ARTICLES

BUILDING A FRAMEWORK FOR GOVERNANCE: RETROSPECTIVE REVIEW AND RULEMAKING PETITIONS

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Of the various regulatory reform efforts advocated by legal scholars and politicians in recent years, perhaps none holds greater promise than retrospective review of agency regulations, whereby agencies revisit existing rules to determine whether they remain appropriate in light of changed circumstances. The Obama Administration has embraced the principles of retrospective review, issuing three executive orders on the subject, and it has trumpeted billions of dollars in economic savings resulting from those efforts. Nevertheless, numerous scholars have criticized these initiatives, contending that agencies reviewing their own regulations are unlikely to repeal or fundamentally overhaul existing rules. This Article addresses the problem from a new angle, focusing not on the overall quantity of regulations but on the actor responsible for devising the regulatory regime. It calls upon the principles of collaborative governance, a field of scholarship that emphasizes the benefits arising from public-private partnerships, and explores mechanisms for replacing agency-centric programs with more collaborative alternatives.

This Article will demonstrate that collaborative solutions are largely underutilized as a result of regulatory inertia. It proposes the expanded use of petitions for rulemaking as a device for breaking this inertia. Individual citizens or groups would file a petition offering a proposed regulatory alternative, which may include collaborative programs such as

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private standard-setting and first or third party certification of regulatory compliance. Any successful petition would demonstrate that the proposed alternative is equally as protective of the public welfare as the existing regulation but imposes less onerous compliance burdens on regulated entities. By marrying the principles of collaborative governance and retrospective review, this Article seeks to move the dialogue beyond stale debates concerning the appropriate quantity or stringency of regulations and identify opportunities for minimizing regulatory burdens while preserving the strong public welfare protections that are the hallmark of the modern regulatory state.

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INTRODUCTION

In 1906, Upton Sinclair released *The Jungle*, a harrowing tale of the travails of an impoverished Lithuanian immigrant as he attempted to navigate the Chicago meatpacking industry. An avowed socialist, Sinclair hoped to garner widespread support for fundamental reforms designed to curtail the depredations of captains of industry, ending the book with a rousing diatribe against the capitalist system by a grandiloquent young orator.[1] Sinclair's potent words failed to spark a socialist revolution, but the

1. UPTON SINCLAIR, THE JUNGLE 413 (1920) ("We shall have the sham reformers self-stultified and self-convicted; we shall have the radical Democracy left without a lie with which to cover its nakedness! And then will begin the rush that will never be checked, the tide that will never turn till it has reached its flood—that will be irresistible, overwhelming—the rallying of the outraged working men of Chicago to our standard! And we shall organize

novel did result in one significant reform: its depiction of the appalling conditions of meat processing[2] contributed greatly to the impetus supporting enactment of the Pure Food and Drugs Act[3] that year.[4] Sinclair and other socialist advocates would win a series of small victories over the ensuing decades. Although the United States never embraced a socialist form of government or even the "third way" policies that arose in Western Europe at the end of the Second World War,[5] the Progressive Era, New Deal, and Great Society Era witnessed increases in governmental regulation of private economic activity.[6] Though a wave of deregulation emerged in the 1970s and 1980s,[7] and though continued efforts to repeal or soften regulations deemed burdensome[8] have led even relatively progressive politicians to observe that "[t]he era of big government is over,"[9] a considerable corpus of regulations touching a wide array of business and noncommercial activities has survived the deregulatory era basically intact.[10]

It is beyond cavil that many of the regulations adopted over the past century have created substantial benefits for society; very few would favor a return to the unfettered, "cowboy capitalism" of an earlier era, wherein government expressed little willingness to rein in corporate excesses in the

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them, we shall drill them, we shall marshal them for the victory! We shall bear down the opposition, we shall sweep it before us—and Chicago will be ours! *Chicago will be ours!* CHICAGO WILL BE OURS!").

2. *Id.* at 117 ("[A]s for the other men, who worked in tank-rooms full of steam, and in some of which there were open vats near the level of the floor, their peculiar trouble was that they fell into the vats; and when they were fished out, there was never enough of them left to be worth exhibiting,—sometimes they would be overlooked for days, till all but the bones of them had gone out to the world as Durham's Pure Leaf Lard!").

3. Pub. L. No. 59-384, 34 Stat. 768 (1906).

4. THE FOOD AND DRUG ADMINISTRATION 151 (Meredith A. Hickmann ed., 2003).

5. Patrick Diamond, *From Fatalism to Fraternity: Governing Purpose and the Good Society*, *in* AFTER THE THIRD WAY: THE FUTURE OF SOCIAL DEMOCRACY IN EUROPE 1, 3 (Olaf Cramme & Patrick Diamond eds., 2012).

6. Thomas O. McGarity & Rena I. Steinzor, *The End Game of Deregulation: Myopic Risk Management and the Next Catastrophe*, 23 DUKE ENVTL. L. & POL'Y F. 93, 96 (2012).

7. George C. Eads & Michael Fix, *Regulatory Policy*, *in* THE REAGAN EXPERIMENT 134–53 (John L. Palmer & Isabel V. Sawhill eds., 1982) (chronicling deregulatory efforts from the Nixon Administration through the early part of the Reagan Administration).

8. *See, e.g.*, Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (repealing portions of the Glass-Steagall Act that prohibited any one company from acting as a combined investment bank, commercial bank, and insurance company).

9. President William J. Clinton, State of the Union Address (Jan. 23, 1996).

10. SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 2–8 (2d ed. 2012) (chronicling the various regulations one will encounter in a typical day and assessing the scope of the federal regulations).

name of the public interest.[11] Of course, some have contended that governmental intervention was largely unnecessary and that market forces would have eventually curbed predatory practices as consumers came to demand more responsible conduct on the part of businesses they patronized.[12] For instance, the modern organic foods movement has largely evolved with scant governmental intervention as companies have sought to cater to consumers willing to pay extra for an ostensibly safer, healthier set of products.[13] Whether one considers the modern regulatory state a godsend that rescued the public from avaricious titans of industry or a nettlesome interference in the free market, many have contended that the cumulative burden of decades of regulations can prove crippling to business development and innovation, regardless of the fact that each individual regulation may have been eminently sensible when adopted.[14] Indeed, the vision articulated by Upton Sinclair and other early 20th century socialists has come to fruition in many ways, if by a slow accretion of governmental interventions rather than a massive uprising of the proletariat.[15]

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11. Further, even when governmental actors sought to enact laws protecting the public welfare, the Supreme Court often intervened to declare such efforts unconstitutional. Specifically, the Court invalidated laws enacted by individual states on the grounds that they interfered with the liberty of contract and violated due process, *see, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905), and struck down similar efforts undertaken by the federal government by holding that such laws exceeded Congress's Commerce Clause authority, *see, e.g.*, *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

12. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 27–32 (2002) (contending that the government has generally been oversensitive to alleged externalities and monopolization in deciding to intervene in the market).

13. Nevertheless, the United States Department of Agriculture has set standards that producers must meet prior to affixing a certified "organic" label to their product. 7 C.F.R. § 205.300–.400 (2014).

14. PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 10 (2011) ("Detailed rule after detailed rule addresses every eventuality, or at least every situation lawmakers and bureaucrats can think of. Is it a coincidence that almost every encounter with government is an exercise in frustration?"); MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POLICY INST., REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM 3 (2013) (comparing the cumulative impact of numerous regulations to "pebbles in a stream" and contending that "[a]s the number of approved regulations grows, they inevitably interact in ways we may not expect"). The number of regulations promulgated per annum has stabilized or even slightly declined in recent years, and virtually all rules create various benefits in addition to the costs they impose on regulated entities. *See* Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473 (2008). However, agencies seldom rescind or modify existing rules, and the overall compliance burden may become overly onerous merely as a result of regulatory accretion.

15. For instance, the 1928 platform of the U.S. Socialist Party called for various reforms such as nationalized power systems and railroads and unemployment insurance that have been at least partially implemented in ensuing decades through programs such as the

In this light, both governmental officials and administrative law scholars have advocated a more robust system for "regulatory lookback" in recent years, whereby agencies catalogue existing regulations, determine which have become outmoded or inefficient, and eliminate or strengthen suboptimal regulations. President Barack Obama has issued three executive orders (EOs) calling upon administrative agencies to conduct such retrospective review.[16] Notwithstanding the close attention to retrospective review in the Obama Administration,[17] numerous scholars have criticized the EOs as inadequate insofar as administrative agencies lack sufficient incentives to carefully scrutinize their existing regulations and then pare back or eliminate those deemed inefficient.[18] Several scholars have offered alternative proposals, and many of them have focused on creating a new, independent body that would be tasked exclusively with identifying individual regulations or sets of regulations that create inefficiencies and suggesting either that agencies rescind or modify those regulations through rulemaking, or that Congress do so through statute.[19]

Tennessee Valley Authority, Amtrak, and Social Security. MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 311–12 (1980).

16. Exec. Order No. 13,610, 3 C.F.R. 258 (2012); Exec. Order No. 13,579, 3 C.F.R. 256 (2011); Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

17. *See, e.g.*, Cheryl Bolen, *Shelanski Considering Changes in Agency Rulemaking Processes in Year Ahead*, BNA BLOOMBERG (Jan. 16, 2014) (quoting newly confirmed Office of Information and Regulatory Affairs (OIRA) Administrator Howard Shelanski as stating that retrospective review is "going to be an area of priority for me and for OIRA over the next . . . several months to a year . . . .").

18. Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57, 60 (2013) ("Without doing more, the Obama Administration's recent lookback initiative will end up in the same dustbin as the regulatory review processes initiated under Clinton and Bush. Sure, some discrete improvements in specific regulations will likely result, but retrospective review will remain a periodic and unsystematic fancy rather than a serious, ongoing part of regulatory policymaking."); MANDEL & CAREW, *supra* note 14, at 13 ("The reality of regulatory self-review is that it is very costly and timely for agencies to review regulations they've already passed and put into effect. . . . More importantly, agencies have little incentive for effective retrospective review. That would mean admitting their rules didn't work as intended, or weren't a valuable use of resources to begin with. . . . Finally, self-review doesn't work well because agencies have internal pressure to ensure next year's budget. The priority of the political appointees is to lead without controversy and [leave a] legacy of notable accomplishments for their next job.").

19. *See, e.g.*, MANDEL & CAREW, *supra* note 14, at 14 ("Our proposal to address regulatory accumulation calls for the establishment of a Regulatory Improvement Commission (RIC). The RIC would be an independent, Congressionally-authorized body that would review existing regulations as submitted by the public."); *Improving Regulatory Performance: Lessons from the United Kingdom: Hearing Before the Task Force on Gov't Performance of the S. Comm. on the Budget*, 112th Cong. 4 (2011) (statement of Michael Greenstone, Professor, Massachusetts Institute of Technology) ("My recommendation is to establish a new, independent body for regulatory review. This body could be housed within the Legislative

Each of these proposals has certain strengths and weaknesses: agencies may lack adequate incentives or resources to conduct self-review, but an independent body tasked with conducting retrospective review of all existing regulations may lack sufficient expertise concerning the rules it examines. This Article explores another alternative approach, one that relies upon private sector entities both to identify regulations that may be overly burdensome or out of date and to devise alternative approaches providing greater flexibility to regulated entities. Recent scholarship has hailed the rise of collaborative governance, a new model for regulation that promotes greater integration between the public and private sectors and emphasizes a cooperative problem-solving approach in lieu of traditional top-down, command-and-control regulation.[20] Nevertheless, regulatory inertia complicates efforts to replace outmoded regulatory systems with more innovative collaborative alternatives. This Article seeks to develop a mechanism for enhancing retrospective regulatory review by leveraging the expertise of private citizen groups in devising alternative approaches that mitigate regulatory burdens while nevertheless preserving robust public welfare protections.

This Article will proceed in four parts. In Part I, it will consider why regulatory proliferation is inherent to a "crisis and response" system of regulation, wherein regulations slowly accrete as agencies respond to market failures. Absent any countervailing force to curtail, eliminate, or modify regulations that have become unnecessary or unwieldy, the regulatory burden will inexorably grow more ponderous over time. In Part II, this Article will analyze the existing framework for retrospective review and examine some of the alternative approaches proposed in the literature. It will explore the strengths and limitations of the existing regime and the proposed alternatives, all of which rely primarily upon a governmental entity (either the agency itself or an independent commission) to conduct such reviews.

In Part III, this Article will explore a model for retrospective review that

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Branch, and it could be modeled after the Congressional Budget Office (CBO) or even become a division within the existing CBO.").

20. *See generally* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); *see also* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297; Daniel J. Fiorino, Reply, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999); Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003).

more closely integrates the expertise of non-governmental entities. It will call upon recent scholarship in the field of collaborative governance and will consider how petitions for rulemaking might be employed to promote collaborative solutions. Finally, Part IV will respond to potential criticisms of the proposal, such as the concern that increased reliance on private sector alternatives constitutes an improper abdication of governmental powers that will favor large corporations at the expense of small businesses and the broader public.

