate that the proposed transaction will not result in utility-related assets being used to cross-subsidize the applicant’s non-utility holdings.²⁵²

(ii) Scope of Public Interest Discretion

FERC rarely makes explicit claims about the scope of its discretion under Section 203, and I found no bald claims of broad discretion. To the contrary, FERC opinions contain clear evidence that the agency sees itself as constrained by Congress and the federal courts. Indeed, FERC has consistently grounded its

248. See *Commonwealth Edison Co.*, 36 F.P.C. 927, 931 (1966) (“The question of whether a particular merger is consistent with the public interest necessarily starts with its consistency with the substantive standards of the Federal Power Act itself, and particularly the primary objective spelled out in Section 202(a) of the Act of promoting and encouraging the maximum regional coordination and interconnection ‘for the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.’”).

249. *Id.* (“It is, however, not sufficient to consult the Federal Power Act alone in evaluating the scope of the public interest standard; it is necessary to examine the entire Public Utility Act of 1935, Title II of which constitutes Parts II and III of the Federal Power Act. The 1935 legislation was designed to bring the electric power industry under effective and continuing regulatory control.”).

250. *S. Cal. Edison Co.*, 49 FERC P 61091, 61359 (1989).

251. Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C. and 16 U.S.C.).

252. See *EIF Berkshire Holdings, LLC*, 116 FERC 61273, 62118 (2006) (“EPAct 2005 amended section 203 to specifically require that the Commission also determine that the disposition will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”).

public interest analysis in the broad purposes of its enabling statutes²⁵³ and has stressed that it is bound by judicial interpretations of the Section 203 public interest standard.²⁵⁴ It has also demonstrated deference to the judiciary in its response to federal court interpretations of Section 203 that differed from its own. Early in the agency's implementation of the FPA, for example, FERC adopted the view that applicants must demonstrate affirmative benefits to consumers and the public to support a public interest finding.²⁵⁵ But it changed course in the wake of contrary interpretations by the federal courts, adopting a significantly lower threshold for demonstrating public interest based on Ninth Circuit case law:

The phrase 'consistent with the public interest' does not connote a public *benefit* to be derived or suggest the idea of a *promotion* of the public interest. The thought conveyed is merely one of *compatibility* * * *. It is enough if the applicants show that the proposed merger is *compatible* with the public interest. The Commission, as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law.²⁵⁶

Since its adoption, FERC has applied the more lenient "compatibility" standard consistently and resisted parties' subsequent attempts to raise the bar for demonstrating public interest.²⁵⁷

253. See *Enron Corp.*, 78 FERC 61179, 61734 (1997); *El Paso Elec. Co.*, 68 FERC 61181, 61914-15 (1994); *Sw. Pub. Serv. Co.*, 71 FERC 61318, 62241 (1995); *Ne. Utils. Serv. Co.*, 56 FERC 61269, 61996 (1991); *Delmarva Power & Light Co.*, 5 FERC 61201, 61437-38 (1978); *Commonwealth Edison Co.*, 51 F.P.C. 2179, 2183 (1974); *Union Elec. Co.*, 25 FERC 61394, 61875, 61877 (1983); *Sw. Pub. Serv. Co.*, 23 FERC 61153, 61338 (1983); *Iowa Power & Light Co.*, 44 F.P.C. 1640, 1643 (1970); *Commonwealth Edison Co.*, 36 F.P.C. at 931; *Pub. Serv. Elec. & Gas Co. of Newark*, 1 F.P.C. at 552.

254. See *Nw. Elec. Co.*, 5 F.P.C. 312, 317 (1946) ("In applying the statutory standard which, by the terms of section 203(a), requires that this proposed merger be 'consistent with the public interest,' the Commission must conform to the judicial interpretation of the section adopted by the courts . . ."); *S.C. Elec. & Gas Co.*, 7 F.P.C. 606, 608 (1948) ("The application is filed pursuant to section 203 and in considering the statutory standards required by this section, we must conform to the interpretation thereof announced by the courts . . .").

255. See *Inland Power & Light Co.*, 1 F.P.C. 380, 384-85 (1937) ("The burden is upon the applicant to show that the proposal is consistent with the public interest. This concept requires something more than a showing of convenience to the applicant, and can reasonably be interpreted as indicating that the Congress intended that there be a showing that benefit to the public will result from the proposed merger of facilities before it should receive Commission approval. The Commission is charged with the responsibility and active duty of making an affirmative finding that a proposed merger is consistent with the public interest. This responsibility carries with it the duty to deny an application for approval of the merger of facilities of two operating companies when it cannot be shown that good and sufficient reason for granting of the application exists and that the consuming public will be benefitted thereby.").

256. *Nw. Elec. Co.*, 5 F.P.C. at 317 (quoting *Pac. Power & Light Co. v. Federal Power Commission*, 111 F.2d 1014, 1016 (1940)).

257. See, e.g., *New PJM Co.*, 105 FERC 61251, 62327 (2003) (preempting Kentucky and Virginia from applying state-law public interest standards that required an affirmative showing of benefits).

(iii) Public Interest Justifications

Substantively, the arguments most frequently made by litigants and the agency about the public interest in a proposed transaction relate to efficiency. These include arguments about the proposed transaction's effects on competition, impact on rates, benefits to consumers, cost savings, economies of scale, facilities integration, and service quality. Consistent with the tests laid out in *Commonwealth* and the *Merger Policy Statement*, the next most commonly made arguments are about various aspects of transaction financing²⁵⁸ and the potential for the proposed transaction to adversely affect the ability of federal or state regulators to regulate the merged entity.²⁵⁹

Beyond the public interest factors explicitly articulated by FERC, the only other significant category of justifications made for public interest findings involve procedural arguments highlighting the applicants' responsiveness to participating stakeholders. In thirty-three (33) cases, FERC supported its public interest finding by noting that no party had argued to the contrary.²⁶⁰ In twenty-one (21) cases, it noted favorably that applicants had made accommodations to address concerns raised by protestors or agency staff.²⁶¹

258. See *Tucson Elec. Power Co.*, 151 FERC 61089, 61585 (2015); *Exelon Corp.*, 138 FERC 61167, 61714 (2012); *Trans Bay Cable LLC*, 130 FERC 61160, 61754 (2010); *Great Plains Energy Inc.*, 121 FERC 61069, 61375 (2007); *ITC Holdings Corp.*, 102 FERC 61182, 61496 (2003); *Madison Gas & Elec. Co.*, 93 FERC 61215, 61712 (2000); *PP&L Res., Inc.*, 90 FERC 61203, 61653 (2000); *Niagara Mohawk Power Corp.*, 89 FERC 61124, 61347 (1999); *Niagara Mohawk Power Corp.*, 87 FERC 61302, 62215-16, 62218 (1999); *Cambridge Elec. Light Co.*, 85 FERC 61217, 61897 (1998).

259. See *Crius Energy Corp.*, 168 FERC 61010, 61034 (2019); *El Paso Elec. Co.*, 170 FERC 61280, 63031 (2020); *Elec. Energy, Inc.*, 170 FERC 61072, 61548-49 (2020); *Calpine Corp.*, 162 FERC 61148, 61816 (2018); *Atlas Power Fin., LLC*, 157 FERC 61237, 61844 (2016); *Upstate N.Y. Power Producers, Inc.*, 154 FERC 61015, 61151 (2016); *Tucson Elec. Power Co.*, 151 FERC at 61584; *Exelon Corp.*, 149 FERC 61148, 61963 (2014); *NRG Energy Holdings, Inc.*, 146 FERC 61196, 61875 (2014); *ITC Holdings Corp.*, 143 FERC 61256, 62851 (2013).

260. See *El Paso Elec. Co.*, 170 FERC at 63031; *Calpine Corp.*, 162 FERC at 61816; *Atlas Power Fin., LLC* 157 FERC at 61845; *Upstate N.Y. Power Producers, Inc.*, 154 FERC at 61151; *Tucson Elec. Power Co.*, 151 FERC at 61584-85; *NRG Energy Holdings, Inc.*, 146 FERC at 61875; *ITC Holdings Corp.*, 143 FERC at 62852; *Exelon Corp.*, 149 FERC at 61712; *Duke Energy Corp.*, 136 FERC 61245, 62137 (2011); *Trans Bay Cable LLC*, 130 FERC at 61751, 61753; *Exelon Corp.*, 127 FERC 61161, 61681 (2009); *Lehman Bros. Commodity Servs. Inc.*, 125 FERC 61122, 61615 (2008); *Great Plains Energy Inc.*, 121 FERC at 61373; *Consumers Energy Co.*, 118 FERC 61143, 61723 (2007); *EIF Berkshire Holdings, LLC*, 116 FERC 61273, 62118 (2006); *MACH Gen, LLC*, 113 FERC 61138, 61558 (2005); *FirstEnergy Corp.*, 112 FERC 61243, 62175 (2005); *ITC Holdings Corp.*, 111 FERC 61149, 61787 (2005); *Exelon Corp.*, 107 FERC 61148, 61484 (2009); *PDI Stoneman, Inc.*, 104 FERC 61270, 61900 (2003); *Ameren Serv. Co.*, 103 FERC 61121, 61387 (2003); *ITC Holdings Corp.*, 102 FERC at 61495; *Mirant Neenah, LLC*, 101 FERC 61025, 61072 (2002); *Trans-Elect, Inc.*, 98 FERC 61142, 61415 (2002); *Commonwealth Atl. Ltd. P'ship*, 97 FERC 61375, 62718 (2001); *Madison Gas & Elec. Co.*, 93 FERC at 61712; *Niagara Mohawk Power Corp.*, 89 FERC at 61346; *Cambridge Elec. Light Co.*, 85 FERC at 61895; *PG&E Corp.*, 80 FERC 61041, 61138 (1997); *Pub. Serv. Co. of Colo.*, 58 FERC 61322, 62037 (1992); *Delmarva Power & Light Co.*, 5 FERC 61201, 61436 (1978); *Pub. Serv. Co. of Ind., Inc.*, 36 F.P.C. 498, 499 (1968).

261. See *Elec. Energy, Inc.*, 170 FERC at 61547; *Exelon Corp.*, 138 FERC at 61706; *Exelon Corp.*, 127 FERC at 61677; *Nat'l Grid plc*, 117 FERC 61080, 61417 (2006); *ITC Holdings Corp.*, 102 FERC at 61495; *Trans-Elect Inc.*, 98 FERC 61142, 61417-18 (2002); *PP&L Res., Inc.*, 90 FERC at 61649; *Long Island Lighting Co.*, 82 FERC 61129, 61465 (1998); *Union Elec. Co.*, 81 FERC 61011, 61051 (1997); *PG&E Corp.*, 80 FERC at 61137; *Midwest Power Sys. Inc.*, 71 FERC 61386, 62503 (1995); *Cincinnati Gas & Elec. Co.*, 69 FERC 61005, 61034 (1994); *Entergy Servs., Inc.*, 65 FERC 61332, 62465

Table 4. Frequency of Justification Types in FERC Decisions

<i>Justification Types</i>	<i>Counts</i>
Efficiency	266
Other Statutorily Required Factors	159
• Transaction financing considerations	81
• Effect on regulation	78
Procedural	68
Substantive values: Statutory	34
• No cross-subsidization	20
• Environmental impacts	5
• Simplification of corporate structure	4
• Best utilization of power resources	5
Substantive values: Non-statutory	6
• Support in affected communities	3
• Employee protections	2
• Protect public utility systems	1

Substantive values-based arguments are rare in FERC decisions, and the majority were based on statutory considerations, such as the prohibition on cross-subsidization, environmental impacts, simplification of corporate structure, and appropriate utilization of power resources for purposes of power development. Environmental concerns were raised in only four (4) cases, but each time, they were dismissed as beyond the scope of the proceeding.²⁶²

In a handful of cases, FERC considered non-statutory substantive values. In three (3) cases, it nodded toward democratic models of the public interest, indicating that approval of a project by the local electorate or local political bodies weighed in favor of a public interest finding.²⁶³ Enhanced employment prospects were raised in support of two transactions.²⁶⁴ And a Commissioner dissented to FERC's approval of a proposal to purchase a public utility company on the grounds that "elimination of a strong public sector in the electric industry

(1993); *Pub. Serv. Co. of Colo.*, 58 FERC at 62035; *Ne. Utilities Serv. Co.*, 56 FERC 61269, 61988 (1991); *Ky. Utilities Co.*, 56 FERC 611684, 61656-57 (1991); *Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61237, 62712-13 (1993); *Commonwealth Edison Co.*, 51 F.P.C. 2179, 2182 (1974); *Pac. Power & Light Co.*, 25 F.P.C. 1156, 1158 (1961); *Pac. Power & Light Co.*, 2 F.P.C. 508, 509 (1941); *Nw. Elec. Co.*, 5 F.P.C. 312, 320 (1946).

262. *S. Cal. Edison Co.*, 49 FERC 61091, 61357 (1989); *Exelon Corp.*, 149 FERC at 61965-66; *Pub. Serv. Co. of Colo.*, 75 FERC 61325, 62047 (1996); *Midwest Power Sys. Inc.*, 71 FERC at 62511.

263. *FirstEnergy Corp.*, 112 FERC at 62173-74 (2005); *Consumers Power Co.*, 39 F.P.C. 103, 106 (1968); *Commonwealth Edison Co.*, 36 F.P.C. 927, 935 (1966).

264. *See Iowa Power & Light Co.*, 44 F.P.C. 1640, 1657 (1970); *Commonwealth Edison Co.*, 51 F.P.C. at 2186.

would, in [his] opinion, be a genuine loss to the consumers of electricity and to the regulatory process.”²⁶⁵

Notably, FERC’s approach to public interest review differs from the other federal agencies analyzed along several dimensions. First, unlike the ICC, labor and environmental considerations are almost entirely absent from FERC merger review. Indeed, FERC merger applicants have been known to openly tout workforce reduction as a benefit of the proposed merger.²⁶⁶ The absence of labor-related considerations can perhaps be explained by distinctions between the two governing statutory schemes. While the Transportation Act of 1940 explicitly requires the ICC to consider “the interest of the carrier employees affected”²⁶⁷ in making public interest determinations, the FPA contains no such language.

The absence of environmental considerations, however, is more puzzling in light of the FPA’s stated purpose of “assuring an abundant supply of electric energy throughout the United States with the greatest possible economy *and with regard to the proper utilization and conservation of natural resources.*”²⁶⁸ FERC appears to have deterred participation by environmental groups by promulgating a rule that categorically excludes Section 203 merger approvals from environmental review under NEPA.²⁶⁹ But it is not entirely clear why environmental groups would not seek a seat at the table in these proceedings to press claims and negotiate accommodations and concessions, as they have done at the ICC. Climate interests are squarely at stake in these proceedings, but I do not find participation by climate-focused interest groups until 2014.²⁷⁰ And it was not until 2020, when the Sunrise Movement El Paso intervened in a proceeding to argue that the proposed transaction “will have an adverse impact on El Paso’s transition to clean, renewable energy,”²⁷¹ that I find climate activists articulating clear, climate-related public interest arguments. In any case, FERC summarily dismissed this argument as irrelevant to its Section 203 public interest analysis.²⁷²

Second, unlike both the ICC and the FCC, FERC does not engage—and does not generally purport to engage—in cost-benefit analysis. Only five (5) cases in the sample define the public interest in terms of the transaction’s net

265. Pub. Serv. Co. of Ind., 39 F.P.C. 498, 499 (1968).

266. See, e.g., Iowa Pub. Serv. Co., 60 FERC P 61048, 61176 (1992) (“By combining administrative and general functions of the two utilities, Applicants hope to achieve significant reductions in their work force.”)

267. Transportation Act of 1940, ch. 722, sec. 7, § 5(c), 54 Stat. 898, 906.

268. *Commonwealth Edison Co.*, 36 F.P.C. at 931 (emphasis added).

269. 18 C.F.R. § 380.4(b) (2022) (finding that merger approval does not generally constitute a major federal action significantly affecting the quality of the human environment, thus precluding environmental review under NEPA).

270. See *Exelon Corp.*, 149 FERC 61148, 61945 (2014) (noting motions to intervene filed by the Chesapeake Climate Action Network, the Sustainable FERC Project, the Natural Resources Defense Council, and the Sierra Club).

271. *El Paso Elec. Co.*, 170 FERC 61280, 63032 (2020).

272. *Id.*

benefits.²⁷³ And only six (6) cases utilize the language of costs and benefits to justify a decision about a transaction.²⁷⁴ As the agency explained in *Midwest Power Systems*,²⁷⁵ cost-benefit analysis is in tension with the low “compatibility” standard applied by FERC: “the acceptability of mergers under the FPA is not generally based solely on a showing of the net consumer benefits that they will likely produce. The rule is, generally speaking, that a merger must produce no detriment overall.”²⁷⁶

Third, unlike both the ICC and the FCC, FERC gives minimal consideration to service quality and access. Indeed, the agency cites the effect of the proposed merger on service as a justification for its public interest finding in only two (2) cases.²⁷⁷ Moreover, the agency has not been receptive to concerns about declines in service quality. The cases reviewed show that FERC was not persuaded by any arguments made by intervenors that a proposed transaction would degrade service quality.²⁷⁸ Further, only seven (7) cases cite service improvements as a justification supporting the public interest analysis.²⁷⁹ This may be because issues such as service quality are addressed in other proceedings before FERC or state public utility commissions in this highly regulated space. But it remains notable that the agency has not let these considerations bleed into its highly circumscribed public interest analysis.

In sum, across nearly a century implementing its public interest mandate, FERC has grounded its understanding of that authority in the FPA and judicial interpretations of the statute. Its public interest determinations have focused on efficiency-related factors with hardly any consideration of substantive values, likely because the FPA has little to say about substantive values other than the conservation of natural resources and the simplification of corporate form.

273. See *Ameren Servs. Co.*, 103 FERC 61121, 63186-87 (2003); *El Paso Elec. Co.*, 68 FERC 61181, 61902 (1994); *Entergy Servs., Inc.*, 65 FERC 61332, 62475 (1993); *Ne. Utilities Serv. Co.*, 56 FERC 61269, 62011 (1991); *Pub. Serv. Elec. & Gas Co. of Newark*, 1 F.P.C. 546, 552-55 (1938).

274. See *Entergy Servs., Inc.*, 65 FERC at 62464; *Utah Power & Light Co.*, 45 FERC 61095, 61299 (1988); *Commonwealth Edison Co.*, 51 F.P.C. 2179, 2185 (1974) (“[T]he benefits of combination operation outweigh any theoretical adverse effect, through absence of competition, in the circumstances present here.”); *Consumers Power Co.*, 39 F.P.C. 103, 106 (1968); *Iowa Power & Light Co.*, 44 F.P.C. 1640, 1645 (1970); *Pub. Serv. Elec. & Gas Co. of Newark*, 1 F.P.C. at 552.

275. 71 FERC 61386, 62513 (1995).

276. *Id.* at 62513.

277. See *Delmarva Power & Light Co.*, 5 FERC 61201, 61437 (1978); *Union Elec. Co.*, 25 FERC 61394, 61875 (1983).

278. See *Exelon Corp.*, 127 FERC 61161, 61683 (2009) (rejecting a competitor’s argument that Exelon’s increased cost of capital as a result of the proposed merger would put pressure on Exelon to reduce other costs, “possibly resulting in a negative impact on reliability and quality of service”); *Nat’l Grid plc*, 117 FERC 61080, 61423 (2006) (rejecting a union’s claim that applicants will cut maintenance staffing to meet savings goals, compromising their ability to respond to outages); *Exelon New England Holdings LLC*, 107 FERC 61148, 61485 (2004) (rejecting a union’s argument that anticipated layoffs caused by the merger would undermine reliability); *Sw. Pub. Serv. Co.*, 71 FERC 61318, 62241 (1995) (rejecting the city of El Paso’s argument that applicants must offer more evidence to support their claim that the merged entity will offer comparable transmission service).

279. See *Twin State Gas & Elec. Co.*, 2 F.P.C. 122, 123 (1940); *Pub. Serv. Co. of Ind., Inc.*, 39 F.P.C. 498, 498 (1968); *S. Cal. Edison Co.*, 33 F.P.C. 687, 689 (1965); *Commonwealth Edison Co.*, 51 F.P.C. at 2187; *Cent. Me Power Co.*, 55 F.P.C. 2477, 2486 (1976); *Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61237, 62709-10 (1993); *ITC Holdings Corp.*, 111 FERC 61149, 61786 (2005).

D. California Water Board Implementation of the California Water Commission Act

1. Statutory Context

According to the California Water Code, “[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”²⁸⁰ California law makes the “public interest” a touchstone of the state’s statutory system of water rights allocation. In 1914, the Water Commission Act established a state agency—originally the California Water Commission, now the State Water Resources Control Board (the Board)—to oversee a permitting system that regulates the acquisition and maintenance of appropriative water rights in the state. The “public interest” standard first appeared in a 1917 amendment to the Water Commission Act, which required the Water Commission to “allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated”²⁸¹ and to “reject an application when in its judgment the proposed appropriation would not best conserve the public interest.”²⁸² However, these standards were infrequently used because the Water Commission’s authority was narrowly circumscribed to deciding whether an adequate supply of unappropriated water was available to satisfy the needs of the permit applicant.

In 1928, following a court decision that further limited the Water Commission’s authority,²⁸³ the people of California, by referendum, amended the state constitution to express the state’s fundamental policy that water use must be allocated based on the public interest:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.²⁸⁴

280. CAL. WATER CODE § 102 (West 2022).

281. *Id.* § 1253.

282. *Id.* § 1255.

283. *See* *Herminghaus v. S. Cal. Edison Co.*, 200 Cal. 81, 100-01 (1926) (holding that a riparian who puts water to be beneficial use cannot be required by an appropriator to do so in a reasonable fashion). This decision hamstrung the Water Commission from conditioning even unreasonable uses of water by riparian rights holders.

284. CAL. CONST. art. X, § 2.

Subsequent statutory amendments reiterate and elaborate the requirement that water allocations be made in the public interest²⁸⁵ and specify factors the Board must consider in making such determinations. The general “public interest” mandate appears in Section 1257 of the California Water Code:

In acting upon application to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.²⁸⁶

Subsequent legislation specifies considerations the Board must take into account in making public interest determinations, including “that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation”,²⁸⁷ state and local plans for the “control, protection, development, utilization, and conservation of the water resources of the State”;²⁸⁸ the “amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources”,²⁸⁹ and provision of water storage “for the purpose of protecting or enhancing the quality of other waters which are put to beneficial uses.”²⁹⁰

The statutory public interest standards governing California’s water rights permitting system exist alongside a tapestry of common-law doctrines relating to appropriative and riparian rights, including beneficial use, reasonable use, and public trust. As discussed below, these doctrines significantly inform the Board’s understanding of which allocations are in the public interest.

285. See, e.g., WATER § 100 (codifying CAL. CONST. art. X, § 2); *id.* § 105 (“It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.”)

286. *Id.* § 1257.