I. THE "CRISIS AND RESPONSE" SYSTEM AND REGULATORY ACCRETION

In recent years, the United States has faced a number of financial and environmental catastrophes that arguably resulted from lax to nonexistent oversight by federal regulators. In late 2008, following the collapse of Lehman Brothers and Bear Stearns, the U.S. economy entered a tailspin from which it has yet to fully recover, a calamity that was perhaps exacerbated by the repeal of the Glass-Steagall Act and the refusal to regulate exotic new derivatives that had helped inflate the financial bubble preceding the crash.[21] In 2010, an explosion on the Deepwater Horizon oil rig caused a sustained spill that ultimately released 4.9 million barrels of oil into the Gulf of Mexico (a record-setting amount),[22] a disaster arguably precipitated by weak oversight of offshore drilling by the Minerals Management Service.[23] In the wake of these disasters, Congress and the President responded partly by enacting new laws, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act,[24] and partly by restructuring the administrative agencies involved, such as the Administration's reassigning the Minerals Management Service's responsibilities to the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement (both sub-agencies of the Department of the Interior).[25]

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21. ROBERT POZEN, TOO BIG TO SAVE?: HOW TO FIX THE U.S. FINANCIAL SYSTEM 138 (2010) ("Several commentators have argued that the repeal of Glass Steagall was a major cause of the current financial crisis because it increased the riskiness of the securities activities of banks and the associated conflicts of interest.").

22. *See generally* JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41531, DEEPWATER HORIZON OIL SPILL: THE FATE OF THE OIL 1 (2010).

23. Leila Monroe, *Restructure and Reform: Post-BP Deepwater Horizon Proposals to Improve Oversight of Offshore Oil and Gas Activities*, 5 GOLDEN GATE U. ENVTL. L.J. 61, 63–66 (2011).

24. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

25. SEC'Y OF THE INTERIOR, ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OCEAN ENERGY MANAGEMENT, THE BUREAU OF SAFETY & ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (May 19, 2010).

It remains to be seen whether the government's responses to the major regulatory failures of the past several years will prove effective in the long term, but the pattern of a major calamity that galvanizes public support for governmental intervention followed by an overhaul of the preexisting system (that often represents an overreaction in light of the probability of the underlying risk) is a pattern that likely dates to the earliest governments known to humankind.[26] As a general matter, societies have not objectively assessed the probability of known risks and then determined how best to allocate existing resources to protect against the most significant risks.[27] Instead, governments tend to react to highly visible, well publicized calamities that capture the public interest, regulating so as to minimize the likelihood of a repeat occurrence. Cognitive psychologists have recently shed light upon the mental processes that undergird humans' assessment of risk, and their work helps explain the historical prevalence of this "crisis and response" style of regulation.

According to this research, when assessing the likelihood of a particular event, individual decisionmakers will base their estimate on the facility with which they can call to mind prior instances of that event, a cognitive process known as the "availability heuristic."[28] In this light, decisionmakers will tend to overreact to events that are especially visceral, recent, or heavily publicized, as they will more easily call those instances to mind when considering the likelihood of a similar mishap. Another cognitive error that tends to skew regulatory decisionmaking is the principle of "loss aversion," which holds that, on average, individuals tend to dislike losses roughly twice as much as they like corresponding gains.[29] Relatedly, the "endowment

26. For example, beginning in the reign of Qin Shihuang at the end of the Warring States period and extending through the Ming Dynasty, Chinese emperors repeatedly built and rebuilt sections of the Great Wall of China in response to depredations from nomadic tribes of the north. JULIA LOVELL, THE GREAT WALL: CHINA AGAINST THE WORLD 1000BC–AD 2000 302 (2006). Similarly, in response to the Battle of Gallia in which Gallic marauders sacked Rome with relative impunity, Roman leaders erected the Servian Wall and modernized their military organization so as to more effectively ward off further attacks. 1 T. COREY BRENNAN, THE PRAETORSHIP IN THE ROMAN REPUBLIC 70 (2000).

27. For instance, the Copenhagen Consensus has outlined a number of low-investment/high-yield projects for alleviating human suffering in impoverished nations, such as promoting micronutrient interventions and expanding subsidies for malaria treatment (priorities 1 and 2, respectively, on the 2012 list), yet international organizations and donor governments have not overhauled their aid programs to focus on these priorities. *Copenhagen Consensus 2012, Expert Panel Findings*, COPENHAGEN CONSENSUS CTR., http://www.copenhagenconsensus.com/sites/default/files/outcome_document_updated_1105.pdf.

28. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 129–36 (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 25 (2009).

29. KAHNEMAN, *supra* note 28, at 283–86; THALER & SUNSTEIN, *supra* note 28, at 33–

effect" provides that individuals overvalue items they already possess vis-à-vis the prospect of obtaining the same items.[30]

Accordingly, notwithstanding the actual probability of a given risk that a statistician may calculate, people will tend to grossly underestimate the risk if it has not occurred recently or if they are not aware that it has taken place—availability. In addition, in the absence of any perceived risk, people will be reluctant to sacrifice a resource they already possess (e.g., increased income resulting from a lack of regulatory intervention) in order to combat a risk they may view as remote—endowment effect. Once the risk has eventuated, however, individuals will be much more amenable to governmental efforts to restore the status quo—loss aversion. Indeed, they will likely be willing to devote far more resources to combating the risk than its underlying likelihood of reoccurrence may justify, given the average decisionmaker's especially intense aversion to losses.

Thus, even in a minimalist government grounded in the principles of classical liberalism, regulations will accrete over time and survive well beyond their useful lifespan.[31] A market failure may justify governmental intervention in the initial instance, yet the market may evolve such that the

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34. For instance, to induce the average person to participate in a simple wager based on a coin flip, you would generally have to offer her $2 or more (e.g., she receives $2 if the coin lands on heads) for every $1 she stands to lose (e.g., she pays $1 if the coin lands on tails), even though a purely rational actor would always participate so long as the upside potential exceeds the possible loss (e.g., receive $1.01 if heads, lose $1.00 if tails).

30. KAHNEMAN, *supra* note 28, at 289–99.

31. Apart from semi-anarchic theories espoused by the most purist devotees of the Austrian School of economics, such as Murray Rothbard, *see* GENE CALLAHAN, ECONOMICS FOR REAL PEOPLE: AN INTRODUCTION TO THE AUSTRIAN SCHOOL 295 (2d ed. 2004), most defenders of the free market envision at least a limited role for government in protecting against market failures. Traditionally, governments have intervened in four sets of circumstances: (1) excessive concentration of a market for a good or service in a small number of firms; (2) over exploitation of a public good; (3) failure of existing firms to internalize negative externalities; and (4) information asymmetry between market participants. *See* DUDLEY & BRITO, *supra* note 10, at 12–14. Liberal philosophers typically viewed preservation of public order through police and military forces, an example of a public good (insofar as all citizens receive benefit from protection regardless of whether they have personally paid for it), as the unique province of the state. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT bk. II, ch. I, § 3, at 8 (C.B. Macpherson ed., 1980). Similarly, Adam Smith acknowledged in *The Wealth of Nations* that government must "erect[] and maintain[] certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. IV, ch. IX, at 311 (4th ed. 1850). Since no society known to humankind has ever attempted to embark on a program of pure anarcho-capitalism, essentially all governments will undertake market interventions in at least these sets of circumstances.

initial response becomes overly restrictive or unnecessary.[32] As a result of the endowment effect, however, societal decisionmakers will likely prefer the familiar results of the status quo to the unknown effects of rescinding or scaling back such regulatory protections, regardless of whether such a reform would represent a more utility-maximizing allocation of societal resources.[33]

Examining the trajectory of the U.S. regulatory state over roughly the last hundred years reveals precisely such a pattern of a market failure precipitating a robust regulatory response followed by entrenchment of existing regulations even in the face of altered market conditions. Initial efforts of the federal government to regulate private industry in roughly the first 150 years of the Republic were relatively modest, but the footprint of the federal regulatory state greatly expanded in the Progressive and New Deal eras in response to perceived market failures requiring governmental intervention.[34] Notwithstanding a few minor counter-currents, such as the relatively modest deregulatory efforts of the late 1970s through the 1990s,[35] these programs have survived intact or even expanded over the ensuing decades.[36]

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32. For instance, the Interstate Commerce Commission (ICC) arose largely to regulate the rates of rail travel. Maureen E. Eldredge, Comment, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 558 (2004). The rail industry was characterized by a natural monopoly insofar as the cost of laying parallel tracks was wasteful and inefficient. *See* PHILLIP HÜTCHER, THEORY OF NATURAL MONOPOLY 2 (2011); Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1264 n.120 (1998). The railroads' effective monopoly on interstate travel ended, of course, with the rise of personal automobiles and air traffic, yet ICC survived far beyond the golden age of rail travel, undergoing massive restructuring in the deregulatory era of the early 1980s, John Blevins, *A Fragile Foundation—The Role of "Intermodal" and "Facilities-Based" Competition in Communications Policy*, 60 ALA. L. REV. 241, 246 (2009), and finally being laid to rest in 1995. ICC Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995). Even so, some of its functions survived in the new agency that replaced it, the Surface Transportation Board.

33. KAHNEMAN, *supra* note 28, at 289–99.

34. JONATHAN RAUCH, GOVERNMENT'S END: WHY WASHINGTON STOPPED WORKING 226–27 (1999).

35. For instance, in a rare moment of rough consensus on both sides of the political spectrum, Congress passed and President Carter signed legislation deregulating the airline industry and eliminating the Civil Aeronautics Board in the late 1970s. Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978). Nevertheless, such instances of wholesale elimination or widescale reduction of governmental regulation are exceedingly rare, given the powerful incentives for special interests that benefit from the status quo to mount a strong opposition to any reform (and the relatively weak incentives of parties who may enjoy relatively minor, diffuse benefits from the proposed change to lobby in favor of it).

36. RAUCH, *supra* note 34, at 134–46 (chronicling various failed efforts in the Reagan, Bush, and Clinton Administrations to pare back or alter anachronistic and inefficient

At the same time, many market failures go uncorrected absent any high-profile catastrophe that electrifies the public and precipitates an upswell of support in favor of regulatory intervention. For instance, notwithstanding mounting evidence of anthropogenic climate change,[37] the U.S. government has yet to enact comprehensive carbon emission control legislation, a mechanism for forcing polluting industries to internalize negative externalities. This is likely, at least partly, the result of the lack of any widely perceived calamity that calls the public consciousness to the grave perils of a warming climate.[38] Similarly, though few would contend that all herbal supplements pose trivial risks to consumers, and though information asymmetries undoubtedly exist between the producers of such supplements and their customers, the Food and Drug Administration generally does not regulate such products as "drugs." Instead, they are regulated under a much laxer standard as food products.[39] Again, absent a catastrophic market failure that generates overwhelming momentum behind governmental intervention, existing market players, who would face substantial losses from regulation and therefore have an incentive to lobby in favor of the status quo, will typically defeat regulation designed to benefit consumers or the public more broadly, because their interests are diffuse, and they are unlikely to mount a concerted campaign in favor of mitigating a vaguely perceived background risk.[40]

In analyzing the results of decades of regulatory intervention, the adage concerning a page of history's being worth a volume of logic proves prescient. A society governed by purely rational philosopher-kings most assuredly would not dedicate billions of dollars to reducing relatively remote risks to near zero while essentially ignoring the potentially

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government programs).

37. NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 169 (2010).

38. Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 615 & n.12 (2013).

39. Dietary Supplement Health and Education Act of 1994, 21 U.S.C. § 343(q)(5)(F); Roseann B. Termini, Pharmanex, Inc. v. Shalala: *A Wake Up Call for Congress and a Not So Bitter Pill for the FDA*, 26 OHIO N.U. L. REV. 269, 269 (2000) ("The DSHEA [Dietary Supplement Health and Education Act] redefined 'dietary supplements,' and the FDA [Food and Drug Administration] now regulates dietary supplements like food products . . . .").

40. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 56–60 (2012) (calling upon public choice theory to explain how parties that would experience significant gains or losses from a policy change have a much greater incentive to attempt to influence the policymaker than do parties that would experience only small gains or losses).

catastrophic effects of climate change,[41] yet this result is predictable when one considers the cognitive flaws of human decisionmaking and the history of high profile regulatory failures the society at issue has encountered. Recognizing these limitations, regulatory reformers have sought to break the inertia favoring gradual accretion of regulations over time by imposing greater discipline upon governmental decisionmaking processes. For instance, building upon innovations initiated in the Nixon and Carter Administrations,[42] President Reagan issued EO 12,291, which required agencies to conduct cost-benefit analysis of proposed rules and tasked the Office of Information and Regulatory Affairs (OIRA) with reviewing that analysis.[43] Various EOs and statutes have also sought to impose a system of retrospective review, whereby agencies reassess rules that they have issued to determine whether they represented an overreaction to an underlying threat and whether circumstances have changed such that they are no longer justified (or, conversely, such that the initial response needs to be strengthened).[44]

As a general matter, these regulatory lookback initiatives have focused upon the overall quantity of regulations, seeking to combat the slow accretion of laws by either encouraging or forcing regulators to periodically revisit their existing regulations. For reasons explored in Part II, those efforts have had mixed success, given the inherent difficulties of tasking a regulatory authority with critically assessing its own handiwork and the countervailing drawbacks of authorizing an independent body with policing that authority's pronouncements. These initiatives have not, however, generally focused upon the identity of the regulator and whether partially or completely private sector-driven alternatives might prove as protective of the public welfare as government-centric solutions.