287. *Id.* § 106.

288. *Id.* at § 1256; see also § 1243.5 (“In determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses, including any uses specified to be protected in any relevant water quality control plan established pursuant to Division 7 (commencing with Section 13000) of this code.”)

289. *Id.* § 1243; see also *id.* § 1257.5 (“The board, in acting on applications to appropriate water, shall consider streamflow requirements proposed for fish and wildlife purposes pursuant to Sections 10001 and 10002 of the Public Resources Code. The board may establish such streamflow requirements as it deems necessary to protect fish and wildlife as conditions in permits and licenses in accordance with this division.”).

290. *Id.* § 1242.5.

2. Findings

The findings reported in this section are based on a sample of eighty-seven (87) decisions between 1927 and 2015.

(i) Definition of Public Interest

More than 75% (58/77) of Board decisions in the sample contain a statement defining the public interest or laying out factors the Board considers in its public interest analysis. Those definitional statements hew closely to statutory and state-constitutional commands. The public interest considerations most commonly cited by the Board are whether the proposed application contemplates a beneficial use of water²⁹¹ and whether it will “best develop, conserve, and utilize in the public interest the water sought to be appropriated.”²⁹² These criteria come straight from the California Constitution, which commands that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable,”²⁹³ as codified by California Water Code Section 1253, which provides: “The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.”²⁹⁴

To elaborate these general criteria, the Board frequently invokes statutory provisions directing consideration of more specific issues. Most central to the Board’s understanding of the public interest are the environmental considerations contained in Water Code Section 1243—“recreation and the enhancement of fish and wildlife resources”²⁹⁵—and the constitutional command that “waste or unreasonable use . . . of water be prevented.”²⁹⁶ The Board has

291. This criterion is cited in twenty-seven (27) cases.

292. This criterion is cited in fifteen (15) cases.

293. CAL. CONST. art. X, § 2

294. WATER § 1253.

295. Section 1243 provides: “The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.” *Id.* § 1243. The Board highlights the public interest in recreation in eight (8) cases, the public interest in preserving fish resources in fourteen (14) cases, and the public interest in other forms of environmental conservation in nine (9) cases. In Application 27868 Enviro Hydro Inc., the Board cites a then-recently enacted statute, Public Resources Code Section 21083, requiring consideration not only of the isolated environmental impacts of a project, but its cumulative impacts “viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future project [sic].” Cal. State Water Res. Bd., Decision No. 1605, 1985 WL 1122067, at *14.

296. CAL. CONST. art. X, § 2; *see* Amend. of the City of L.A.’s Water Right Licenses 10191 & 10192, Cal. State Water Res. Bd., Decision No. 1631 1994 WL 16804395, at *6 (“All diversions and use of water in California are subject to the mandate of Article X, Section 2 of the California Constitution to maximize the beneficial use of water and to prevent the wasteful or unreasonable use, method of use, or method of diversion.”). Based on this constitutional provision, the Board has stressed in multiple decisions the importance of avoiding waste, *see* Applications 13676, 13956, 13957, 14112 & 14113 by Oroville-Wyandotte Irrigation Dist., Cal. State Water Res. Bd., Decision Nos. 13676, 13956, 13957, 14112, 14113,

also defined the public interest to include other interests advanced by the legislature, including preference for domestic,²⁹⁷ irrigation,²⁹⁸ municipal,²⁹⁹ and

12532, 12573, 14571, 14572, 14741, 14983, 14984, 14985, 14986, 14987, 14988, 838, 1955 WL 78201, at *11; Application 26375 & 26376 to Appropriate Water from the S. Fork of the Am. River & its Tributaries, Cal. State Water Res. Bd., Decision No. 1587, 1982 WL 17561, at *15, *23; Application 20621 of Deluz Heights Mun. Water Dist., Cal. State Water Res. Bd., Decision No. 1235, 1965 WL 158311, at *7; Applications 12092 & 15145 by United Water Conservation Dist., Cal. State Water Res. Bd., Decision No. 884, 1958 WL 5636, at *35; Application 5109 of James D. & Mary Louise Phelan, Cal. State Water Res. Bd., Decision Nos. A 5109, 5110, 5143, 5473 D 213, 1929 WL 62387, at *9, as well as unreasonable use, *see* License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr., Cal. State Water Res. Bd., Division Decision 2015-0001, 2015 WL 4187944, at *9-*11, *16; *Amend. of the City of L.A.'s Water Right Licenses 10191 & 10192*, 1994 WL 16804395, at *6; Application 26627 Henwood Assocs., Inc., Cal. State Water Res. Bd., Decision No. 1620, 1988 WL 1568015, at *2; Application 27815 Energy Growth Grp. & Butte Creek Improvement Co., Cal. State Water Res. Bd., Decision No. 1617, 1988 WL 1568013, at *6; Applications 14858, 14859, 19303 & 19304 to Appropriate from the Stanislaus River in Calaveras & Tuolumne Cnties., Cal. State Water Res. Bd., Decision No. 1422, 1973 WL 19662, at *15; Applications 24446 & 24447 of Boyd Trucking Co., Cal. State Water Res. Bd., Decision No. 1446, 1975 WL 370176, at *6.

297. *See* Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822, and 9369, United States of America, Cal. State Water Res. Bd., Decision No. 935, 1959 WL 5685, at *17 (“Water Code sections 106 and 1254 provide as follows: ‘106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.’ ‘1254. In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.’ These sections are clear and precise that domestic and irrigation uses are preferred over all others necessarily including water for fish life”); *see also* Application Number 5154 of the Tesemite Power Co., Cal. State Water Res. Bd., Decision No. A 5154, D 143, 1927 WL 62784, at *5-*6; Application 2922 of Coachella Valley Cnty. Water Dist., Cal. State Water Res. Bd., Decision No. A 2922, D 191, 1928 WL 60613, at *11; Applications 1680, 1703, 1899, 2124, 2198, 2199, 2200, 2493, 2767, 2776, 2966, 3344 & 5330 of the Yuba River Power Co., Cal. State Water Res. Bd., Decision Nos. A. 1680, 1703, 1899, 2124, 2198, 2199, 2200, 2493, 2767, 2776, 2966, 3344, 4916, 5330 D 193, 1928 WL 60620, at *6-*7; *Application 5109 of James D. & Mary Louise Phelan*, 1929 WL 62387, at *10-*12; *License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr.*, 2015 WL 4187944, at *15.

298. *See* Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822, & 9369, United States of America, 1959 WL 5685, at *17 (“Water Code Sections 106 and 1254 provide as follows: ‘106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.’ ‘1254. In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.’ These sections are clear and precise that domestic and irrigation uses are preferred over all others necessarily including water for fish life”); *see also* Application Number 5154 of the Tesemite Power Co., 1927 WL 62784, at *5; *Application 2922 of Coachella Valley Cnty. Water Dist.*, 1928 WL 60613, at *10-*11; *Applications 1680, 1703, 1899, 2124, 2198, 2199, 2200, 2493, 2767, 2776, 2966, 3344 & 5330 of the Yuba River Power Co.*, 1928 WL 60620, at *6-*7; *Application 5109 of James D. & Mary Louise Phelan*, 1929 WL 62387, at *9-*12; *License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr.*, 2015 WL 4187944, at *9-*10, *15-*16.

299. *See* Applications 11792, 12953 & 13265 by Calaveras Cnty Water Dist., Cal. State Water Res. Bd., Decision Nos. A 11792, 12842, 12953, 13156, 13265, 15201, D 858, 1956 WL 94644, at *33 (“[T]he provisions of Section 20 of the Water Commission Act, which are now in Water Code Section 1460, should be construed to confer priority in right upon applications by municipalities for use of water within said municipalities for all beneficial uses customarily associated with urban areas including, but not limited to, use of water for the inhabitants thereof for domestic purposes.”).

local uses;³⁰⁰ development of water resources;³⁰¹ water-quality maintenance;³⁰² wetlands preservation;³⁰³ watershed protection;³⁰⁴ development of hydroelectric power;³⁰⁵ conservation and flood control;³⁰⁶ and implementation of the California State Water Plan.³⁰⁷

300. See *Application 26375 & 26376 to Appropriate Water from the S. Fork of the Am. River & its Tributaries*, 1982 WL 17561, at *6 (“Release or assignment of the priority of any state-held application is prohibited, however, when the county in which the water originates would be deprived of water necessary for development. (Water Code Section 10505.)”); *Lake Alpine Water Co., Cal. State Water Res. Bd., Decision No. 1648*, 2009 WL 6602555, at *8 (“Water Code Section 10505 provides that: No priority . . . shall be released or assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.”).

301. See *License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr.*, 2015 WL 4187944, at *16; *Application 18714 of the U.S. Bureau of Reclamation*, Cal. State Water Res. Bd., Division Decision No. 1365, 1970 WL 9497, at *16; *Application 12092 of United Water Conservation Dist., Cal. State Water Res. Bd. Decision No. D 1129*, 1963 WL 113366, at *18-*19; *Application 8156 of Fallbrook Pub. Util. Dist., Cal. State Water Res. Bd., Decision Nos. A. 8156, 8205, 8418, D 432*, 1938 WL 66816, at *4; *Revocation of Permit 1980*, Cal. State Water Res. Bd., Decision No. A 3310 D 178, 1928 WL 60602, at *7; *Application 10752 by Francis Dlouhy*, Cal. State Water Res. Bd., Decision No. D 958, 1960 WL 104961, at *3-*4.

302. See *Application 26375 & 26376 to Appropriate Water from the S. Fork of the Am. River & its Tributaries*, 1982 WL 17561, at *9 (citing Water Code Section 10504 to support the Board’s statement that it “may not release from priority or assign state-held applications that conflict with water quality objectives”).

303. See *License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr.*, 2015 WL 4187944, at *15 (citing the “statewide policy in favor of ‘no net loss’ of wetlands and of increasing state wetlands”).

304. See *Application 26375 & 26376 to Appropriate Water from the S. Fork of the Am. River & its Tributaries*, 1982 WL 17561, at *21 (noting that the Board’s determination is “subject to the requirements of Water Code Sections 11460 and 11128, the watershed protection statutes”); *Applications 24578 & 24579 to Appropriate from the Underflow of the Santa Ynez River*, Cal. State Water Res. Bd., Decision No. 1486, 1978 WL 21156, at *13 (acknowledging that while the watershed-protection principle protects water for future growth within the watershed, it does not preclude present use by persons outside the watershed if water is needed by them).

305. See *Application 27815 Energy Growth Grp. & Butte Creek Improvement Co.*, Cal. State Water Res. Bd., Decision No. 1617, 1988 WL 1568013 1, at *1 (“Section 106.7 of the Water Code addresses the use of water for hydroelectric power generation. Subdivision (a) of that section declares that it is ‘the established policy of this state to support and encourage the development of environmentally compatible small hydroelectric projects as a renewable energy source’”); *Application 26627 Henwood Assocs., Inc.*, Cal. State Water Res. Bd., Decision No. 1620, 1988 WL 1568015, at *1 (“The Legislature has declared that it is: ‘[T]he established policy of this state to support and encourage the development of environmentally compatible small hydroelectric projects as a renewable energy source’”).

306. See *Applications 11792, 14250, 14251 & 18729 of Calaveras Cnty. Water Dist.*, Cal. State Water Res. Bd., Decision No. D 1179, 1964 WL 6840, at *7 (“WHEREAS, It is hereby declared that the people of this State have a primary interest in the control and conservation of the waters of the State, and that the prevention of floods and conservation of water are proper functions of the State in cooperation with local agencies, private interests, and the Federal Government” (citing S. 17, 1958 Leg., 1st Extra. Sess. (Cal. 1958))).

307. See *Application 20621 of Deluz Heights Mun. Water Dist.*, Cal. State Water Res. Bd., Decision No. 1235, 131965 WL 158311, at *6 (“Water Code Section 1256 requires the Board, in determining public interest under Sections 1253 and 1255, to ‘give consideration to any general or co-ordinated plan looking toward the control, protection, development, utilization, and conservation of the water resources of the State, including the California Water Plan, prepared and published by the Department of Water Resources or any predecessor thereof and any modification thereto as may be adopted by the department or as may be adopted by the Legislature’”); *Applications 11792, 12537 12910, 12911, 12912, 13091, 13092, 13093, 18727, 18728, 19148 & 19149 of Calaveras Cnty. Water*

State common law shapes the Board’s understanding of its public interest authority as well. This influence is perhaps most evident in the aftermath of the California Supreme Court’s decision in *National Audubon Society v. Superior Court*, which articulated the relationship between California’s statutory appropriative water rights system and the common-law public trust doctrine.³⁰⁸ Maintaining that “the core of the public trust doctrine is the state’s authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters,”³⁰⁹ the court held that “before . . . agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”³¹⁰ Subsequent Board decisions acknowledge the Board’s obligation to protect public trust values as part of its public interest analysis.³¹¹ Indeed, long before this signal case, and throughout its history, the Board has regularly examined the interplay between common-law and statutory water rights to determine the contours of its public interest authority.³¹²

Dist., Cal. State Water Res. Bd., Decision No. 1114, 1963 WL 113351, at *8-9; Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822, & 9369, United States of America, Cal. State Water Res. Bd., Decision No. 935, 1959 WL 5685, at *24; Lake Alpine Water Co., Cal. State Water Res. Bd., Decision No. 1648, 2009 WL 6602555, at *7.

308. 33 Cal.3d 419, 425-26 (1983).

309. *Id.* at 425.

310. *Id.* at 426.

311. See Applications 29919, 29920, 29921 & 29922 & Petition for Assignment of State Filed, Cal. State Water Res. Bd., Decision No. 1635, 1996 WL 34482524, at *12 (“[T]he decision requires the Board to consider the effect of proposed diversions of water upon interests protected by the public trust, and attempt, insofar as feasible, to avoid or minimize any harm to those interests.”); Amend. of the City of L.A.’s Water Right Licenses 10191 & 10192, Cal. State Water Res. Bd., Decision No. 1631, 1994 WL 16804395, at *4 (“The Court recognized that in some cases the public interest served by water diversions may outweigh harm to public trust resources, but it held that harm to public trust resources should be avoided or minimized if feasible.”); License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr., Cal. State Water Res. Bd., Division Decision 2015-0001, 2015 WL 4187944, at *8, *15; Applications 31487 & 31488 Filed by the U.S. Bureau of Reclamation, Cal. State Water Res. Bd., Decision No. 1651, 2012 WL 5494093, at *44-*46; License 7979 (Application 20301) of Irv Leen, Cal. State Water Res. Bd., Division Decision 2013-0001, 2013 WL 596457, at *11; Fishery Res. & Water Right Issues of the Lower Yuba River, Cal. State Water Res. Bd., Decision No. 1644, 2001 WL 36250472, at *18-*20; Amended Application 27614, Cal. State Water Res. Bd., Decision No. 1632, 1995 WL 464946, at *17; Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822 & 9369, United States of America, 1959 WL 5685, at *17.

312. The common-law principle most frequently articulated by the Board is that proposed diversions cannot infringe vested water rights. See License 13868 (Application 30497b) Clint Eastwood & Margaret Eastwood Tr., 2015 WL 4187944, at *8 (“Before approving a petition submitted pursuant to Water Code section 1700, the State Water Board must find that the proposed change will neither in effect initiate a new right nor injure any other legal user of water.”); Applications 31487 & 31488 Filed by the U.S. Bureau of Reclamation, 2012 WL 5494093, at *11; Amended Application 27614, 1995 WL 464946, at *12; Application 18714 of the U.S. Bureau of Reclamation, Cal. State Water Res. Bd., Division Decision No. 1365, 1970 WL 9497, at *4; Applications 12092 & 15145 by United Water Conservation Dist., Cal. State Water Res. Bd., Decision No. 884, 1958 WL 5636, at *8; Application 8156 of Fallbrook Pub. Util. Dist., Cal. State Water Res. Bd., Decision Nos. A. 8156, 8205, 8418, D 432, 1938 WL 66816, at *4; Lake Alpine Water Co., 2009 WL 6602555, at *7-*8; Application 12092 of United Water Conservation Dist., Cal. State Water Res. Bd., Decision No. D 1129, 1963 WL 113366, at *8. The Board also explained that the public interest requires it to condition permits to reserve water for future uses that have higher priority under California law. See Applications 14785, 15717, 15718 & 15719 of Pac. Gas &

Common good or community values *not* grounded in statutory or common law have not been invoked by the Board in staking out the definition of public interest. Further, the Board rarely defines the public interest in terms of net benefits, and cost-benefit analysis does not feature prominently in its public interest determinations. This may be a legacy of early decisions holding that the Water Code “does not contemplate the balancing of the welfare of one community against that of another.”³¹³ Instead, when the Board uses net-benefits analysis, it does so to adjudicate the relative merits of competing applications rather than to assess if any single application is in the public interest.³¹⁴

Elec. Co., Cal. State Water Res. Bd., Decision No. 978, 1960 WL 6703, at *6 (“The Board agrees that the public interest necessitates conditioning permits to be issued to applicant so as to reserve water for those future uses that have higher priority under the law of California . . .”); Applications 11792, 12953 & 13265 by Calaveras Cnty Water Dist., Cal. State Water Res. Bd., Decision Nos. A 11792, 12842, 12953, 13156, 13265, 15201, D 858, 1956 WL 94644, at *37 (“By-pass of unappropriated water to maintain fish life could only be required in these proceedings to the extent that it would not substantially interfere with diversion for higher uses.”); Applications 14785, 15717, 15718 & 15719 of Pac. Gas & Elec. Co., Cal. State Water Res. Bd., Decision No. 989, 1961 WL 109610, at *5 (“[P]ublic interest necessitates conditioning permits to be issued to applicant so as to reserve water for those future uses that have higher priority under the law of California . . .”); Applications 9092, 9093, 9094 & 9095 of United States of America, Cal. State Water Res. Bd., Decision Nos. A. 9092, 9093, 9094, 9095 D 491, 1942 WL 78000, at *29 (“While the use to which the applicant proposed to apply the water is useful and beneficial, such use should be so restricted as to eliminate interference with existing or future higher uses . . .”). Early decisions followed the “first in time, first in right” principle deeply entrenched in appropriative water rights doctrine. See Application 2922 of Coachella Valley Cnty. Water Dist., Cal. State Water Res. Bd., Decision No. A 2922, D 191, 1928 WL 60613, at *11 (“[T]he Division of Water Rights has repeatedly held that it was not the intent of the legislature that such provisions should constitute a departure from the old established doctrine that ‘first in time is first in right’ . . .”); Application 5109 of James D. & Mary Louise Phelan, Cal. State Water Res. Bd., Decision No. A 5109, 5110, 5143, 5473 D 213, 1929 WL 62387, at *10-*11. Subsequent decisions, however, recognized that the Water Code had displaced that principle and allowed the Board to disregard common-law priority designations if not in the public interest. See Applications 11792, 12537 12910, 12911, 12912, 13091, 13092, 13093, 18727, 18728, 19148 & 19149 of Calaveras Cnty. Water Dist., 1963 WL 113351, at *9-*10; Applications 12092 & 15145 by United Water Conservation Dist., 1958 WL 5636, at *8; Applications 12919a, 12920a, 15704, 15736, 15737, 15738, 15739 & 15779 to Appropriate Water from E. Fork Russian River & Russian River in Mendocino & Sonoma Cnties., Cal. State Water Res. Bd., Decision No. 965, 1960 WL 66320, at *10 (“[T]he Board may disregard the priority of an application in the public interest . . .”); Applications 11792, 12537, 12910, 12911, 12912, 13091, 13092, 13093, 18727, 18728, 19148 & 19149 of Calaveras Cnty. Water Dist., 1963 WL 113351, at *9 (“In the absence of other factors to be taken into consideration, when there are conflicting applications, the earlier one should be favored. However, the Board is directed by law to reject an application when in its judgment the proposed appropriation would not best conserve the public interest.” (internal citation omitted)).

313. *Application 2922 of Coachella Valley Cnty. Water Dist.*, 1928 WL 60613, at *11 (citing to an earlier Board decision for this holding).

314. See Applications 29061, 29062, 29063, 29066, 30267, 30268, 30269 & 30270, Cal. State Water Res. Bd., Decision No. 1643, 2001 WL 1880741, at *41 (“The relative benefit of a project is relevant to determining whether a project is in the public interest.”); Applications 29919, 29920, 29921 & 29922 & *Petition for Assignment of State Filed, Cal. State Water Res.*, 1996 WL 34482524, at *12 (“[T]he Board is required to consider . . . competing applications for the appropriation of water.”); *Application 12092 of United Water Conservation Dist.*, 1963 WL 113366, at *18 (indicating that the Board “weighed the projects” of two competing applicants); Application 20621 of Deluz Heights Mun. Water Dist., Cal. State Water Res. Bd., Decision No. 1235, 1965 WL 158311, at *7-*8; Applications 13681, 13682, 14919, 14920, 15551 & 15552 Held by Richvale Irrigation Dist., Cal. State Water Res. Bd., Decision No. 1224, 1965 WL 158300, at *3, *22 (weighing the relative benefits of the originally proposed project or a modified project); Application 27815 Energy Growth Grp. & Butte Creek Improvement Co., Cal. State Water Res. Bd., Decision No. 1617, 1988 WL 1568013, *4-*5 (holding that water rights could be reallocated in its favor if PG&E’s efficiency claims were ultimately substantiated); Applications 11792,

The Board's core definition of the public interest as beneficial use that best develops, conserves, and utilizes the state's water resources does not exhibit significant change over time. As with the other agencies in this study, significant changes in the Board's focus tend to occur after a major court decision or statutory enactment. For instance, all decisions invoking the public trust doctrine followed *National Audubon Society*. Similarly, the Board began considering the value of hydroelectric power development in the 1980s, after the California legislature enacted Section 106.7 of the Water Code. This Section established the state's "policy of . . . support[ing] and encourag[ing] the development of environmentally compatible small hydroelectric projects as a renewable energy source."³¹⁵ Although the Board consistently invokes the principle that vested rights must not be infringed throughout the twentieth century, this criterion becomes increasingly important in twenty-first century cases, when most water in the state has already been allocated.

Patterns in the Board's inclusion of environmental factors in its public interest definition present something of a puzzle. Almost all explicit statements of environmental criteria appear after 1980. This significantly lags enactment of Water Code Section 1243, which endorsed such considerations in the public interest analysis as early as 1959. I suspect the more robust discussion of environmental criteria two decades later can be explained by the increased participation of environmental groups in Board proceedings following the enactment of the California Environmental Quality Act (CEAQ) in 1970³¹⁶ and the institutionalization of CEQA-related litigation of government permitting processes.