Federal regulation has traditionally followed the "command-and-control" model, whereby federal regulators issued a series of directives to private sector entities mandating that they undertake or refrain from certain activities.[45] In recent years, various developments have called into

41. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 19–29 (1993).

42. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 44–45 (2011).

43. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

44. JOSEPH E. ALDY, ADMIN. CONFERENCE OF THE U.S., LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY 27–34, 42–44 (2014), *available at* https://www.acus.gov/report/retrospective-review-report.

45. Stewart, *supra* note 20, at 438.

question the continuing viability of the top-down regulatory approaches that have survived relatively intact over the last several decades.[46] As will be explored in Part III, scholarship in the field of collaborative governance has reconceptualized regulation as a cooperative process between government and key stakeholders seeking a mutually beneficial outcome rather than a system by which centralized agencies dictate rules governing how regulated entities structure their activities. Nevertheless, absent a high profile regulatory failure that galvanizes public opinion in favor of a shift to newer models,[47] agencies are unlikely to jettison prevailing systems in favor of newer alternatives (even though they may have selected those alternatives in the first instance absent a preexisting regulatory framework).[48] In that light, this Article aims to construct a model of retrospective review that would supplement the existing programs focused upon the overall quantity of regulations by seeking to identify opportunities for replacing outmoded regulatory frameworks with newer, collaborative alternatives designed to minimize the burden on regulated entities while maintaining equally strong protections of the public interest.

II. RETROSPECTIVE REVIEW: HISTORY AND PROPOSALS FOR REFORM

A. A Brief History of Retrospective Review

Beginning with Jimmy Carter, presidents have periodically called upon administrative agencies to assess existing regulations and cull those that have proven unnecessary or unworkable.[49] These regulatory lookback initiatives were one-time affairs: after having responded to the presidential directive, agencies were under no continuing obligation to reassess past regulations until a subsequent administration undertook a similar initiative.[50] In early 2011, however, Barack Obama issued EO 13,563,

46. *See, e.g.*, WILLIAM D. EGGERS & PAUL MACMILLAN, THE SOLUTION REVOLUTION: HOW BUSINESS, GOVERNMENT, & SOCIAL ENTERPRISES ARE TEAMING UP TO SOLVE SOCIETY'S TOUGHEST PROBLEMS 3 (2013) ("[G]overnment is no longer the only game in town when it comes to societal problem solving. Society is witnessing a step change in how it deals with its own problems—a shift from a government-dominated model to one in which government is just one player among many.").

47. THALER & SUNSTEIN, *supra* note 28, at 25.

48. Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 227 (2014) ("Regulatory inertia can be hard to break without an external shock, usually a tragedy or massive failure that reignites interest in regulation.").

49. MANDEL & CAREW, *supra* note 14, at 2; *see* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 355–61 (5th ed. 2012) (chronicling various regulatory lookback efforts over the past several decades).

50. SIDNEY A. SHAPIRO, AGENCY REVIEW OF EXISTING REGULATIONS, REPORT FOR ADMINISTRATIVE CONFERENCE OF THE U.S. RECOMMENDATION 95-3, at 420 (1995). Such

which sought to create a comprehensive, perpetual system of retrospective review.[51] EO 13,563 declares that "agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[52]

EO 13,563 called upon Executive Branch agencies to develop plans for retrospective review and submit those plans to OIRA.[53] Roughly a year later, in EO 13,610, President Obama trumpeted cost savings arising from the retrospective review plans implemented to date[54] and established a more comprehensive framework for such reviews, calling for enhanced public participation, setting forth basic principles by which agencies might triage regulations to identify high priority candidates for review, and creating a review mechanism by which agencies reported on their retrospective review efforts to OIRA.[55] In response to these EOs, a number of agencies have either amended or eliminated outmoded regulations, resulting in reputed cost savings of several billion dollars.[56]

The Regulatory Flexibility Act (RFA), a law promulgated in 1980, aimed at alleviating regulatory burdens on small businesses,[57] also imposes retrospective review requirements upon agencies, directing them to periodically review existing regulations to identify those that "have a significant economic impact upon a substantial number of small entities."[58] The Office of Advocacy within the U.S. Small Business Administration (SBA) monitors compliance with the RFA. In identifying rules for reform,

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one-time review efforts largely proved unsuccessful, in part because agencies were not given adequate time to conduct a thorough review of existing regulations. *Id.* at 420–21.

51. Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

52. *Id.* § 6(a), 3 C.F.R. at 217.

53. *Id.* § 6(b), 3 C.F.R. at 217. Although Executive Order (EO) 13,563 does not apply to the independent regulatory agencies, President Obama subsequently issued EO 13,579, which encourages those agencies to follow the same principles, declaring that "[t]o the extent permitted by law, independent regulatory agencies should comply with these provisions as well." Exec. Order No. 13,579, § 1(c), 3 C.F.R. 256, 257 (2011).

54. Exec. Order No. 13,610, 3 C.F.R. 258 (2012) ("In response to Executive Order 13563, agencies have developed and made available for public comment retrospective review plans that identify over five hundred initiatives. A small fraction of those initiatives, already finalized or formally proposed to the public, are anticipated to eliminate billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens.").

55. *Id.* §§ 2–4, 3 C.F.R. at 259.

56. CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 180–84 (2013) [hereinafter SUNSTEIN, SIMPLER]; Cass R. Sunstein, *Regulatory Reform Progress,* OFFICE OF MGMT. & BUDGET (Jan. 30, 2012, 5:07 PM), http://www.whitehouse.gov/blog/2012/01/30/regulatory-reform-progress.

57. 5 U.S.C. §§ 601–612 (2012).

58. *Id.* § 610(a) (directing agencies to repeat this review process every decade).

agencies should consider, inter alia, any public complaints concerning the rule, overlap between the rule of interest and other rules, and the amount of time since the rule was last evaluated.[59] Finally, several statutes impose program-specific retrospective review requirements on designated agencies.[60]

In theory, the infrastructure arising from the EOs, the RFA, and agency-specific statutes creates a comprehensive system for retrospective review of all agency regulations. The RFA erects a program for review of regulations impacting small businesses, and the EOs implement a more comprehensive review scheme that theoretically implicates all other regulations. In practice, the various enactments have been insufficient to spur a strong commitment to periodic reassessment of existing regulations on the part of agencies. Agencies largely ignore the RFA's retrospective review provisions, and efforts by SBA to ensure compliance have enjoyed limited success.[61] Though it is perhaps too early to decide upon the success or failure of the Obama Administration's retrospective review initiatives, and though OIRA has logged a number of laudable success stories,[62] the EOs explicitly foreclose judicial review of agencies' compliance therewith.[63] In fact, it is not entirely clear how vigorously OIRA will review agencies' retrospective review efforts and attempt to promote regulatory reform that agencies might not otherwise opt to pursue.[64]

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59. *Id.* § 610(b)(2), (4)–(5)

60. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 62–65 (2007) (explaining how the U.S. Department of Agriculture (USDA) must reassess boards created to expand commodity markets every five years to ensure that they remain effective); *see also* 7 U.S.C. § 7401(c) (2012) (mandating that each commodity board fund an independent evaluation of its programs every five years); Federal Advisory Committee Act, 5 U.S.C. app. §§ 14(a)(1)(A), (a)(2)(A) (providing that all advisory committees created by the President or by administrative agencies will automatically be disbanded unless the convening entity renews them).

61. *See* Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. PA. J. BUS. L. 837, 871 (2011) (explaining how, in the late 2000s, the Small Business Administration's (SBA's) Office of Advocacy attempted to enhance enforcement with a Regulatory Review & Reform Initiative (r3), wherein it identified regulations that could easily be streamlined by amendments to regulations (rather than statutory reform); however, the r3 program has been underutilized); *id.* at 871 n.178 (explaining that there does not appear to be any recent activity in connection with this program).

62. *See* SUNSTEIN, SIMPLER, *supra* note 56, at 180–84.

63. Exec. Order No. 13,610 § 5(d), 3 C.F.R. 258, 260 (2012); Exec. Order No. 13,579, § 3(d), 3 C.F.R. 256, 257 (2011); Exec. Order No. 13,563, § 7(d), 3 C.F.R. 215, 217 (2011).

64. *See* Exec. Order No. 13,610 § 4, 3 C.F.R. 258, 259 (2012) (requiring, in a section entitled "Accountability," that Executive Branch agencies report to OIRA semiannually, but not specifying what role, if any, OIRA is to play in reviewing or policing agencies' efforts); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98

A number of commentators have suggested improvements to or modifications of the existing regime to promote more robust retrospective review. The next subsection explores some of these proposals.

B. Flaws of the Existing Regime and Potential Solutions

As explained in the previous subsection, notwithstanding the nominally comprehensive retrospective review system created by the recent EOs, neither the President nor the courts possess any formal mechanism for ensuring agency compliance. Of course, the lack of Executive Branch enforcement or judicial review does not necessarily doom the project to failure; much of administrative law consists of informal norms to which agencies adhere,[65] and the EOs may create such a norm that, over time, will pervade the entire regulatory system, as agencies will regularly reassess existing regulations and come to view new regulations as subject to periodic reexamination and modification.[66] Nevertheless, the entire system suffers from a set of underlying flaws that, though far from fatal, justify some level of pessimism in contemplating the likely outcome. Specifically, even assuming good faith on the part of agency officials in seeking to construct a robust program of retrospective review, including those at independent regulatory agencies who technically are under no obligation to comply with the EOs, the following issues will likely limit the success of the enterprise:

(1) Agency Officials Are Invested in Existing Rules: Existing retrospective review requirements, including those contained in the Obama Administration EOs, the RFA, and agency-specific statutes, essentially create a system of "self-review," whereby agencies determine when they will assess existing regulations, which regulations they will review, and whether any regulations may require modification or elimination.[67] Under such a regime, agencies may lack any incentive to amend existing regulations, given that eliminating or modifying an existing rule may be perceived as a tacit admission that the agency erred in issuing the rule.[68] Furthermore,

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CORNELL L. REV. 769, 836–37 (2013) (claiming that presidents have historically declined to require independent regulatory agencies to submit proposed rules to OIRA for review, though EO 13,579 encourages those agencies to pursue retrospective review).

65. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 28 (1998) ("[The administrative process's] own dimensions include not only the legal rules according to which administrative decisions are made—administrative law—but also the informal norms that inform regulatory decisions . . . .").

66. *See* SUNSTEIN, SIMPLER, *supra* note 56, at 184–86 (describing efforts to create a "culture of retrospective analysis" at agencies).

67. MANDEL & CAREW, *supra* note 14, at 12–13.

68. *Id.* at 13 ("[A]gencies have little incentive for effective retrospective review. That

the evidence supporting revision or rescission of existing rules will seldom be unassailable, and agency officials are likely to entertain a strong presumption in favor of the rules they are tasked with administering.

One reason that regulators may have a bias toward their own ideas can be found in the research of Dan Ariely, who has conducted experiments testing study participants' commitment to ideas they have personally formulated as opposed to ideas that they have learned.[69] In what Ariely describes as the "Not-Invented-Here bias," individuals display far more solicitude for ideas of their own origination, regardless of the objective quality of those ideas.[70] Furthermore, though only a handful of agency officials will have personally participated in formulating any given policy, the time invested in learning and internalizing the governing regulations likely fosters a commitment to the status quo.[71] Thus, one can expect agency officials tasked with reviewing the rules their agency has issued to react skeptically, if not hostilely, when tasked with conducting retrospective review, particularly in cases where the review may suggest that the rule was ill-advised from the outset as opposed to rules that may have been completely appropriate initially but have become overly burdensome in light of changed circumstances.

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would mean admitting their rules didn't work as intended, or weren't a valuable use of resources to begin with. Such an admittance could call unwanted attention to all of their regulations or programs, and potentially raise embarrassing questions.").

69. DAN ARIELY, THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME 107–22 (2010) (describing experiments wherein test subjects consistently rated their own answers to broad policy questions, such as "How can individuals help to promote our 'gross national happiness'?," as superior to answers provided by the experimenters). Ariely describes the real world effects of this phenomenon at the Sony Corporation, which demonstrated a "Not-Invented-Here" bias, and expressed little interest in developing versions of products pioneered by other companies (e.g., MP3 players and flat-screen televisions), which negatively affected the company's market competitiveness. *Id.* at 120–21.