(ii) Scope of Public Interest Discretion

From its earliest days, the Board has explicitly acknowledged constraints on its public interest authority:

[T]he Division is of opinion that the Legislature has not and could not constitutionally delegate its general legislative authority to determine public policy and welfare to an administrative official, board, or body. In other words the legislature has not and could not delegate unlimited and undefined authority upon the Division whereby it is or would be empowered to use its own unrestricted judgment and discretion as to what is or might be in the public interest or for the public welfare.³¹⁷

12537 12910, 12911, 12912, 13091, 13092, 13093, 18727, 18728, 19148 & 19149 of Calaveras Cnty. Water Dist., 1963 WL 113351, at *9 ("The basic problem before the Board is which of the projects will provide the widest benefits and more fully develop the natural resources of the State in the public interest.").

315. CAL. WATER CODE § 106.7 (West 2022).

316. California Environmental Quality Act, 1970 Cal. Stat. 2780 (codified at CAL. PUB. RES. CODE §§ 21000-21151).

317. Application 5109 of James D. & Mary Louise Phelan, Cal. State Water Res. Bd., Decision No. A 5109, 5110, 5143, 5473 D 213, 1929 WL 62387, at *12.

The Board explicitly disavowed discretion in about one in five cases (19%)³¹⁸ and cited statutory or caselaw constraints on its authority in one in four cases (25%).³¹⁹ It only claimed broad discretion in six cases.³²⁰

318. See License 7979 (Application 20301) of Irv Leen, Cal. State Water Res. Bd., Division Decision 2013-0001, 2013 WL 596457, at *9; Applications 10872, 11105, 12490, 12614, 12873, 13309 & 13310 of the Oakdale Irrigation Dist., Cal. State Water Res. Bd., Decision Nos. A. 10872, 11105, 12490, 12614, 12873, 13309, 13310, 12257, 12493, 12497, 12498, 12856, 12860, 13827 13875 & D. 777, 1953 WL 83104, at *9; Application 17002 by Pleasanton Twp. Cnty. Water Dist., Cal. State Water Res. Bd., Decision No. 894, 1958 WL 97821, at *11; Application 12152 by Santa Margarita Mut. Water Co., Cal. State Water Res. Bd., Decision No. 897, 1958 WL 97824, at *13; Applications 11792, 12953 & 13265 by Calaveras Cnty Water Dist., Cal. State Water Res. Bd., Decision Nos. A 11792, 12842, 12953, 13156, 13265, 15201, D 858, 1956 WL 94644, at *33; Applications 8173, 8174, 3175 & 8176 of Nev. Irrigation Dist., Cal. State Water Res. Bd., Decision Nos. A. 8173, 8174, 8175, 8176, 8177, 8178, 8179, 8180 D. 478, 1941 WL 79406, at *6; Application 8156 of Fallbrook Pub. Util. Dist., Cal. State Water Res. Bd., Decision Nos. A. 8156, 8205, 8418, D 432, 1938 WL 66816, at *5; Application 8884 of the City of Redding, Cal. State Water Res. Bd., Decision Nos. A 8884, D 4-21, 1938 WL 66805, at *6; Petition of the El Dorado Irrigation Dist., Cal. State Water Res. Bd., Decision Nos. A. 3270 D-283, 1931 WL 69718, at *5; Applications 27504 & 27671 Fred M. Sutter, Jr., Cal. State Water Res. Bd., Decision No. 1597, 1984 WL 19051, at *2; Application 26651 Pac. Gas & Elec. Co., Cal. State Water Res. Bd., Decision No. 1626, 1990 WL 10590465, at *3-*4; Application 24788 to Appropriate from Pescadero Creek in San Mateo Cnty., Cal. State Water Res. Bd., Decision No. 1565, 1980 WL 30101, at *2-*3; *Application 5109 of James D. & Mary Louise Phelan*, 1929 WL 62387, at *9-*12.

319. Caselaw constraints were cited in Amend. of the City of L.A.'s Water Right Licenses 10191 & 10192, Cal. State Water Res. Bd., Decision No. 1631, 1994 WL 16804395, at *4-*5; Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 & 10588, U.S. Bureau of Reclamation, Cal. State Water Res. Bd., Decision No. 990, 1961 WL 6816, at *11; *Applications 8173, 8174, 3175 & 8176 of Nev. Irrigation Dist.*, 1941 WL 79406, at *6; *Application 5109 of James D. & Mary Louise Phelan*, 1929 WL 62387, at *9-*12; Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822 & 9369, United States of America, Cal. State Water Res. Bd., Decision No. 935, 1959 WL 5685, at *35; and Application 24758 Arthur Andreotti, Cal. State Water Res. Bd., Decision No. 1558, 1980 WL 591580. Statutory constraints were cited in Applications 31487 & 31488 Filed by the U.S. Bureau of Reclamation, Cal. State Water Res. Bd., Decision No. 1651, 2012 WL 5494093, at *40; Fishery Res. & Water Right Issues of the Lower Yuba River, Cal. State Water Res. Bd., Decision No. 1644, 2001 WL 36250472, at *17; Applications 11792, 14250, 14251 and 18729 of Calaveras Cnty. Water Dist., Cal. State Water Res. Bd., Decision No. 1179, 1964 WL 6840; Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 & 10588, U.S. Bureau of Reclamation, 1961 WL 6816, at *10-*11; Applications 9092, 9093, 9094 & 9095 of United States of America, Cal. State Water Res. Bd., Decision Nos. A. 9092, 9093, 9094, 9095 D 491, 1942 WL 78000, at *29; *Applications 8173, 8174, 3175 & 8176 of Nev. Irrigation Dist.*, 1941 WL 79406, at *6; *Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822 & 9369, United States of America*, 1959 WL 5685, at *27-*29; Permits 10657, 10658 & 10659, Issued on Applications 11198, 11199, 12578 & 12716 by U.S. Bureau of Reclamation, Cal. State Water Res. Bd., Decision No. 869, 1957 WL 92938, at *8-*9; *Application 5109 of James D. & Mary Louise Phelan*, 1929 WL 62387, at *9-*12; Applications 14785, 15717, 15718 & 15719 of Pac. Gas & Elec. Co., Cal. State Water Res. Bd., Decision No. 989, 1961 WL 109610, at *8; and Application Number 5154 of the Tesemite Power Co., Cal. State Water Res. Bd., Decision No. A 5154, D 143, 1927 WL 62784, at *5-*6.

320. See Applications 29061, 29062, 29063, 29066, 30267, 30268, 30269 & 30270, Cal. State Water Res. Bd., Decision No. 1643, 2001 WL 1880741, at *32; Applications 14858, 14859, 19303 and 19304 to Appropriate from the Stanislaus River in Calaveras & Tuolumne Cnties., Cal. State Water Res. Bd., Decision No. 1422, 1973 WL 19662, at *7; Applications 12092 & 15145 by United Water Conservation Dist., Cal. State Water Res. Bd., Decision No. 884, 1958 WL 5636, at *8. Three of these claims are qualified by an acknowledgment that the Board's broad discretion is exercised within given caselaw or statutory constraints: *Applications 9092, 9093, 9094 & 9095 of United States of America*, 1942 WL 78000, at *26; Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822 & 9369, United States of America, 1959 WL 5685, at *28-*29; *Application 8156 of Fallbrook Pub. Util. Dist.*, 1938 WL 66816, at *3-*4.

(iii) Public Interest Justifications

In terms of absolute numbers, and in contrast to the federal case studies, substantive values dominate Board decisions, and nearly all of them are grounded in statutory requirements. Environmental considerations lead the way, followed by community values such as access to water for local and domestic use, the community’s need for additional water supply, the community’s access to recreation activities, and the project’s impact on cultural resources. The Board also commonly applies statutory provisions expressing the legislature’s preference for prioritizing the development of certain economic activities, for example, agriculture over other industrial development.³²¹ Common-law doctrine supplies the next most common source of public interest justifications, particularly beneficial use, the availability of unappropriated water, and respect for existing rights. Procedural and efficiency arguments follow.

Table 5. Frequency of Justification Types in Water Board Decisions

<i>Justification Types</i>	<i>Counts</i>
Substantive values: Statutory	255
• Environmental	127
• Community	82
• Economic priorities	46
Common-law doctrine	241
Procedural	105
Efficiency	50
Substantive values: Non-statutory	20
• No harm	12
• Community support for project	3
• Community need for power generation	2
• Promotion of orderly conflict resolution	2
• Impact on community tax base	1

Several reasons might explain the differences in the distribution of justifications used by the Board and the federal agencies. As a starting point, the balance of efficiency and environmental considerations is bound to shift from the merger context to the natural resource allocation context. But it is also true that the California legislature wrote more substantive values into its statutory code than Congress did into the federal statutes. Finally, the Board operates against a backdrop of state common law that does not exist in the federal case studies. Although arguments made in the vocabulary of economic efficiency appear less frequently in Board decisions as compared with the federal agencies, efficiency

321. See, e.g., Implementation of Water Quality Objectives for the S.F. Bay/Sacramento-San Joaquin Delta Estuary, Cal. State Water Res. Bd., Decision No. 1641, 1999 WL 35019790, at *22.

concerns such as opportunity costs, scarcity, and growth are deeply embedded in the common-law doctrines that the Board often invokes.

Beyond the sheer numbers of different types of arguments, moreover, some arguments have more traction than others in Board proceedings. Common-law arguments drive denials more so than other justifications. This occurs when the applicant cannot put the water sought to beneficial use,³²² the proposed diversion would interfere with preexisting rights,³²³ or there is no unappropriated water

322. See *Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822 & 9369, United States of America*, 1959 WL 5685, at *31 (“Issuance of permits is further precluded by failure on the part of either the City or the District to demonstrate during the hearing their ability to obtain storage space in Millerton Lake which now occupies the site proposed by them. Any unappropriated water of the San Joaquin River otherwise available to these entities can only feasibly be placed to beneficial use with the aid of storage facilities.”); *Application 12152 by Santa Margarita Mut. Water Co.*, 1958 WL 97824, at *7 (“In fact, no plans for actual distribution of water have been presented, and there is no reasonable assurance that issuance of permit would be followed by beneficial use of water.”); *Applications 24446 & 24447 of Boyd Trucking Co., Cal. State Water Res. Bd., Decision No. 1446*, 1975 WL 370176, at *3 (“One may appropriate all the water in a stream for a beneficial purpose, but a diversion for the purpose of acquiring a title for future use when additional land may be developed for agriculture is not a beneficial use, and no rights accrue by such a diversion. A claim to a water right that has no other basis than its value for possible future use is merely speculative”); *Applications 11792, 14250, 14251 & 18729 of Calaveras Cnty. Water Dist.*, 1964 WL 6840, at *5 (accepting the U.S. Bureau of Reclamation’s argument that competing applicants could not put the contested diversion to beneficial use because the plans of the other applicants were “remote, speculative, and less comprehensive than those of the United States”); *Applications 29919, 29920, 29921 & 29922 & Petition for Assignment of State Filed, Cal. State Water Res. Bd., Decision No. 1635*, 1996 WL 34482524, at *29; *Applications 5631, 5632, 15204, 15205, 15563 & 15574 of Yuba Cnty. Water Agency, Cal. State Water Res. Bd., Decision No. 1159*, 1963 WL 113396, at *11 (denying Placer County’s application because it “has not demonstrated intent or ability to proceed with due diligence to construct the necessary works and to place the water to beneficial use under its Application 12746, and its approval would not best serve the public interest”); *Application 18686 of the Est. of James W. Mapes, Cal. State Water Res. Bd., Decision No. 1073*, 1962 WL 7460, at *5 (discussing the many barriers to completing the project and the lack of evidence that applicant is capable of surmounting them); *Application 12152 by Santa Margarita Mut. Water Co.*, 1958 WL 97824, at *7 (“The plans of the Company for developing a water supply and distribution system are highly speculative and uncertain. In fact, no plans for actual distribution of water have been presented, and there is no reasonable assurance that issuance of permit would be followed by beneficial use of water.”); *Applications 1423 & 4486 of the Vail Co., Cal. State Water Res. Bd., Decision Nos. A. 1423, 4486 D. 500*, 1943 WL 73911, at *3 (“Action by the Division was withheld until July 1 when applicant’s attention was again directed to the necessity of either obtaining the withdrawal of the protests or withdrawing its applications if it was not in a position to proceed. No reply to our letter of July 1 has been received which leads us to believe that applicant is not in a position to proceed with construction work and utilization of the water even though the applications were approved.”)