70. *Id.* at 114 ("[W]e concluded that once we feel that we have created something, we feel an increased sense of ownership—and we begin to overvalue the usefulness and the importance of 'our' ideas.").

71. In another set of experiments designed to test what he labels the "Ikea effect" (in honor of the Swedish ready-to-assemble furniture retailer), Ariely found that individuals overvalued origami animals they created as compared to those assembled by others, notwithstanding the fact that they simply followed a set of instructions in producing the product. *Id.* at 89–95. Though he did not test the phenomenon as it relates to acquiring information as opposed to assembling a piece of amateur artwork, one could safely assume that individuals would feel some sense of investment in a set of concepts that required a significant amount of time to learn.

(2) Agency Resource Limitations May Hamstring Retrospective Review Efforts: In a time of budgetary austerity, when discretionary spending allocated to regulatory agencies is at already depressed levels by historical standards and continues to dwindle,[72] agencies can ill afford the resources required to periodically reassess their entire body of regulations, determine whether each regulation remains justified, and then eliminate or alter overburdensome regulations. Indeed, reviewing an entire corpus of extant regulations, as well as regulations of other agencies that may overlap or otherwise interact with that agency's regulations, would be cost prohibitive, and prioritization is a crucial element to any scheme of retrospective review.[73]

(3) Agency Officials May Be Unaware of the Inter-Articulation Between Their Rules and Those of Other Agencies: Even assuming an ability to overcome biases in favor of the status quo, individuals at any given agency conducting retrospective review may lack the information required to assess the full impact of their rules insofar as the necessary expertise may be divided amongst two or more agencies. Business researchers have described a "silo effect,"[74] wherein different departments within a common organization fail to coordinate with one another, and a similar phenomenon plagues the various largely autonomous agencies of the federal government.[75] In theory, for Executive Branch agencies, OIRA serves as a central clearinghouse to ensure that an agency contemplating a

72. Michael Linden, *Budget Cuts Set Funding Path to Historic Lows*, CTR. FOR AM. PROGRESS (Jan. 29, 2013), http://www.americanprogress.org/issues/budget/report/2013/01/29/50945/budget-cuts-set-funding-path-to-historic-lows (noting that discretionary spending now accounts for roughly 4% of gross domestic product (GDP), a level lower than in the 1960s–1980s, and is on track to decrease to less than 3% of GDP by 2022). These spending levels have been further eroded by the effects of sequestration cuts. *Id.* ("Since the start of fiscal year 2010, the official Congressional Budget Office projection of nondefense discretionary spending has fallen by more than $730 billion, a cut of more than 10 percent. . . . Furthermore, if the additional automatic cuts known as the 'sequester' remain in place the overall reduction will swell to well over $1 trillion, a 15 percent cut in total.").

73. For instance, ACUS has articulated several factors that agencies should consider in selecting a regulation for review, including: (a) whether changed conditions compromise the regulation's effectiveness; (b) whether the public has called for modification of the regulation; (c) whether a private sector entity could more effectively perform the function that is the subject of the regulation; and (d) whether the regulation overlaps or is inconsistent with other regulations. Special Committee to Review the Government in the Sunshine Act, 60 Fed. Reg. 43,108, 43,109–10 (Aug. 18, 1995).

74. ALBERT J. MILLS ET AL., ORGANIZATIONAL BEHAVIOR IN A GLOBAL CONTEXT 116 (2007).

75. BREYER, *supra* note 41, at 22.

"significant" rule[76] takes into consideration concerns of its sister agencies and of the President,[77] but OIRA review applies primarily to *prospective* rulemaking rather than *retrospective* review of existing rules (though any rulemaking undertaken to modify an existing regulation would be subject to OIRA review if the action qualified as significant).[78] Furthermore, rules that are not classified as significant and all rules that are issued by independent regulatory agencies are not subject to OIRA review.[79]

In short, though any given regulation by a specific agency likely makes eminent sense in isolation, regulations might interact in undesirable ways, including apparent conflicts between regulations issued by different agencies, and the cumulative effect of the entire corpus of regulations may produce an overly burdensome regulatory climate.[80] Because no individual regulatory agency is likely to possess the holistic worldview or resources necessary to rationalize the overall corpus of federal regulations, reliance upon individual agencies to conduct retrospective reviews is likely to lead to suboptimal results.

In light of the flaws bedeviling the existing regime, numerous scholars have put forward proposals for either supplementing or overhauling the current system to provide stronger incentives for thorough retrospective review. Michael Greenstone has proposed a permanent regulatory review board that would apply a "cost-benefit analysis" to all existing regulations and would have the authority to alter or repeal regulations it deems overly burdensome.[81] The board would include "well-respected professionals and academics who have the technical ability to review evaluations critically *and*

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76. EO 12,866 defines a "significant regulatory action" as, inter alia, one that is likely to "have an annual effect on the economy of $100 million or more," create an inconsistency with another regulation pursued by a sister agency, or raise novel legal or policy issues. Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1993).

77. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1858–59 (2013) (emphasizing OIRA's role as a "convener," to "transmit[] comments" from other regulatory agencies and coordinate arms of the Executive Office of the President, in addition to its role of reviewing regulations).

78. *See* Exec. Order No. 13,610, § 4, 3 C.F.R. 258, 259–60 (2012) (providing that agencies "shall regularly report on the status of their retrospective review efforts to OIRA," yet not seting forth any role for OIRA in reviewing those reports or ensuring that agencies conduct robust analyses).

79. Datla & Revesz, *supra* note 64, at 773 ("Status as an independent agency carries limitations on presidential control that reach beyond those specified in the statute. For example, whether the President can require agencies with for-cause removal protection to submit regulations to [OIRA] for review is an open question.").

80. *See* MANDEL & CAREW, *supra* note 14, at 8.

81. Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, *in* NEW PERSPECTIVES ON REGULATION 111, 119–21 (David Moss & John Cisternino eds., 2009).

do not have a stake in whether a regulation remains on the books."[82] In many ways, the process would resemble OIRA review, but the board would be separate from OIRA so as to ensure independence from both the agencies themselves and the political process.[83] Congress and the President could overrule the board (presumably by passing legislation designed to overturn its decisions), but the board's determinations would otherwise have the effect of law.[84]

Michael Mandel and Diana Carew, economists with the Progressive Policy Institute, have articulated a proposal for a Regulatory Improvement Commission (RIC).[85] Under their system, whenever Congress wishes to reduce the overall regulatory burden, it could authorize an RIC, an independent body including eight members appointed by the President and Congress.[86] Relying upon public submissions describing those regulations deemed overly onerous, the RIC proposes fifteen to twenty regulatory changes to Congress, and Congress takes an up-or-down vote on approving or rejecting the entire set of changes (rather than voting on the changes individually).[87] Senators Angus King and Roy Blunt have introduced a bill entitled the Regulatory Improvement Act of 2013 that implements most of the elements of Mandel and Carew's RIC proposal.[88]

Both proposals rely upon an independent commission to conduct retrospective analysis of existing agency regulations. This innovation greatly mitigates or eliminates the various drawbacks of regulatory self-review. First, members of an independent commission will not be nearly so beholden to the status quo as will officials at a given agency, since the independent commission members had no role in drafting or implementing any given regulation under review.[89] Second, unlike regulatory agencies, such a commission need not divert resources from other projects to retrospective review.[90] Finally, an independent commission will, by design, possess a cross governmental perspective and will not suffer from the same silo effect that prevails at individual regulatory agencies.[91] As such, one can

82. *Id.* at 120 (emphasis in original).
83. *Id.* at 120–21.
84. *Id.* at 120.
85. *See generally* MANDEL & CAREW, *supra* note 14.
86. *Id.* at 14.
87. *Id.*
88. Regulatory Improvement Act of 2013, S. 1390, 113th Cong. (2013).
89. Greenstone, *supra* note 81, at 119–20; MANDEL & CAREW, *supra* note 14, at 14.
90. *See* Adoption of Recommendation, 79 Fed. Reg. 75,114, 75,115 (Dec. 17, 2014) ("Given the costs of performing robust retrospective analysis, it is critical that agencies have adequate resources such that conducting retrospective review does not detract from other aspects of their regulatory missions.").
91. MANDEL & CAREW, *supra* note 14, at 14.

reasonably expect an independent commission to achieve greater success in its retrospective review efforts than has arisen in the current system of self-review.

At the same time, self-review retains one major advantage vis-à-vis review by an independent commission: regulatory agencies are far more familiar with the intricacies of the rules they administer. Though this nuanced understanding of the rules might actually compromise agency regulators' objectivity, as explained above, it also allows such regulators to perceive risks entailed in modifying or eliminating existing rules that an independent commission may not appreciate. This is especially true with respect to the RIC, which would include only a handful of politically appointed officials who would almost certainly lack the scientific and economic expertise to determine which rules are truly unnecessary and which are not.[92] Greenstone's regulatory review board could, in theory, be staffed by a sufficient number of experts steeped in the relevant disciplines to ensure adequate retrospective review, but the organization would require a massive infusion of resources to execute this function properly. OIRA, which reviews no more than a few hundred significant rules per year[93] and focuses most of its independent analysis on assessing the costs and benefits of proposed rules,[94] includes a full-time staff of approximately forty-seven federal employees.[95] An independent review commission, by contrast, would be responsible for reviewing the entire corpus of federal regulations. Though it would presumably develop methods for prioritizing certain rules for review,[96] the number of rules it would be responsible for assessing is nonetheless daunting. Furthermore, the independent review commission would not limit itself to assessing the economic costs and benefits of any given rule but also would grapple with the science underlying it, the likely state of affairs in the absence of such a rule, and numerous other complex factors that generally fall outside OIRA review. Accordingly, such a commission could require a very large staff, though the staff should not

92. *See id.* at 14.

93. CTR. FOR EFFECTIVE GOV'T, *OIRA Reviews*, http://www.foreffectivegov.org/node/3645.

94. Exec. Order No. 12,866, § 6, 3 C.F.R. 638, 644–45 (1993) (setting forth various analytical criteria applicable to regulatory actions review by agencies other than those specifically exempted by the Administrator of OIRA).

95. CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 51 (Nov. 1, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Revised%20Draft%20OIRA%20Report%20110113%20CIRCULATED.pdf.

96. *See, e.g.*, Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114, 75,116 (enumerating factors for identifying rules that are strong candidates for retrospective review).

become so massive as to compromise the ability of different review teams to coordinate effectively. Investing the necessary resources may prove difficult in an environment characterized by deep skepticism of any expansion of government.

III. A POTENTIAL SOLUTION: LEVERAGING COLLABORATIVE ALTERNATIVES

As explored in the previous section, existing regulatory lookback initiatives, which essentially create a system of self-review undertaken by individual agencies, are largely inadequate to overcome regulatory inertia. The alternative proposals, such as those put forward by Greenstone and Mandel/Carew, correct for the issues of investedness, inadequacy of resources, and tunnel vision endemic to self-review, but they create countervailing problems insofar as an independent body tasked with retrospective review will generally lack the nuanced understanding of individual rules that agencies possess.

A potential solution to this dilemma may involve relying primarily upon regulated entities to identify regulations that have become outmoded or inefficient. Unlike agencies conducting self-review, many market participants will not have a vested interest in the preservation of the existing regime. In some instances, larger businesses may actually prefer more stringent regulations insofar as they protect incumbent firms from competition by upstart companies seeking to exploit new technologies or business models,[97] but smaller firms have a strong incentive to identify overly burdensome regulations and seek regulatory relief. Furthermore, businesses will allocate resources to advocating for regulatory reform to the extent that the cost of such lobbying efforts is less than the cost of simply complying with the relevant regulations.[98] In addition, businesses will not

97. HANS-HERMANN HOPPE, A THEORY OF SOCIALISM & CAPITALISM 105–06 (Ludwig von Mises Institute 2010).

98. Of course, a system that relies upon private businesses to lobby for the modification of overly onerous regulations may create a public good problem, insofar as some businesses may be tempted to free ride on the advocacy efforts of other businesses while reaping the full reward of any ensuing changes in law. ROBERT E. HALL & MARC LIEBERMAN, MICROECONOMICS: PRINCIPLES & APPLICATIONS 467–68 (5th ed. 2010); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 371 (1990) ("Distributed benefits or costs increase the likelihood of free riding and lower the likely incentive for individuals to bear the informational and transactional costs of advocacy or resistance."). As will be explained in greater detail below, the retrospective review mechanism envisioned by this Article would create an incentive for virtually all market players in a given industry to participate in any reform efforts, thereby obviating the free-rider problem at least in many instances.

suffer from the "tunnel vision" that prevails at individual agencies:[99] Regulated entities are concerned with the regulatory burden created by the full corpus of regulations applicable to their activities (and the interactions amongst the various regulations) rather than the output of any one agency. Finally, unlike an independent retrospective review body (but like individual agencies), businesses that must comply with specific regulations will have an exceedingly nuanced understanding of those regulations and the economic effect thereof.

On the other hand, a system that relies primarily upon private parties to identify flaws in existing regulations will almost certainly be subject to industry capture.[100] Were private sector participants given a more prominent role, such as by Congress instituting a legal requirement that agencies consider public comments calling for retrospective review of rules and subjecting agencies' disposition of those comments to judicial review,[101] businesses would likely exploit the opportunity to challenge any and all regulations that create costs for their operations (regardless of whether those costs are justified by countervailing public welfare benefits). Even if those challenges proved unsuccessful, the mere threat of litigation might force agencies to pare back any regulations disfavored by the business community.

The prevailing regime already allows regulated entities to comment on regulations subject to retrospective review[102] or to challenge agency regulations on judicial review,[103] but this power is purely negative, empowering private interests only to identify flaws with a proposal or final agency determination. As recent scholarship in the field of collaborative governance has demonstrated,[104] however, the relationship between government and the regulated public need not be primarily adversarial: significant synergies can emerge when both government and the private sector collaborate in devising solutions that promote the public welfare and minimize restrictions on market activities. Ideally, retrospective review initiatives would align the incentives of both parties by encouraging private sector entities to offer good faith proposals for regulatory alternatives and ensuring that governmental entities carefully consider those alternatives and adopt them where justified. This Article explores an expanded use of

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99. BREYER, *supra* note 41, at 22.

100. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT, SCI. 3, 3 (1971).

101. This is, of course, precisely what the Administrative Procedure Act (APA) requires with respect to public comments in informal rulemakings. 5 U.S.C. § 553(c) (2012).

102. Exec. Order No. 13,610, § 2 3 C.F.R. 258 (2012).

103. 5 U.S.C. §§ 704, 706.

104. *See supra* note 20 and accompanying text.

petitions for rulemaking by which private sector entities would offer alternative regulatory approaches that agencies would then consider and implement as appropriate. This proposal would at least partially redirect regulated entities' efforts from the purely destructive activity of endlessly challenging agency regulations without offering any viable alternative. It would also require agencies to pay greater heed to rulemaking petitions, which they have largely neglected in the past, and to consider any viable alternative proposals offered by regulated entities.

The proposed use of petitions for rulemaking should not function as the sole mechanism for retrospective review, and it is not intended to displace EO 13,610 or the other regulatory lookback requirements prevailing under existing law. In some instances, regulated entities may seek complete rescission of a regulation, and existing mechanisms for challenging regulations, including requesting that the agency review a rule under EO 13,610, though imperfect, provide at least some opportunity for achieving that end. Conversely, public interest organizations may wish to strengthen existing regulations or encourage agencies to act in previously unregulated areas, and they too can exploit the existing levers to attempt to encourage or compel agency action.[105] The proposals of this Article are limited to situations in which private parties might petition an agency to recognize a less burdensome alternative to prevailing regulations that provides equal or superior protection of the public welfare. In this sense, it seeks to marry the recent push for retrospective review with the ongoing development of collaborative models that might supplement or replace traditional, top-down regulatory models.

A. Toward a More Systematic Implementation of "Collaborative Governance"

In the last several decades, a new paradigm of regulation has arisen, a model variously known as "collaborative governance" or simply "governance," the "Renew Deal," and a handful of other monikers.[106] As Professor Richard Stewart has shown, the theoretical model justifying administrative decisionmaking in the United States has evolved over time.

105. Specifically, such groups may file a petition for rulemaking urging the agency to issue a new rule or strengthen an existing regulatory program. Since public interest organizations would not, as a general matter, devise an alternative regulatory approach and petition the agency to adopt it, this Article places primary emphasis on petitions from regulated entities, which would be better positioned to craft such alternatives. Nevertheless, this Article seeks to preserve a role for public interest input in any regulatory reform an agency might undertake in response to a petition from a regulated entity. Moreover, the reinvigoration of the rulemaking petition process might encourage such groups to make more extensive use of petitions to lobby for increased regulatory protection.

106. *See* Lobel, *supra* note 20, at 345–47.

During the New Deal, administrative reformers highlighted the prevalence of market failures and emphasized the need for professional, technically-oriented agencies to engage in long-term economic planning in order to smooth the vicissitudes of the business cycle and promote the overall public welfare.[107] By the late 1970s, regulatory experts had come to appreciate the risks associated with overregulation, and reformers sought to discipline the process by promoting cost-benefit analysis and presidential review of agency rulemaking to ensure that regulations proposed by agencies actually served the overall public welfare and that regulatory burdens were minimized.[108]

In recent decades, scholars have increasingly come to view regulation not as a process of selecting between the Manichean extremes of a centralized planned economy and laissez-faire capitalism, but as a system for controlling an interconnected web involving numerous points of contact between regulated entities, governmental bodies—including federal, state, and local legislatures and agencies—and the general public.[109] Rather than conceiving of agencies and regulated entities as competitors locked in a zero-sum game wherein stronger regulations disincentivize economic activity and create deadweight social loss while weaker regulations allow businesses to chase increased profit regardless of any associated harms visited upon the public good, collaborative governance scholars reconceptualize the administrative process in problem-solving terms. They recognize the possibility of win-win scenarios wherein both regulators and regulated parties can achieve mutually desirable outcomes, while acknowledging that traditional top-down regulation may be appropriate in some areas and laissez-faire preferable in still other contexts.[110] By promoting a more collaborative model, the governance paradigm not only

107. Stewart, *supra* note 20, at 440–41.

108. *Id.* at 443; Tozzi, *supra* note 42, at 44–45.

109. Stewart, *supra* note 20, at 448 ("Various forms of flexible agency-stakeholder networks for innovative regulatory problem-solving have developed in order to avoid the limitations of top-down command regulation and formal administrative law procedures. Rather than attempting to dictate unilaterally the conduct of the regulated, regulatory agencies have developed a number of strategies to enlist a variety of governmental and nongovernmental actors, including business firms and nonprofit organizations, in the formulation and implementation of regulatory policy.").

110. Freeman, *supra* note 20, at 22 ("Collaborative governance seeks to respond to the litany of criticisms about the quality, implementability, and legitimacy of rulemaking by reorienting the regulatory enterprise around joint problem solving and away from controlling discretion"); Lobel, *supra* note 20, at 344 ("The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals.").

enables agencies and stakeholders to capture synergies that may arise from collective problem solving but also creates a greater sense of investedness on the part of regulated parties, who enjoy expanded opportunities to participate in the rulemaking and implementation processes and therefore may be less likely to challenge the ultimate outcome.[111]

Collaborative governance is an umbrella concept involving diverse networks featuring a variety of interconnections between government agencies, regulated entities, and the general public.[112] For example, in 1990, Congress authorized the use of negotiated rulemaking,[113] a process by which a committee of stakeholders negotiates the text of a proposed rule prior to the agency's issuance of a notice of proposed rulemaking.[114] In other instances, rather than formally convening a process wherein the key stakeholders directly collaborate, governmental entities leverage competencies of the private sector by relying upon privately developed standards and delegating certain aspects of the enforcement process to private parties.

Specifically, under the National Technology Transfer and Advancement Act (NTTAA), agencies are required to "use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments."[115] Rather than expending agency resources on developing separate rules that may duplicate work by private standard-setting organizations or disrupt a preexisting system, federal agencies often codify such privately developed standards into regulatory law by incorporating them by reference into the *Code of Federal Regulations*.[116] In other contexts, the federal government may partially delegate the compliance monitoring function to private entities. If the agency determines that a regulated entity has strong incentives to comply with relevant regulations or that the costs of monitoring exceed the benefits of enhanced compliance, it may simply erect a system of first-party conformity assessment wherein the regulated party declares its compliance

111. *See* Freeman, *supra* note 20, at 23–24.

112. Lobel, *supra* note 20, at 359 ("Contemporary legal scholarship recognizes that, today, no single model of social organization exists and thus a unitary conception of the regulation of diverse social fields and contexts is impossible.").

113. 5 U.S.C. § 561–570 (2012).

114. DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (1995).

115. National Technology Transfer and Advancement Act, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996) (codified in scattered sections of 15 U.S.C.).

116. Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 133 (2013).

with the relevant regulation or standard.[117] In other instances, if an agency requires a higher degree of confidence than can be obtained from a system of self-auditing but does not wish to erect a monitoring system itself, it can create a system of third-party conformity assessment. Such assessment is performed by an independent private body, which certifies the agency's compliance with the relevant regulations or standards. The conformity assessment body can be accredited either by a private accrediting organization or by the agency itself.[118]

As Professors Freeman and Lobel demonstrate, collaborative governance has already pervaded the modern regulatory landscape, and agencies have increasingly utilized public-private alternatives in lieu of traditional, top-down regulatory models.[119] Notwithstanding these advances, Professor Freeman notes that opportunities for expanded reform are "encumbered by the constraints of the existing regime: over and over again, participants' ability to do something new is limited, either by statutes, regulations, culture, or habit."[120] For instance, Professor Freeman examines a negotiated rulemaking undertaken by the Occupational Safety and Health Administration (OSHA).[121] In the course of the negotiations, the various participants, which included representatives from labor, management, and state and federal agencies, explored a number of theretofore underappreciated workplace risks and considered a certification regime that would both improve overall safety and minimize compliance burdens on employers.[122] Nevertheless, the negotiating committee ultimately settled upon a more conventional readjustment to existing regulations, perhaps partly as a result of the committee's limited mandate.[123]

The full potential of collaborative governance reforms cannot be reached until legislatures and agencies devise a more systematic process for determining when collaborative models might yield superior results. Unsurprisingly, public-private collaboration has emerged slowly and fitfully, arising in scattered contexts wherein regulatory inertia does not stifle contemplated reforms. In some instances, agencies have filled

117. LESLEY K. MCALLISTER, THIRD-PARTY PROGRAMS TO ASSESS REGULATORY COMPLIANCE 3, 5 (Oct. 22, 2012), http://www.acus.gov/sites/default/files/documents/Third-Party-Programs-Report_Final.pdf.

118. *Id.* at 3–5.

119. *See* Freeman, *supra* note 20, at 33–66; Lobel, *supra* note 20, at 404–42.

120. *See* Freeman, *supra* note 20, at 66.

121. *Id.* at 49–55.

122. *Id.* at 51–52.

123. *Id.* at 53–55, 67 ("Limited scope helps to explain why the certification idea was never seriously considered as a potential solution in the OSHA [Occupational Safety & Health Administration) reg-neg. Tie-off heights were a familiar, accessible solution that easily fit within the negotiating committee's mandate.").

interstices in existing programs or exploited flexibilities in regimes previously characterized by a command-and-control model, moving toward a more collaborative approach. For instance, Professor Lobel observes that OSHA "has shifted its emphasis in recent years from extensive elaboration of standards and high rates of inspection to fewer inspections and more programs of collaborative, semivoluntary compliance."[124] Similarly, when an agency is crafting new rules in a previously unregulated area, it may select a collaborative model. For instance, from the very outset, the process of setting standards applicable to the Internet has featured extensive cooperation between national governments throughout the world and private entities such as the Internet Corporation for Assigned Names and Numbers (ICANN).[125] Agencies also have the option of utilizing negotiated rulemaking when adopting new rules, though this early instantiation of public-private collaboration has unfortunately fallen into relative disuse in recent years.[126]

Notwithstanding the increased recognition by scholars and regulators alike that the traditional command-and-control model of the New Deal has become outmoded in certain areas and that a collaborative governance model more nimbly responds to the realities of a globalized, interconnected world in which the traditional distinctions between the public and private sectors have blurred,[127] regulatory inertia impedes any comprehensive reexamination of the existing regime. Anachronistic programs tend to persist until a major regulatory failure or overwhelming evidence of inefficiency leads to popular demands for regulatory reform. Retrospective review, in theory, has the capacity to break this logjam, requiring agencies to reassess regulatory programs to determine whether they remain viable in light of technological, political, economic, and other changes.[128] In

124. Lobel, *supra* note 20, at 417–18.

125. *Id.* at 436–38.

126. *See generally* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987 (2008). Notwithstanding the decline in negotiated rulemaking activity, several agencies continue to utilize the process, and its fall from popularity may have much less to do with any flaws fundamental to the process itself than with legal complexities that frustrate efforts to conduct such rulemakings, such as the requirement that negotiated rulemaking committees comply with the strictures of the Federal Advisory Committee Act. *Id.* at 1001; *see also* REEVE T. BULL, THE FEDERAL ADVISORY COMMITTEE ACT: ISSUES AND PROPOSED REFORMS 37–38 (2011), *available at* http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf.

127. *See* Lobel, *supra* note 20, at 344–45.