323. See *Application 11852 by Russell Thibodo, Cal. State Water Res. Bd., Decision Nos. A. 11852 D. 719, 1951 WL 86717*, at *9 (denying application to dam Buena Vista Creek based on that use’s conflict with other beneficial uses in the watershed, including “domestic and irrigation purposes and for the maintenance, substantially full, of Buena Vista Lagoon as a fresh water body”); *Application 12152 by Santa Margarita Mut. Water Co.*, 1958 WL 97824, at *2 (“[A]ny development under Application 12152 will greatly diminish the quantity of water remaining in Santa Margarita River and will render the supply inadequate to satisfy, in full or substantial part, the protestant’s rights which are required in full to meet the present and future requirements of the lands and inhabitants within its boundaries.”); *Application 21446 of Elmer Degregori, Cal. State Water Res. Bd., Decision No. 1223*, 1965 WL 158299, at *1 (“The District contends that the water in question is within its distribution system and has not been abandoned. It further contends that approval of an application by a member of the District for water occurring within the District’s system would obligate other members of the District to file on such water, causing problems of measurement and distribution of water within the District.”)

available for the proposed diversion, to name some recurring examples.³²⁴ Although efficiency justifications occur less frequently than other types of arguments, they commonly provide the basis for denial—for instance, when the Board finds that a proposed project is financially infeasible,³²⁵ that it would impose opportunity costs by precluding more beneficial projects,³²⁶ or that it would yield less net benefits than a competing proposal.³²⁷ The Board has occasionally drawn on statutorily-based substantive values in denying applications, including the need to preserve recreational opportunities,³²⁸ protect water for local use,³²⁹ and prevent damage to fish and wildlife populations.³³⁰ But these arguments rarely stand alone. Rather, they tend to be linked to common-law doctrinal concerns about water availability and beneficial use.

324. See *Applications 234, 1465, 5638, 5817, 5818, 5819, 5820, 5821, 5822 & 9369, United States of America*, 1959 WL 5685, at *31 (“It is concluded that unappropriated waters occurring with such infrequency are insufficient to warrant the issuance of permits to either the City or the District.”); *Application 18686 of the Est. of James W. Mapes*, 1962 WL 7460, at *6 (“[I]nsufficient unappropriated water is available to justify approval of subject applications”); *Application 20621 of Deluz Heights Mun. Water Dist.*, Cal. State Water Res. Bd., Decision No. 1235, 1965 WL 158311, at *11 (rejecting the District’s argument that unappropriated water is available to it).

325. See *Applications 5631, 5632, 15204, 15205, 15563 & 15574 of Yuba Cnty. Water Agency*, 1963 WL 113396, at *8; *Application 20621 of Deluz Heights Mun. Water Dist.*, 1965 WL 158311, at *11; *Application 12092 of United Water Conservation Dist.*, Cal. State Water Res. Bd., Decision No. D 1129, 1963 WL 113366, at *16, *21.

326. See *Applications 11792, 14250, 14251 & 18729 of Calaveras Cnty. Water Dist.*, Cal. State Water Res. Bd., 1964 WL 6840, at *11; *Application 20621 of Deluz Heights Mun. Water Dist.*, 1965 WL 158311, at *11; *Applications 11792, 12537 12910, 12911, 12912, 13091, 13092, 13093, 18727, 18728, 19148 & 19149 of Calaveras Cnty. Water Dist.*, Cal. State Water Res. Bd., Decision No. 1114, 1963 WL 113351, at *9-*10.

327. See *Application 20621 of Deluz Heights Mun. Water Dist.*, 1965 WL 158311, at *11; *Application 10752 by Francis Dlouhy*, Cal. State Water Res. Bd., Decision No. D 958, 1960 WL 104961, at *3-*4.

328. See *Application 17232 of Willow Cnty. Water Dist.*, Cal. State Water Res. Bd., Decision No. 1110, 1963 WL 113347, at *3; *Applications 5631, 5632, 15204, 15205, 15563 & 15574 of Yuba Cnty. Water Agency*, 1963 WL 113396, at *6; *Application 18686 of the Est. of James W. Mapes*, 1962 WL 7460, at *6 (“Any export of lake water and the resulting lowering of lake levels would be detrimental, not only to fish and wildlife but to recreation in its many aspects. Uses of water in this closed basin for said purposes are found to be important and beneficial.”).

329. See *Applications 11792, 12537 12910, 12911, 12912, 13091, 13092, 13093, 18727, 18728, 19148 & 19149 of Calaveras Cnty. Water Dist.*, 1963 WL 113351, at *10; (denying the application of the Tuolumne Water District because “[t]he proposed project does not develop any water for direct use in Tuolumne County”).

330. See *Application 11852 by Russell Thibodo*, Cal. State Water Res. Bd., Decision Nos. A. 11852 D. 719, 1951 WL 86717, at *2 (crediting protestant’s allegations that “the value of the lagoon as a wild life refuge and bird sanctuary would be impaired”); *Application 10752 by Francis Dlouhy*, 1960 WL 104961, at *1 (citing the U.S. National Park Service’s argument that “it is incompatible with the fundamental purposes for which national parks and monuments are established, and . . . would result in permanent damage to Kings Canyon National Park”); *Application 17232 of Willow Cnty. Water Dist.*, 1963 WL 113347, at *3; *Application 18686 of the Est. of James W. Mapes*, 1962 WL 7460, at *4 (accepting testimony on behalf of the California Department of Fish and Game “that any lowering of the lake’s surface below about elevation 82 Bly (USGS 5099) is detrimental to the fisheries of the lake”); *Applications 11792, 14250, 14251 & 18729 of Calaveras Cnty. Water Dist.*, 1964 WL 6840, at *6 (sharing the concern of the California Department of Fish and Game that “fishery resources, a property of the State, will be damaged unless minimum stream flows and reservoir pools are maintained as part of project operations”).

Procedural arguments have not proven to be dispositive for permit denials, even when the applicant is accused of serious and ongoing misconduct.³³¹

Perhaps because so many substantive values are written into the California Code, the parties hardly ever raise, and the Board hardly ever considers, arguments about extra-statutory substantive values. The most notable exceptions are a general “no-harm” principle that guides the agency in some cases, as well as the need to provide an avenue for orderly, nonviolent resolution of community conflicts over water. The Division of Water Rights (the Board’s predecessor agency) first explained in 1929 why it was necessary to displace the common-law allocation system of “first in time, first in right.” The Division’s uncharacteristic candor reveals the likely, but almost always unspoken, underpinnings of much public interest regulation as a method for preserving public order:

Necessarily the first man to conceive the use of such water would have to physically defeat all later comers and engage in an actual campaign of vigilance and speed with possible defeat in the end, not to mention the possibilities of physical combat involved and disorderly conduct throughout. Such a situation is certainly at variance with the spirit and intent of the Water Commission Act and its design and purpose among other things to provide a systematic and orderly method for the initiation of appropriate water rights³³²

In sum, across nearly a century implementing its public interest mandate, the Board grounded its understanding of that authority in California constitutional and statutory law and judicial interpretations of those provisions. Its public interest determinations focused on substantive environmental values, as required by the California Water Code, as well as longstanding common-law doctrine governing the fair and efficient distribution of water.

IV. Summary of Findings and Implications

In rejecting an early challenge to a statutory public interest standard, the Supreme Court observed: “It is a mistaken assumption that [the public interest criterion] is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and

331. See, e.g., Applications 24446 & 24447 of Boyd Trucking Co., Cal. State Water Res. Bd., Decision No. 1446, 1975 WL 370176, at *4 (“An additional factor presented by these applications while not controlling is disturbing. At the time of the hearing on the applications . . . substantial construction on the facilities had already taken place in the applicant’s anticipation that the applications would be approved”).

332. Application 5109 of James D. & Mary Louise Phelan, Cal. State Water Res. Bd., Decision No. A 5109, 5110, 5143, 5473 D 213, 1929 WL 62387, at *5. For a more modern version of this argument, see Application 21446 of Elmer Degregori, Cal. State Water Res. Bd., Decision No. 1223, 1965 WL 158299, at *3 (“To approve the application would amount to a discrimination in favor of applicants against other district members, would create competition for water among the members, would cause problems of measurement, and otherwise interfere with the orderly distribution of water by the district and the administration of its trust.”).

the context of the provision in question show the contrary.”³³³ The study presented here provides evidence that agencies implementing statutory public interest standards behave in a manner consistent with the Court’s intuition. They ground definitions of the public interest in their statutory authority and respond to legislative amendments of that authority. And they rarely consider substantive values outside the four corners of their statutory authority in making public interest determinations. At the same time, the federal agencies, in particular, gave relatively little consideration to substantive values that are explicitly within their statutory authority. The doctrinal, theoretical, and normative implications of these findings are discussed below.

A. Doctrinal Implications

The U.S. Supreme Court’s recent administrative law and separation-of-powers jurisprudence is animated by a highly stylized caricature of administrative agencies as power-hungry usurpers,³³⁴ lying in wait for any statutory opening that will enable them to pounce on citizens’ liberties and “churn out new laws more or less at whim.”³³⁵ This caricature explains the Court’s renewed interest in the nondelegation doctrine.³³⁶ It underlies the formalist turn the Court has taken in appointment and removal cases.³³⁷ And it drives the Court’s official embrace of the major questions doctrine in *West Virginia v. EPA*, which it explained is necessary to police “a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”³³⁸

333. *Fed. Radio Com. v. Nelson Bros.*, 289 U.S. 266, 285 (1933); *see also* *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976) (“This Court’s cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.”).

334. *Nat’l Fed. of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (fretting that an agency “may seek to exploit some gap, ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond its initial assignment”); *accord* *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

335. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

336. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (arguing that the nondelegation doctrine must be revived for the purpose of “safeguarding a structure designed to protect their [the people’s] liberties, minority rights, fair notice, and the rule of law”); *Nat’l Fed. of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (“If Congress could hand off all its legislative powers to unelected agency officials, it ‘would dash the whole scheme’ of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.” (citing *Dept. of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring))).

337. *See, e.g.*, *United States v. Arthrex*, 141 S. Ct. 1970, 1981 (2021) (“The Government proposes (and the dissents embrace) a roadmap for the [PTO] Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision.”); *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203-04 (2020) (characterizing the Consumer Finance Protection Bureau Director as someone who “may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans”).

338. *West Virginia*, 142 S. Ct. at 2609.

The picture of administrative agencies that emerges from my study looks very different from this cartoon. Acting under what is considered the broadest of statutory delegations, the agencies exercised restraint and sought limits on their authority rather than loopholes to exploit it. The agencies defined what constitutes the public interest in their respective contexts, grounding their definitions in statutory law. These definitions remained mostly stable over time, with significant changes occurring in response to statutory amendments or judicial decisions—not the agencies' own initiative. Agencies also refused to entertain arguments raised by parties that strayed beyond the boundaries of these constraints and ventured into the territory of values and morality. These implementation practices are consistent with rule-of-law and separation-of-powers principles and should temper concerns about the breadth of statutory public interest delegations of authority. To be sure, the Court has made clear that an agency cannot cure an unconstitutionally broad delegation by adopting a narrowing construction.³³⁹ But these agency practices and interpretations are not narrowing constructions, they are simply the agencies' best—and only—understanding of the meaning of these statutes. It would surely surprise them to learn that these statutes give them unbounded powers that must be curtailed.