128. Professors Freeman and Lobel explicitly recognize the necessity of flexibility in any modern system of governance, noting that agencies must consistently reexamine regulations and make any adjustments needed to respond to changed circumstances. Freeman, *supra*

practice, existing retrospective review requirements tend to focus on the quantity of regulations rather than the optimal mechanism of regulation, assuming a constant level of regulatory protection, and suffer from the various limitations explored in Part II.

The remainder of Part III will consider an alternative system of retrospective review designed to exploit the opportunities that the collaborative governance model creates. Specifically, it explores a heretofore largely underutilized mechanism for citizen participation provided in the Administrative Procedure Act (APA), the rulemaking petition process, and examines how agencies and stakeholders might utilize it to promote a more robust review of existing regulations and identify new opportunities for public-private collaboration.

B. Expanding the Use of Petitions for Rulemaking

Among the various procedures for citizen participation implemented by the APA, the ability of citizens to file petitions requesting agency rulemaking activity is likely one of the most underappreciated.[129] The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[130] The First Amendment merely guarantees the right to bring such a petition; it does not require that the governmental entity receiving the petition take any specific action in response.[131] The APA, by contrast, in addition to providing citizens "the right to petition for the issuance, amendment, or repeal of a rule,"[132] places

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note 20, at 22 ("Rules are viewed as temporary and subject to revision. This requires a willingness to move forward under conditions of uncertainty. It also demands a willingness to devise solutions to regulatory problems without foreclosing a rethinking of both solutions and goals. To this end, continuous monitoring and evaluation are crucial."); Lobel, *supra* note 20, at 357–58.

129. *See* Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions And Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 323 (2010) (noting that "the little scholarly commentary on petitions has been strongly negative"); William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 58 (1988) (concluding based on available data that "the scope of rulemaking petition activity is generally not great," with certain exceptions).

130. U.S. CONST. amend. I.

131. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."); Smith v. Ark. State Highway Emps., 441 U.S. 463, 464–66 (1979); *see also* Luneburg, *supra* note 129, at 6.

132. 5 U.S.C. § 553(e) (2012).

affirmative obligations upon agencies for addressing such petitions. Though it eschews any explicit deadlines for resolution of petitions for rulemaking, it provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it."[133] In addition, it provides for notice concerning the disposition of a petition:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.[134]

The APA is far more explicit than the First Amendment in imposing obligations upon petitioned entities to address and ultimately decide citizen petitions, yet it still leaves a considerable degree of discretion to agencies in deciding when and how to resolve such matters, leading to wide variations in agency practice.[135] Thus, agencies often place a low priority on the process of responding to rulemaking petitions, leading to significant delays in their responses thereto.[136] Perhaps as a consequence, stakeholder use of the petitioning process is relatively anemic.[137]

Several scholars have recently shown strong interest in reinvigorating and expanding the use of such petitions.[138] Professors Eric Biber and Berry Brosi challenge the commonly held belief that petitions tend to divert agencies' attention from more important issues and waste limited agency resources.[139] They note the paucity of empirical analyses comparing agency decisions reached of the agency's own accord to those reached in response to a petition for rulemaking, and they undertake precisely such an analysis for species listed by the U.S. Fish and Wildlife Service under the

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133. *Id.* § 555(b).

134. *Id.* § 555(e).

135. *See generally* Luneburg, *supra* note 129 (cataloguing some of the various approaches of administrative agencies to disposition of petitions for rulemaking).

136. *See, e.g.*, 1 C.F.R. § 305.86-6 (1993) ("An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.").

137. Luneburg, *supra* note 129, at 58.

138. *See, e.g.*, Biber & Brosi, *supra* note 129; Sean Croston, *The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over "Regulation through Guidance"*, 63 ADMIN. L. REV. 381 (2011); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323 (2013).

139. *See generally* Biber & Brosi, *supra* note 129.

Endangered Species Act.[140] Ultimately, they conclude that there are "no statistically significant differences . . . between species listed as a result of petitions and species listed on the agency's own initiative. If anything, petitions seem to better identify at-risk species that cost relatively little to restore to health."[141] Specifically, they found that listings initiated as the result of petitions were essentially no more likely than those undertaken sua sponte to focus on less threatened species or species with a low recovery potential and were only slightly more likely to pose conflicts with existing business development projects.[142] Indeed, petitions were slightly more likely to identify highly threatened species and those with a strong recovery potential, though the difference was not statistically significant.

Professors Biber and Brosi conclude that reliance upon petitions (as well as permitting citizen suits to challenge agency decisions) may ultimately result in superior conclusions by "collecting dispersed or diffuse information to help better inform agency decisionmaking."[143] Of course, they acknowledge that the result may be unique to the endangered species context, noting that information concerning threatened species may be especially widely dispersed in society given the existence of some 200,000 native species in the United States.[144] They suggest that agencies may especially benefit from citizen petitions for rulemaking in regulatory arenas characterized by a simple set of decisions and technical factors that do not require complex resource-tradeoff determinations.[145]

C. Rulemaking Petitions and Retrospective Review

As explored in Part I, regulatory activity has typically ebbed and flowed over time, expanding rapidly in response to a major crisis and then gradually receding as the precipitating calamity fades from the public consciousness. The government has not devised any comprehensive system for assigning regulatory resources based upon the gravity of the risk and the adequacy of market incentives or private oversight mechanisms to hold the risk to acceptable levels. Furthermore, notwithstanding the rise of the collaborative governance model and the expansion of public-private networks, there is no formal process for assessing whether private sector driven alternatives may be superior in areas already subject to heavy regulation.

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140. *Id.* at 324.
141. *Id.* at 324–25.
142. *Id.* at 358–59, 377.
143. *Id.* at 364.
144. *Id.* at 366.
145. *Id.* at 379.

In this light, agencies might consider increased reliance on the rulemaking petition process, permitting regulated entities to propose an alternative regulatory scheme that more fully exploits the synergies of public-private networks. This might include voluntary consensus standards,[146] private certifications of compliance with relevant regulations or standards,[147] and any number of other innovative schemes that provide greater flexibility for regulated entities while maintaining high levels of regulatory protection. Though the expanded use of rulemaking petitions need not be limited to regulated entities, and though public interest groups can and should exploit such petitions in order to strengthen regulatory programs deemed inadequate to protect the public against any given risk, this Article focuses primarily upon petitions initiated by regulated parties insofar as they are best positioned to propose a more collaborative regulatory scheme in the initial instance. Nonetheless, to prevent erosion of regulatory protections, the agency must preserve a role for representatives of the public interest in any reform it ultimately undertakes, and this Article will therefore explore mechanisms to ensure that such interests are not overlooked.

To initiate the process, a private party would submit a petition for rulemaking recommending appropriate agency action. The proposal could request any number of responses from the agency. In some, likely rare, instances, one or more regulated parties may recommend replacing an entire body of regulations with a system of voluntary consensus standards or substituting a program of self-auditing or third-party certification for a system of government inspection. More frequently, regulated parties may propose that individual elements of a broader command-and-control program be replaced with more flexible alternatives. For instance, within an overall licensing system, a regulated party might identify certain inspections that can be conducted by a third-party firm. Finally, and likely most importantly, regulated parties might identify instances in which privately developed standards or private sector enforcement proves equally protective of the public welfare while imposing a less onerous burden on industry, and agencies may recognize compliance with those programs as equivalent to adherence to governmentally devised regulations. This process would resemble proposals for international regulatory cooperation via mutual recognition agreements, by which one nation certifies compliance with another nation's regulations as equivalent to satisfying the

146. OMB Circular A-119; Fed. Participation in the Dev. and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8554 (Feb. 19, 1998); Bremer, *supra* note 116, at 134.

147. McAllister, *supra* note 117, at 2–7.

domestic requirements, as currently being discussed in connection with the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), an E.U.-U.S. free trade agreement.[148]

Erecting such a system would not require any change in existing law, given that the right to petition for rulemaking dates to the enactment of the APA[149] and grows from preexisting rights to petition the government guaranteed in the Constitution[150] and extending back to English common law.[151] It would, however, require regulated entities, agencies, and courts to reconceptualize the purposes of such petitions, allowing them to serve as vehicles to readjust the balance between traditional, governmentally driven regulation and more novel modes of collaborative governance that feature more intricate interrelationships between regulatory agencies, regulated parties, and private sector standard-setting and enforcement entities.[152] The remainder of this subsection explores how regulated parties, administrative agencies, and federal courts might reexamine their approach to rulemaking petitions.

(1) Private Sector Entities: Under the current regime, regulated entities that wish to challenge contemplated agency action or extant regulations have a number of potential options. For a pending rulemaking, they can file written comments, and agencies are legally bound to consider the "relevant matter presented" therein.[153] If the agency is unsympathetic to a stakeholder's arguments addressed in its comments, the stakeholder can raise its concerns with OIRA, which has an "open door" policy for meeting with outside parties and considers insights gained from such meetings in reviewing those agency decisions deemed "significant."[154] Once a rule has been issued, any private party able to establish standing can challenge it in court as exceeding the agency's jurisdiction or representing an arbitrary and capricious abuse of decisionmaking authority, amongst other things.[155] Even after a rule has become firmly entrenched in the regulatory

148. Adam C. Schlosser & Reeve T. Bull, Regulatory Cooperation in the TTIP, REGBLOG (Aug. 27, 2013), https://www.law.upenn.edu/blogs/regblog/2013/08/27-schlosser-reeve-ttip.html.

149. 5. U.S.C. § 553(e) (2012).

150. U.S. CONST. amend. I.

151. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.); Bill of Rights, 1689, 1 W. & M., 2d sess., c. 2 (Eng.); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1181 (1986) ("The most important lesson of history, however, is that in England after 1702 the right to petition in practice was an absolute right against the government.").

152. *See generally* Freeman, *supra* note 20; Lobel, *supra* note 20.

153. 5 U.S.C. § 553(c) (2012).

154. Sunstein, *supra* note 77, at 1860.

155. 5 U.S.C. § 706(2) (2012).

landscape, under EO 13,610, members of the public can submit suggestions concerning rules that should be subject to the regulatory lookback analysis described in Part II.A.[156] Thus, on the whole, opportunities for regulated parties to challenge both incipient and longstanding regulations abound; indeed, some have contended that an unintended consequence of decades of reforms designed to enhance agency accountability has been "ossification" of the administrative state, hobbling agency efforts to accomplish any far-reaching goals.[157]

The various mechanisms for challenging agency action are united by a common mode of operation: each involves a private party raising a challenge to one or more aspects of a prospective or existing rule, to which the agency responds either by refuting the challenge or adjusting the rule to respond thereto or by ignoring the challenge, in those instances in which the agency is not bound to reply and elects not to do so. At no point in the process must a challenging party furnish any alternative proposal to that proffered by the agency, although doing so may enhance the persuasiveness of the challenge—e.g., by rendering rulemaking comments more compelling or providing a basis for considering retrospective review of an existing regulation.

Examining the propriety of the existing procedures for challenging regulatory activity is beyond the scope of this Article, but supplementing those mechanisms with a process by which regulated parties might identify viable collaborative alternatives to agency-driven regulation would provide extensive benefits for both agencies and regulated entities. For their part, private parties would gain an additional avenue for pursuing relief from regulations that may prove particularly burdensome. At the same time, the contemplated use of rulemaking petitions would not serve a purely deregulatory function, as petitioners would be required to demonstrate that the proposed alternative achieves the same public welfare-promoting ends that motivated the introduction of the initial regulatory regime. For example, imagine that the Environmental Protection Agency (EPA) promulgated a rule setting the maximum concentration of carbon emitted per kilowatt-hour of electricity produced and creating an inspection regime by which EPA agents periodically conduct tests at power installations to ensure compliance. Several businesses have voluntarily curtailed their

156. Exec. Order No. 13,610, § 2 3 C.F.R. 258 (2012).

157. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) ("The informal rulemaking process of the 1990s is so heavily laden with additional procedures, analytical requirements, and external review mechanisms that its superiority to case-by-case adjudication is not as apparent now as it was before it came into heavy use.").

carbon emissions,[158] and those businesses might contract with a third-party entity to certify that their emissions fall below a certain level, such as what would prevail if the United States were to adopt the Kyoto Protocol. If the voluntarily adopted emission standards proved to be equal to or lower than the levels permitted by the EPA, rather than conducting a duplicate inspection, the EPA might recognize the results of such private inspections, which would both preserve agency resources and ensure a level of environmental protection at least as strong as that contemplated in the agency's regulations.

Agencies also would derive significant benefits from the contemplated reforms, which would promote a more collaborative model of stakeholder engagement and ideally diminish the adversarial nature of the prevailing regime. At present, essentially any regulated entity, public interest organization, or everyday citizen can challenge a policy decision contemplated or implemented by the agency, although doctrines of standing place an outer limit upon the parties that can seek judicial review of agency determinations.[159] This regime is designed to leverage expertise from the private sector, yet it suffers from a number of flaws that compromise its ability to fully exploit the decentralized information that private sector entities can provide. First, the economic incentives of private sector participants are inadequate to promote optimal participation. For regulated entities, the temptation to "free ride" on the efforts of other participants is great, for the success of any one challenger will be adequate to reverse the agency's action and thereby benefit all regulated parties, only one of whom will have borne the expense of challenging the agency's determination.[160] Second, as a consequence of the market incentives that tend to limit participation to a handful of highly motivated regulated entities, the information that the agency receives is often skewed and fails to represent the full range of affected interests.[161] Finally, and most significantly, since challenging entities can forestall or even kill rules merely by identifying flaws in the agency's analysis, they lack any incentive to

158. William A. Tanenbaum & Sapna Palla, *Understanding the Voluntary Carbon Market: Why Companies Buy Carbon Credits, Why the Voluntary Market Will Coexist with Future Mandatory Regulation, and Why Contracts Should Allocate Carbon Credit Ownership*, BLOOMBERG LAW REPORTS (2009), at 2–4, *available at* http://www.kayescholer.com/news/publications/200905011/_res/id=sa_File1/tanenbaum-palla052009.pdf.

159. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.").

160. *See* Turley, *supra* note 98, at 371.

161. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010).

attempt to devise a viable alternative.

The proposed use of petitions for rulemaking would mitigate or eliminate many of these flaws. First, the proposal would promote more widespread participation by relevant stakeholders. Privately developed standards and third-party enforcement programs exhibit so-called network effects: a standard or inspection program becomes increasingly valuable as more and more businesses participate therein.[162] Indeed, the entire purpose of standard-setting is to promote uniformity throughout a particular industry so as to facilitate trade.[163] As such, regulated entities seeking recognition for a standard or third-party enforcement mechanism will have a strong incentive to cooperate and seek maximal industry participation to produce a viable alternative to the existing regulatory program. Of course, such cooperation may increase the risk of improper industry collusion, an issue that Part IV.C will address. The agency also should solicit input from different groups of stakeholders, including small businesses and public interest organizations, to ensure that all relevant views are represented, as the next subsection will explore.

More significantly, the proposal would limit the incentives for regulated entities merely to identify flaws in contemplated or extant regulations without grappling with possible alternatives. When a court strikes down a regulation as "arbitrary and capricious," the agency is free to attempt to craft an alternative regulation.[164] Some regulated entities may attempt to forestall any regulation whatsoever by filing a series of challenges to sequential rules issued by the agency, but the agency may nonetheless ultimately produce a suboptimum regulation.[165] The contemplated system would incentivize the constructive activity of proposing regulatory alternatives and concomitantly disincentivize the destructive practice of highlighting flaws in proposed and final rules.[166]

(2) Administrative Agencies: Administrative agencies have not, as a

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162. Arjun Sundarajan, *Economics of IT, Network Effects* (2006) http://oz.stern.nyu.edu/io/network.html; S.J. Liebowitz & Stephen E. Margolis, Network Externalities (Effects), http://www.utdallas.edu/~liebowit/palgrave/network.html.

163. IEEE Standards Assoc., What Are Standards?, IEEE.ORG (2015), http://standards.ieee.org/develop/overview.html ("Standards address a range of issues, including but not limited to various protocols to help maximize product functionality and compatibility, facilitate interoperability and support consumer safety and public health.").

164. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW & PROCESS 343, 388 (5th ed. 2009).

165. BREYER, *supra* note 41, at 58.

166. In this sense, the proposal resembles the use of negotiated rulemaking, in which the key stakeholders negotiate the text of a proposed rule prior to the agency's issuance of a notice of proposed rulemaking. 5 U.S.C. §§ 561–570 (2012); PRITZKER & DALTON, *supra* note 114, at 1.

general matter, placed a high priority upon the resolution of petitions for rulemaking. Such petitions arguably interfere with resource prioritization within agencies,[167] and petitioning activity has generally been fairly anemic.[168] Furthermore, the agency's disposition of a petition receives a high level of deference on judicial review,[169] and the agency may have little incentive to closely analyze each petition and determine whether it merits a shift in the policy the agency otherwise would have pursued. Finally, since the APA places no time limit upon the disposition of agency petitions, they often languish at agencies for months or years without any response.[170] The proposed expansion of the use of rulemaking petitions would not require any formal change in existing law, but its success would depend critically upon agencies' committing to closely analyze petitions received and respond thereto in a timely manner.

Naturally, agencies must continue to set their own regulatory agendas and avoid wasting resources in responding to meritless petitions. As agencies come to place a higher priority upon addressing rulemaking petitions, one can expect the number of petitions filed to increase. Accordingly, agencies should institute a system for screening petitions to identify meritorious candidates. Factors the agency might weigh in reaching this determination include the following: (a) petitions must show that the proposed change would not weaken overall regulatory protections; (b) petitions should present evidence demonstrating why the proposed regime would prove less burdensome than the existing state of affairs; (c) petitions supported by a substantial number of stakeholders should receive preference vis-à-vis those proposed by only a handful of market participants; (d) petitions that include diverse ranges of participants—e.g.,

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167. Biber & Brosi, *supra* note 129, at 345 (exploring the resource allocation problem with respect to citizen suits, noting that "[s]cholars have argued that citizen suits divert agencies from rational priority-setting by requiring them to attend to low-priority matters").

168. *See* Luneburg, *supra* note 129, at 55

> ("In discussing the petition process, a considerable number of practitioners who regularly engage in administrative practice indicated that currently there are more effective ways of influencing an agency's regulatory agenda than filing rulemaking petitions, such as informal contact or litigation, and that they would be loath to file a petition because of the delays they expect in the final disposition of their requests.").

169. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007).

170. *See* Luneburg, *supra* note 129, at 56 ("[D]elay in the disposition of petitions is a common problem . . . ."); *see also* Special Committee to Review the Government in the Sunshine Act, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995) ("[The Administrative Conference] suggests, among other things, that agencies establish deadlines for responding to petitions. The Conference . . . proposes that, if necessary, the President by executive order or the Congress should mandate that petitions be acted upon within a specified time, for example 12–18 months.").

both small and large market players—should also be favored; and (e) petitions that would free up agency resources by leveraging the expertise of private sector entities should receive a strong preference. Though the APA requires agencies to dispose of all petitions received and provide some explanation for the decision reached,[171] the agency would be justified in summarily denying petitions that perform poorly on the aforementioned factors.

When the agency identifies a promising petition in applying the various factors outlined above, it can initiate the rulemaking process. At the petitioning stage, the most likely participants will be corporations and industry-affiliated groups interested in alleviating regulatory burdens. In order to ensure that the agency receives a balanced set of perspectives, once an agency has determined to act on a petition, it should consider actively soliciting comments from public interest organizations that may oppose the contemplated regulatory change.[172] For instance, were a group of employers to file a rulemaking petition with OSHA seeking recognition of a third-party workplace safety certification regime as equivalent to the system of inspections operated by the agency itself, OSHA might reach out to unions, workplace safety advocacy organizations, and even individual employees of the petitioning organizations seeking comments concerning the proposed change in policy. In order to facilitate input by non-industry commenters, the agency may consider using a program such as "Regulation Room," a service developed by Professor Cynthia Farina of Cornell Law School, which provides a comprehensible description of the proposed regulation and then identifies the types of information that public commenters might provide.[173] By actively soliciting input from stakeholders other than corporations and major industry players, agencies could both provide greater balance and ensure that they are acting on a more complete record when deciding upon petitions received.

In the process of granting and denying such petitions, agencies should view neither their own regulations nor existing cases of collaborative

171. 5 U.S.C. § 555(e).

172. Governmental decisionmakers have, in certain instances, sought input from groups that otherwise would enjoy scant representation. For instance, ACUS has recommended that agencies undertake special efforts "to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings." ADMIN. CONFERENCE OF THE U.S., Recommendation 68-5, 1 C.F.R. § 305.68-5 (1993). The European Commission solicits input from relevant stakeholder groups prior to issuing a regulation or directive (which are roughly analogous to legislative bills in the United States), though the participating entities tend to be relatively large, repeat players. PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW OF THE EUROPEAN UNION: RULEMAKING 79–80 (George A. Bermann et al. eds., 2008).

173. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 412–14 (2011).

governance between agencies and regulated parties as immutable; rather, agencies, regulated entities, and other stakeholders should periodically reassess the existing state of affairs and consider whether the balance between public and private enforcement should be readjusted. The use of petitions for rulemaking enables this sort of dynamism, creating an incentive for affected entities to lobby for regulatory changes. Agencies, in turn, will have an incentive to analyze such petitions in good faith, for increased reliance upon more collaborative models can preserve agency resources. Finally, though they would generally not be in a position to propose an alternative regulatory model, the expanded use of rulemaking petitions may encourage public interest organizations to petition agencies to enhance existing protections or even undertake new regulations in previously under-regulated or unregulated areas, enabling a more complete dialogue on the appropriate level of regulation.

Moreover, by increasingly recognizing adherence to certain privately developed standards or certification of compliance by private entities, agencies can implement a type of regulatory experimentation that would allow empirical comparison of alternative approaches to determine the optimal arrangement.[174] Professor Michael Greenstone has advocated this approach in regulatory policy more generally, proposing that "[i]f possible, regulations should be launched on a small scale before being applied to a large population."[175] By doing so, agencies can avoid the difficulty of constructing a counterfactual scenario to compare the status quo to a hypothetical alternative: agencies can directly compare one state of affairs to another and determine which is preferable.[176] In order to preserve this flexibility, agencies might recognize privately developed standards or certification regimes as equivalent to prevailing regulations on a provisional basis, enabling the agency to summarily rescind the recognition of equivalence in the event that evidence later emerges showing that the privately driven alternative does not provide equal or superior levels of public protection.[177] If, on the other hand, a private standard or inspection

174. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

175. Greenstone, *supra* note 81, at 118.

176. *See id.* at 116.

177. So long as the agency clearly indicates in the recognition of equivalence that it reserves the right to rescind the recognition at any time and for any reason, entities complying with the alternative regulatory regime would lack any property interest in the prevailing state of affairs that would serve as the basis of a due process claim. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); *see also* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005).

program proves far superior to the agency's original system, the agency may consider adopting the private regime as official policy. This alternative might entail incorporating privately developed standards by reference into agency regulations or abandoning agency-driven inspection in favor of self-auditing or third-party certification. In short, the agency need not immediately select between a government-centered or completely privatized regime but instead can experiment with differing combinations of both until an optimal system is discovered.

(3) Reviewing Courts: The case law addressing appeals of agency dispositions of petitions for rulemaking has been somewhat vague concerning the standard of review that courts will apply. In *Massachusetts v. EPA*,[178] the Supreme Court held that an agency's disposition of a petition for rulemaking is subject to judicial review, unlike mere refusal to initiate enforcement proceedings, which is generally deemed to be exempt from review.[179] Nevertheless, the Court asserted that any judicial review of "[r]efusals to promulgate rules" is "'extremely limited' and 'highly deferential.'"[180] The Court then proceeded to analyze EPA's purported justification for refusing to initiate a rulemaking aimed at regulating greenhouse gases and concluded that EPA's explanation was inadequate,[181] but it did not opine at any length on the precise level of deference courts must accord agencies' determinations.

Traditionally, commentators have contended that courts are far more deferential to agency inaction than to agency action.[182] This distinction is arguably justified by the language of the APA: § 706(1) rather tersely provides for judicial review to "compel agency action unlawfully withheld or unreasonably delayed," whereas § 706(2), which deals with judicial review of affirmative agency action, enumerates a series of grounds upon which courts may set aside agency decisions.[183] Denial of a petition for rulemaking straddles the action/inaction divide, seeing as one could characterize denial of such a petition as a failure to act or as an affirmative decision to reject the petition. Professor Eric Biber contends that the focus upon the action/inaction dichotomy is largely unproductive, noting that

178. 549 U.S. 497 (2007).

179. *Id.* at 527–28.

180. *Id.* (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)); *see also* Livermore & Revesz, *supra* note 138, at 1382 ("[C]ourts overturn an agency denial or petition for rulemaking only in rare and compelling circumstances.").

181. *Massachusetts*, 549 U.S. at 527–35.

182. *See, e.g.*, Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 466 (2008).

183. 5 U.S.C. § 706 (2012).

courts generally tender greater deference to decisions involving the allocation of agency resources, regardless of whether the predicate decision can be characterized as an affirmative act or a failure to act.[184] Thus, to the extent a rulemaking petition calls upon an agency to undertake an activity that would require substantial reallocation of agency resources—e.g., requesting that the agency intercede in a heretofore unregulated segment of the economy or abandon existing rules applicable to an area subject to longstanding regulation—courts should show a high degree of deference to the agency's ultimate determination.