This characterization of my findings is bolstered by the California case study, which demonstrates that the California Water Board shows patterns of restraint, regularity, and deference to the legislature that look much like the federal agencies. While the substantive statutory requirements in the state and federal contexts differ, the agency implementation practices are broadly similar. This similarity is striking given the very different political ecosystem in which the Water Board operates. Embedded in a more liberal set of political and judicial institutions than those at the federal level, the Water Board might have been able to go further than its federal comparators in conceptualizing the scope and content of its public interest authority, but it did not. As the Board put it bluntly, “the legislature has not and could not delegate unlimited and undefined authority [to an agency] . . . whereby it is or would be empowered to use its own unrestricted judgment and discretion as to what is or might be in the public interest or for the public welfare.”³⁴⁰ This suggests that the patterns I document at the federal agencies are not strictly *in terrorem* effects, driven by the fear of discipline by conservative federal courts, but rather flow from institutional characteristics of the agencies. Thus, my findings are consistent with theories of bureaucratic accountability: that agencies are constrained by internal norms, culture, processes, and an ingrained understanding of their limited role.³⁴¹

In interpreting the scope of delegations effectuated by statutory public interest standards, it is important to recognize that Congress (and the California legislature) amended the statutes several times over the course of the period

339. See *Whitman v. Am. Trucking Ass'n*, 541 U.S. 457, 472 (2001).

340. Application 5109 of James D. & Mary Louise Phelan, Cal. State Water Res. Bd., Decision No. A 5109, 5110, 5143, 5473 D 213, 1929 WL 62387, at *12

341. For a thick description of the “everyday agency processes [that] facilitate accountability,” see Bernstein & Rodríguez, *supra* note 29, at 1607.

studied. Sometimes these amendments were pointedly intended to prompt a change in the agency's public interest analysis. The Staggers Act, for instance, required the ICC to adopt a less protectionist and more pro-competitive approach to merger review. But these statutory amendments left the agencies' frameworks for public interest analysis mostly intact. This repeated legislative review, adjustment, and implicit endorsement of the agencies' interpretation of their public interest standards over the course of a century is strong evidence that elected representatives in Congress (and the California state legislature) exercised sustained supervision over the agencies and generally believed that the agencies were acting in a manner consistent with their statutory authority.

All of this points to the value of attending to contextual and institutional nuance in addressing administrative law and separation-of-powers questions. It could be that the agencies in my sample differ than those that occupy some Justices' imaginations because they are independent sectoral regulators, each responsible for a single industry, and are engaged in licensing of a circumscribed set of activities (mergers or water appropriation) through open and participatory proceedings.³⁴² "[T]aking into account the totality of the relevant characteristics,"³⁴³ the shape and size of the authority these regulators exercise under their public interest mandates might not raise constitutional concerns, because it is nowhere near "comparable to a power vested in Congress under one of the enumerations in Article I."³⁴⁴ Yet, the fact that the agencies studied are not representative of the whole of the administrative state is both beside the point and precisely the point. Their distinctive characteristics illustrate the need to evaluate statutory delegations holistically and in context rather than through the narrow and singular lens of intelligible principles.³⁴⁵ Indeed, this is how the Court has analyzed public interest standards for at least a century,³⁴⁶ and this line of cases, together with the analysis presented here, provides a useful model for evaluating other broad statutory delegations.

The foregoing raises the question: what differentiates the agencies in my study from federal agencies that the Court frets are making overly aggressive policy moves? Clearly, it is not the breadth of their statutory authority. For instance, two substantial federal policy initiatives recently struck down by the Court as exceeding agencies' statutory authority—the Environmental Protection Agency's (EPA) Clean Power Plan and the Occupational Health and Safety Administration's (OSHA) temporary emergency workplace COVID vaccine

342. The features of the case studies identified here track the six degrees of delegation articulated in Coglianese, *supra* note 63, at 1863-68: (1) the nature of the agency action; (2) the range of regulated targets; (3) the scope of regulated activity; (4) the degree of sanctions; (5) the clarity of the decision-making standard; and (6) the extent of required process.

343. Coglianese, *supra* note 63, at 1863.

344. *Id.* at 1864.

345. *See id.* at 1863-68.

346. *See supra* notes 43-61 and accompanying text.

mandate—were grounded in narrow, specific statutory provisions.³⁴⁷ One striking difference between these agencies and the agencies in my study is that they are executive agencies, tightly controlled by the President.³⁴⁸ Indeed, respective Presidents pressed EPA and OSHA to adopt the policies that the Court ultimately found beyond the statutory pale. This calls into question the Court’s prevailing narrative about presidential control as an accountability mechanism for agencies,³⁴⁹ bolsters the conclusions of empirical work showing that presidential control is not an especially meaningful source of accountability or constraint on agencies,³⁵⁰ and suggests the need to restore the values of agency independence to administrative law doctrine and practice.

While considerations of delegation and agency constraint are top-of-mind given the predilections and priorities of the current Court, this study raises a very different set of doctrinal questions relating to congressional intent and statutory fidelity. It is not clear whether the Congresses that enacted broad public interest mandates intended for the delegated agency to implement them with restraint. Indeed, William Novak has traced the genealogy of statutory public interest standards to the most expansive notions of business regulation found in the common law.³⁵¹ And Adrian Vermeule has argued that the function of statutory public interest standards is to “make the implicit explicit, writing the common good into the terms of the law itself.”³⁵² If the enacting Congresses intended

347. EPA grounded the Clean Power Plan, struck down in *West Virginia v. EPA*, in a narrow statutory provision authorizing the agency to determine the “best system of emission reduction which . . . has been adequately demonstrated.” 142 S. Ct. 2587, 2596 (2022) (citing 42 U.S.C. 7411(a)(1)). OSHA grounded its workplace COVID vaccine mandate, struck down in *National Federation of Independent Businesses v. Department of Labor*, in statutory authority permitting the agency to promulgate “emergency temporary standards” when: (1) “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) the “emergency standard is necessary to protect employees from such danger.” 142 S. Ct. 661, 663 (2022) (citing 29 U.S.C. 655(c)(1)).

348. As the dissent pointed out in *National Federation of Business v. Department of Labor*, OSHA’s vaccine mandate had “the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.” *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 676 (Breyer, Sotomayor & Kagan, JJ., dissenting).

349. *Seila Law* summarizes the Court’s current understanding of presidential accountability:

The [] constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President’s oversight, ‘the chain of dependence [is] preserved,’ so that ‘the lowest officers, the middle grade, and the highest’ all ‘depend, as they ought, on the President, and the President on the community.’

Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (citing 1 ANNALS OF CONG. 499 (1789) (J. Madison)).

350. See, e.g., Bernstein & Rodríguez, *supra* note 29, at 1614-15 (“[P]residential control of the administrative state is both important and entrenched. But . . . it is also subsumed within the larger phenomenon of political control, which is defined by the interplay between political appointees and civil servants. This political connection offers a much more diffuse link to voters than the stylized presidential control story suggests, but the connection permeates policymaking.”).

351. See NOVAK, *supra* note 12, at 120.

352. VERMEULE, *supra* note 16, at 15.

agencies to utilize statutory public interest standards more boldly—to seek and effectuate a broader conception of the common good—agencies arguably exceed their statutory authority by exercising restraint.

B. Theoretical and Normative Implications

Part of what makes defining the public interest so intractable is that the construct conflates the normative and the actual.³⁵³ The concept simultaneously describes the social fact of some public's interest (manifest in various ways) and purports to be a normative aspiration for policy. This duality presents manifold challenges for administrators called upon to regulate in the public interest. On one level, there is the basic difficulty of ascertaining the social fact of the public interest, namely, identifying the relevant public and determining its interest in any given decision. This is compounded by larger questions about whether this social fact, even if knowable, is the appropriate normative ideal, or whether the regulator should aspire to some different substantive ideal, such as human flourishing, public care, equality, inclusion, or something else.

Faced with such a dilemma, it is perhaps not surprising that public interest regulators seek safe harbor in statutory standards and the seeming objectivity of efficiency and procedure. These agencies seldom consider substantive values in their public interest analyses *unless* such considerations are mandated by statute. In the federal case studies, even statutory values-based considerations were rarely central to the agency's ultimate public interest determination. Still, substantive values come into these proceedings via the procedural framework that public interest standards provide, which facilitates participation by parties whose values are threatened by an application. Although these values are not outcome-determinative, the public interest framework provides a forum in which they can be raised and potentially addressed.³⁵⁴

My study does not extend beyond the formal proceedings in my sample, but these proceedings contain evidence that applicants make concessions to intervening stakeholders to win their support or neutralize their opposition. Agencies frequently cited with approval applicants' efforts to engage protesting parties and accommodate their concerns. This approach is consistent with procedural conceptions of the public interest, which theorize that the public

353. See Sorauf, *supra* note 118, at 186.

354. Cognizant that political control of agencies might influence their approach to public interest regulation, particularly their willingness to consider certain substantive values, I included a variable indicating which party controlled the legislature and the executive when each decision was made. Analyses of this data yielded no clear trends. The only commonality I identified across case studies is that both the ICC and FERC were more likely to consider statutory and non-statutory substantive values when Congress and the President were of the same party, suggesting the possibility that agencies are willing to be bolder in their decision making in less polarized political environments. However, I hesitate to draw any firm conclusions about the meaning of these findings given the lack of larger trends. Future research is necessary to generate more confident and nuanced insights into how political control impacts the implementation of public interest standards.

interest is constructed and manifest through political processes,³⁵⁵ legislation,³⁵⁶ and citizen participation in administrative processes.³⁵⁷ The agencies in my study appear to share this proceduralist or civic republican³⁵⁸ orientation toward the public interest.

Such conceptions of the public interest (and of public administration generally) are vulnerable to the critique that they reproduce existing social hierarchies.³⁵⁹ Merely providing a forum for diverse voices in the administrative process does not ensure that these voices will be raised or heard. There are many barriers to participation, particularly in highly technical proceedings such as those conducted by the regulators studied here. Many publics lack the resources or expertise to effectively communicate their interests in legal proceedings. Agencies' rigid adherence to technical statutory standards could heighten these barriers, as well as crowd out other forms of reasoning and justification that the public might find important. Some of the agencies in my study sought to address these issues by creating offices to bolster public participation in the administrative process. The Office of Rail Public Counsel (RPC) at the ICC³⁶⁰ and Staff Counsel at FERC were designed to bridge the gap between public *interest* in the regulatory process, which was often substantial, and public

355. See Bronwen Morgan & Karen Yeung, AN INTRODUCTION TO LAW AND REGULATION: TEXT AND MATERIALS 36 (2007) (“[P]olitical systems define the content of collective agreement on certain ideas about what counts as ‘good’ in political, social and economic life.”); Miller, *supra* note 41, at 202 (“Governmental decisions must not only be in proper form; they must accord, in a substantive sense, with the enduring values of a democratic polity.”); Goodsell, *supra* note 100, at 96; Barth, *supra* note 98, at 290-92.

356. See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 66-67 (1938) (“Phrases such as ‘public interest’ . . . abound in the law. . . . For the administrative the task of grasping the legislative thought should not be difficult. The meaning of such expression is, of course, derivable from the general tenor of the statute of which they are a part. To read them properly one must catch and feel the pace of the galvanic current that sweeps through the statute as a whole.”); EMMETTE S. REDFORD, ADMINISTRATION OF NATIONAL ECONOMIC CONTROL 229-30 (1952) (arguing that unities in community purpose are sometimes expressed in preambles to statutes, statutory standards, statutes as a whole, or the legislative and historical background of statutes).

357. See DEWEY, *supra* note 91, at 208 (“No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in ways which force the administrative specialists to take account of the needs.”).

358. See generally Seidenfeld, *supra* note 93 (arguing that the political theory of civic republicanism provides the best justification for the administrative state).

359. See Rahman, *supra* note 23 (discussing the limitations of existing agency participation processes and need for policy design that remedies structural power imbalances); Christopher Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 55) (arguing that existing agency participation processes “operate[] under conditions of background social and economic inequality between *interested* parties and do[] nothing to mitigate these inequalities to ensure equal access or equal status between *affected* parties”).

360. The ICC created an Office of Public Counsel administratively based on statutory authorization in the Regional Rail Reorganization Act of 1973 and Congress' intent to promote public participation in the agency's proceedings. This office was succeeded by the Office of Rail Public Counsel (RPC), established explicitly by statute in the Railroad Revitalization and Regulatory Reform Act of 1976, which mandated that the RPC act as an advocate for the interests of “communities and users of rail service not otherwise adequately represented before the Commission.” Pub. L. No. 94-210, 90 Stat. 31.

participation, which was often lacking or ineffectual.³⁶¹ The RPC was a model in this regard. RPC outreach attorneys held public hearings across the country and spent weeks in the field soliciting public comment, sharing information, and assisting anyone who needed help preparing testimony.³⁶² And RPC attorneys participated in public interest proceedings to present what they learned to the Commission. Yet, it is not clear that even this vigorous support made a difference. The ICC rejected most of the arguments made by the RPC in the proceedings in my sample,³⁶³ and Congress quietly defunded the office just a few years after it was established.

The deficiencies of administrative procedure have prompted some to advocate an approach by regulators that is more explicitly values-driven³⁶⁴ or, in some cases, redistributive.³⁶⁵ But among the regulators studied here, there appears to be little appetite for such a project. Instead, the substantive value that the agencies in my study most commonly overlay on the public interest is efficiency. Two of the agencies, the ICC and the FCC, explicitly embraced a cost-benefit analysis framework for making public interest determinations. In each of the federal case studies, regulators and parties shared a broadly aggregationist perspective on the public interest. Not only applicants but objecting intervenors seem to believe that the language of efficiency is the best way to translate their private interests into public interests, and the agencies appear to agree with them. In the California Water Board context, although the language of economic efficiency appears less often in explicit terms, economic considerations frequently prompt the Board to *reject* applications. And efficiency concerns such as opportunity costs, scarcity, and growth are deeply embedded in the common-law doctrines routinely invoked by the Board to support its decisions.

As discussed above, there are many different conceptions of the public interest that parties and agencies might have drawn on to frame their claims. But they overwhelmingly chose economics. Indeed, economic justifications dominate throughout the life of the sample. They do not track the rise of neoliberal discourses such as law-and-economics, cost-benefit analysis, and

361. See generally Nathan I. Finkelstein & Collister Johnson, Jr. *Public Counsel Revisited: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 ADMIN. L. REV. 167 (1977) (exploring the philosophical evolution of the RPC as a mechanism to secure public participation in the regulatory process).

362. *Id.* at 174-75.

363. See *CSX Corp.*, 363 I.C.C. 521, 575-76 (1980) (rejecting the RPC's concerns about the applicant's management plan); *Norfolk & W. Ry. Co.*, 360 I.C.C. 498, 505 (1979) (finding the application to be in the public interest despite the RPC's argument that the "applicants have presented no benefits for the Commission to weigh against the anticompetitive factors of their proposal").

364. See VERMEULE, *supra* note 16, at 15.

365. See Rahman, *supra* note 23.

regulatory reform in the late twentieth century.³⁶⁶ Rather, they are always already embedded in the fabric of decision making at these agencies.³⁶⁷

Two characteristics of my sample agencies go some way toward explaining the persistence of economic vocabulary in these cases. First, these agencies are public utility regulators. Public utility law, the dominant regulatory paradigm when these agencies were first authorized to regulate in the public interest, comprised a well-understood regulatory toolkit derived from economic theory that included rules about price, profit, service, and industry structure.³⁶⁸ While the economic vocabulary remained constant throughout the sample period, it is important to recognize that this discourse likely had different meanings at different times. For instance, economic concepts such as price, profit, service, and scale had a different valence in the early-twentieth-century public utility law paradigm than they do in the Chicago School paradigm dominant since the late twentieth century. Specifically, public utility law pursued a common set of substantive values through market regulation, including providing communities access to necessary services on a reliable and nondiscriminatory basis, promoting industrial development, and enabling democracy.³⁶⁹ Public utility law's conception of the market as a tool to cabin regulation in service of collective goals is very different from the Chicago School's conception of regulation, for instance through quantified welfare-maximization criteria. The fact that the economic vocabulary remains similar across these eras, even as its functions and meanings change, bears noting and further study.

Second, the prevalence of economic vocabulary is also driven by the merger review context of the federal case studies. Authorizing statutes in this context require these agencies to consider the competitive impacts of proposed transactions. In addition, regulators' focus on economic considerations might reflect a strategic calculation that their decisions are most likely to be challenged by applicants' competitors, who tend to focus on the anticompetitive effects of proposed transactions. But that cannot be the entire explanation. These agencies go to great lengths to emphasize that public interest merger review departs from traditional antitrust doctrine and from the approach to merger review conducted by the Department of Justice and the Federal Trade Commission. Specifically, public interest merger review entails a broader set of considerations, beyond efficient markets, that the sectoral regulators claim to be uniquely situated to apply. And scholars have documented that public interest merger review in many countries around the world includes robust consideration of substantive values such as job preservation, economic development, small business protection,

366. For accounts of the rise of this discourse, see generally BERMAN, *supra* note 68; Short, *supra* note 68.

367. This finding is consistent with prior work arguing that, in the water rights allocation context, "public interest review for many years meant little, if anything, beyond assessing whether a proposed appropriation would conform with the goal of maximum economic development." Grant, *supra* note 28, at 688.

368. See RICKS ET AL., *supra* note 30, at 24.

369. See *id.* at 11-19.

control of important enterprises, and advancing diversity of viewpoints.³⁷⁰ In addition, the strategic considerations are not so clear-cut: values-based objections to transactions raised in agency proceedings are often made by state and local governments with the resources and political heft to pressure regulators.

Moreover, the authorizing statutes require consideration of values other than efficiency. The Interstate Commerce Act, for instance, requires consideration of employee interests, the impact on other railroads not included in the transaction, and the adequacy of public access to transportation services. The Communications Act, for its part, specifies considerations including access, programming diversity, service development, and service quality.³⁷¹ And the Federal Water Power Act's stated purpose includes "regard to the proper utilization and conservation of natural resources."³⁷² Emerson argues that provisions such as these serve as an anchor for the legal obligation that agency officials act with an ethic of public care,³⁷³ but these statutorily grounded values were eclipsed by efficiency considerations in my case studies.

These findings will disappoint to those who seek to infuse administrative decision making with common good or collective values—not least, to intervening parties whose communities are directly affected by the agencies' decisions. Parties have used statutory public interest standards as an invitation to place community and other common good values into the conversation, such as the ability to go fishing in the local reservoir or the enjoyment of their community's status as a commercial crossroads. But these arguments have not sparked a larger conversation about community values because agencies typically respond in the register of efficiency, telling intervenors that while their cherished values might be trampled by the decision, they—or someone else—will get some benefits in return.

This suggests that advocates of values-driven administration have much spadework ahead to build the capacity of administrative agencies to undertake such projects. One path suggested by this project is to take public interest standards more seriously as statutory requirements and consider ways to leverage them in advocacy with agencies. This could include funding organizations to challenge agencies' focus on efficiency when implementing public interest standards, especially when there are specific statutory commands to consider non-efficiency issues. As one commentator has suggested in the water rights context, public interest standards provide a vehicle for interested parties "to

370. Harry First & Eleanor M. Fox, *Philadelphia National Bank, Globalization, and the Public Interest*, 80 ANTITRUST L. J. 307, 309 (2015) ("[T]he U.S. rejection of the relevance of public interest factors to antitrust merger policy actually makes the United States somewhat of an outlier in the international community. Many countries around the world today take account of public interest factors when evaluating mergers, not by farming them out to sectoral regulators but by providing for their consideration within the context of merger analysis.").

371. *E.g.*, Nynex Corp., 12 F.C.C.R. 19985, 19987, 20002-03 (1997).

372. Commonwealth Edison Co., 36 F.P.C. 927, 931 (1966).

373. Emerson, *supra* note 14, at 43-47.

move public officials to give preference to shared public values over private interests.”³⁷⁴

The agencies in my study demonstrated a willingness to grapple with the meaning of public interest as a statutory standard. Interested parties should follow their lead and press these and other agencies to develop a more robust conception of their public interest authority. This begins with the way interested parties frame their own claims and demands in administrative proceedings. They can open new conversations by basing their arguments on a clearly articulated, substantive vision of what the public interest requires in a given context and pressing agencies to pursue it. Interested parties likewise can urge agencies to articulate their conception of the public interest more clearly. This could be done in the context of rulemaking or adjudication proceedings, or by petition requesting “agencies to commence a rulemaking to define the public interest and to establish a process for carrying out a public interest review.”³⁷⁵ Finally, interested parties can seek judicial review of agency refusals to define the public interest³⁷⁶ or challenge agency actions as contrary to the public interest as defined in statutory context.³⁷⁷ As demonstrated above, statutory law sometimes provides a richer and more communal conception of what the public interest requires than agencies are inclined to recognize, providing a legal hook for such claims. And even if legal challenges for violating public interest standards do not prevail, the tactic could force a more vigorous and candid dialogue about the substantive values underlying administrative policies and their contribution to the collective good.

Conclusion

Given a broad mandate to regulate in the public interest—a mandate that by its terms would appear to invite consideration of all manner of non-economic collective values—the agencies studied here exercised restraint, sought limits on their authority, and framed their public interest analysis primarily in economic terms. While these findings do not resolve debates about the meaning of the public interest, the constitutionality of public interest standards, or the utility of public interest standards, they provide a much-needed empirical grounding for these debates. More importantly, they highlight the need for a renewed conversation about the public interest that takes it seriously as a social and legal construct, attends to its actual function in government administration, and grounds whatever normative aspirations we might have for it in these understandings.

374. Squillace, *supra* note 78, at 682.

375. *Id.*

376. See 5 U.S.C. § 706(1) (2018) (providing for judicial review of agency action “unlawfully withheld or unreasonably delayed”).

377. See 5 U.S.C. § 706(2)(C) (2018) (empowering courts to set aside agency action that is “in excess of statutory jurisdiction, authority, or limitations”).

Appendix A: Public Interest Standards in the U.S. Code

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Title 13. Census	2
Title 14. Coast Guard	5
Title 15. Commerce and Trade	187
Title 16. Conservation	153
Title 18. Crimes and Criminal Procedure	14
Title 19. Customs Duties	9
Title 20. Education	15
Title 21. Food and Drugs	21
Title 22. Foreign Relations and Intercourse	34
Title 23. Highways	13
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Title 26. Internal Revenue Code	10
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Title 33. Navigation and Navigable Waters	56
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Title 35. Patents	3
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Title 37. Pay and Allowances of the Uniformed Services	1
Title 38. Veterans' Benefits	4
Title 39. Postal Service	12
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