At the same time, courts should not merely rubber stamp agency denials of rulemaking petitions. As Professors Biber and Brosi have demonstrated, such petitions are often as sophisticated as agency determinations in weighing the relevant factors and reaching defensible conclusions.[185] Moreover, the success of the present proposal would depend critically upon agencies' paying proper heed to high-quality rulemaking petitions: stakeholders will lack any incentive to participate in the process unless they believe that the agency will seriously consider their submissions.[186]

In this light, reviewing courts may wish to take various factors into account when reviewing agency dispositions of rulemaking petitions proposing collaborative alternatives to existing regulations. Although articulating the precise standard of review which courts should apply is beyond the scope of this Article, it is nonetheless informative to outline some of the considerations that may bear upon the analysis. In particular, rather than applying a monolithic standard to reviewing petition denials, agencies might consider a sliding scale of deference, via a standard loosely analogous to that applied to agency statutory interpretations under so-called *Skidmore* deference.[187] Evidence that the petition for rulemaking would interfere significantly with agency resource allocation decisions would militate strongly in favor of tendering a high degree of deference to the agency's determination,[188] for courts should generally not second guess administrative agencies in determining how best to accomplish their

184. Biber, *supra* note 182, at 467–69. Of course, courts may nevertheless typically show greater deference to decisions generally characterized as a failure to act insofar as they are more likely to reflect important resource allocation decisions. *Id.* at 478.

185. Biber & Brosi, *supra* note 129, at 324–25.

186. Luneburg, *supra* note 129, at 55.

187. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (reaffirming the *Skidmore* standard for cases wherein Congress did not necessarily intend to delegate interpretive authority to the agency such that *Chevron* deference applies).

188. Biber, *supra* note 182, at 467–68 ("An agency's decision about how to allocate its resources among competing priorities is at the core of the policymaking discretion that the executive branch of government and any administrative agency must have.").

statutory mandates.[189] By contrast, evidence showing that the petitioning entity conducted a sophisticated analysis of the regulatory tradeoffs and submitted a well-informed proposal offering a viable alternative would weigh in favor of somewhat diminished deference if the agency failed to grapple with the arguments raised and to provide a justifiable explanation for denying the petition. This would also have the salutary effect of providing an incentive for regulated entities to develop well researched, nuanced petitions.

D. Achieving "Smarter" Regulation via Retrospective Review

As explored in Part I, the modern pattern of regulation roughly follows a crisis and response model: governments adopt a laissez-faire approach until a highly visible calamity occurs, at which point the government intervenes to correct the underlying market failure that precipitated the immediate crisis.[190] The stringency of the governmental response can vary. At one extreme, governments may nationalize certain industries;[191] at the other, governments may simply create economic incentives to persuade market players to undertake desirable conduct, such as by offering tax credits for investing in technology designed to curtail carbon emissions.[192] The government generally does not, however, systematically analyze all existing risks and closely tailor the stringency of regulations to correspond to the gravity of each individual risk.

Similarly, the government has not devised any comprehensive program for selecting between traditional, agency-driven regulation and newer alternatives hailed in the collaborative governance literature. Absent any galvanizing event calling attention to a high profile regulatory failure, the combination of regulatory inertia and the endowment effect, with citizens reluctant to upset the prevailing regime,[193] will generally prevent any major

189. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

190. *See, e.g.*, Karl S. Okamoto, Essay, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183, 186 (2009); Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 173.

191. Following the failures in airport security screening that led to the tragedy of September 11, 2001, the federal government did precisely that, centralizing all security functions, which had traditionally been performed by private contractors, in the newly constituted Transportation Security Administration. 49 U.S.C. § 44901 (2012); *see also* Huntleigh USA Corp. v. United States, 525 F.3d 1370, 1374 (Fed. Cir. 2008).

192. Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 582 (1979).

193. KAHNEMAN, *supra* note 28, at 289–99.

reassessment of the existing regulatory framework. Though public-private partnerships have become an increasingly important component of federal regulation,[194] one can reasonably expect underutilization of such alternatives to agency-driven regulation merely because they are novel and command-and-control programs are well entrenched. Further, in the event of a major market failure, the public pressure upon the agency to react is overwhelming, and it will often erect relatively restrictive regulations to show a strong commitment to preventing any repeat occurrence.

Of course, the countervailing pressure to eliminate or repeal existing regulations is not nonexistent, and lobbyists will frequently press Congress or agencies to repeal statutes or regulations when a regulatory failure has not arisen for some time, sometimes precisely because the law has minimized the background risk. The repeal of the Glass-Steagall Act is a striking illustration of this phenomenon.[195] Nevertheless, neither Congress nor administrative agencies have adopted a system for "right sizing" regulations in light of new information concerning systemic risks, instead relying on the rather blunt solution of adopting elaborate, agency-driven regulatory schemes or repealing them wholesale. Retrospective review is designed to solve this dilemma, erecting a formal process for periodically reassessing regulations to ensure that they remain viable in light of additional evidence concerning the effectiveness of existing regulations in protecting against known risks. The existing mechanisms of retrospective review and most of the proposed alternatives rely almost entirely upon governmental actors to ascertain the appropriate level of regulatory interference. The system proposed in this Article would supplement the existing regime by bringing the expertise of the private sector to bear, calling upon regulated entities to develop alternatives to traditional, top-down agency regulation and to present those proposals to agencies through the vehicle of rulemaking petitions. Agencies would retain the discretion to decide upon the optimal course of action, but they would be legally bound to consider such petitions and to explain their ultimate disposition thereof.[196] Over time, one would expect that iterative interactions between agencies and private groups would ultimately lead to a level of regulatory stringency that is more proportional to the underlying risks and that minimizes the burden on regulated entities while still ensuring a high standard of regulatory protection.

Assessing the success of such an enterprise would require

194. *See, e.g.*, Bingham, *supra* note 20, at 300–01; Freeman, *supra* note 20, at 6; Lobel, *supra* note 20, at 343–44; Salamon, *supra* note 20, at 1611–12.

195. *See* POZEN, *supra* note 21, at 138.

196. 5 U.S.C. § 555(b), (e) (2012).

experimentation and empirical analysis, seeing as agencies have not traditionally alleviated regulatory burdens by acceding to greater self-policing by private sector entities, but related studies and broader principles of economic theory provide reason for optimism. As Professors Biber and Brosi found in their limited study of species listing under the Endangered Species Act, input by private sector entities can actually improve the rulemaking process.[197] There is reason to believe these results are generalizable. The work of F.A. Hayek reinforces the notion that large, decentralized groups of citizens can make decisions that are objectively superior to those reached by small groups of government experts. Hayek observes:

> [I]t is the very complexity of the division of labor under modern conditions which makes competition the only method by which such coordination can be adequately brought about. There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a synoptic view of them that decentralization becomes imperative.[198]

Though any individual will generally lack the expertise required to reach a well-informed conclusion on any given problem, under the Condorcet jury theorem, so long as participating individuals are even slightly more likely to reach an accurate result than random probability would dictate, the collective response will converge on the correct solution with a sufficiently large number of participants.[199] This principle explains the "wisdom of crowds," the counterintuitive phenomenon by which a large group of non-experts can reach a surprisingly accurate decision on exceedingly complex problems.[200] Regulatory issues do not necessarily admit of a correct solution, but a process that aggregates the expertise of a large number of participants is likely to reach a more viable result than is a process that vests all decisionmaking power in a small coterie of bureaucrats, no matter how much expertise the latter may possess. Thus,

197. Biber & Brosi, *supra* note 129, at 379.

198. F.A. HAYEK, 1 THE ROAD TO SERFDOM 95 (Bruce Caldwell ed., 2007).

199. Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, *in* 3 JEAN-JACQUES ROUSSEAU: CRITICAL ASSESSMENTS OF LEADING POLITICAL PHILOSOPHERS 264, 268 (John T. Scott ed., 2006).

200. JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMICS, SOCIETIES, AND NATIONS xiii (2004) ("[U]nder the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them."); *see also* DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 15 (2008); SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 41 (2007).

privately developed standards and enforcement mechanisms, which are informed by large numbers of participants in the affected markets, are certainly worthy of agency consideration, and the proposed use of petitions for rulemaking would ensure that they are considered.

Calling upon private-sector entities to devise regulatory alternatives *not only* promotes more nuanced regulation *but also* frees up agency resources to concentrate on other, underappreciated risks. The tendency of agencies to overreact to high-profile regulatory oversights, as chronicled in Part I, not only results in onerous regulation of affected businesses but also diverts limited agency resources away from problems that may not yet have resulted in a major catastrophe. Thus, the proposed use of rulemaking petitions should not be perceived as inherently deregulatory. Indeed, petitioners seeking recognition of a private sector alternative would be tasked with demonstrating that the proposal, if implemented, would prove equally protective of the public welfare as any existing regulation it supplements or displaces, and agencies would seek input from public interest groups and other representatives of the general welfare in any rulemaking undertaken in response. To the extent that this process conserves resources that would otherwise be allocated to devising or enforcing governmentally-driven regulations, those resources can be redirected to identifying underappreciated risks and, ideally, adopting prophylactic regulations that prevent any potential crises. Moreover, public interest groups would be expected to take advantage of the expanded use of rulemaking petitions to lobby for greater protections in under- or unregulated areas. In short, the proposed system should enhance agencies' ability to leverage the expertise residing in all sectors of the general public and thereby lead to "smarter" regulations that more rationally respond to both widely appreciated and less salient risks.

IV. POTENTIAL OBJECTIONS AND RESPONSES

Although the proposed expansion of rulemaking petitions would not require any revision in existing law, other than perhaps clarifying the level of scrutiny applied to petition denials on judicial review, it nevertheless represents a significant departure from the existing state of affairs and therefore may give rise to a number of objections concerning its normative value and practicability. Three of the more salient potential objections include the following: (a) the proposal improperly delegates lawmaking and enforcement power to private parties, effectively outsourcing critical governmental functions to entities that have a vested interest in weakening governmental regulation designed to enhance public welfare; (b) industry groups would comprise the dominant influence in agencies' response to rulemaking petitions, crowding out input from public interest groups or the

broader public; and (c) permitting businesses to devise standards and establish compliance certification programs will tend to favor large corporations at the expense of smaller companies, as larger firms will have more money and time to dedicate to such endeavors. Each of these concerns merits careful consideration, and the remainder of this Part will address them in turn.

A. Improper Delegation of Governmental Functions

Perhaps the most significant trend in government in the last several decades is the increasing privatization of functions once performed exclusively or primarily by governmental entities. Research by Professor Paul Light has shown that the number of jobs arising from government contracts expanded by over 2.5 million in the period from 1990 to 2005, an increase of roughly 50%.[201] Over the same period, the number of civil servants decreased by 366,000, a decline of 16%.[202] This development has raised concerns that the federal bureaucracy is effectively abandoning its role as a corps of public servants dedicated to promoting the public good. As Paul Verkuil has forcefully argued, "[t]he government exercises sovereign powers. When those powers are delegated to outsiders, the capacity to govern is undermined."[203]

Any expanded use of collaborative governance mechanisms, including privately developed standards and enforcement procedures, similarly raises concerns regarding increased privatization. Such concerns implicate broader normative questions concerning the proper role of government in society.[204] Indeed, delegating the power to draft standards or to enforce a

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201. PAUL C. LIGHT, A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT 197 (2008).

202. *Id.*

203. PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 1 (2007).

204. Though governmental agencies can capture significant efficiencies by reliance upon outside entities in areas wherein the private sector enjoys a comparative advantage, EGGERS & MACMILLAN, *supra* note 46, at 3, the risks of excessive privatization are non-trivial and threaten the underlying stability of the state. In *The Origins of Political Order*, Francis Fukuyama explores the trajectories of major world civilizations from the Neolithic era to the period immediately preceding the French Revolution. FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION (2011). In the sections dealing with the ancien régime in France and the Spanish monarchy in the centuries following the European discovery of the New World, Fukuyama chronicles the rise of rent-seeking interests in the nobility, clergy, bourgeoisie, and other privileged segments of society. *Id.* at 336–54. Early modern monarchs of France and Spain typically funded their incessant wars and lavish court lifestyle by selling off various governmental functions and

regulatory program comes perilously close to violating the prohibition on private entities performing inherently governmental functions.[205] Though this system of public-private collaboration has become quite widespread,[206] one should pause before proposing reforms that would expand its scope and prevalence.

Nevertheless, so long as one accepts a significant role for public-private collaboration, as has increasingly become a fait accompli, then one should ensure that the balance between traditional, purely government driven regulations and newer collaborative models is optimized. As explored in Part I, the existing regulatory pastiche does not represent a comprehensive governmental analysis of all known risks followed by a series of determinations concerning whether bureaucratic agencies or private sector entities are better positioned to minimize those risks in the most cost-effective manner possible. Instead, it represents an ongoing evolution of the crisis and response system of governmental intervention, whereby the government declines to act until a major calamity forces its hand, at which point it often overregulates.

The proposed use of petitions for rulemaking should therefore be seen not as a vehicle for enhanced privatization but as a catalyst that removes some of the inertial barriers to achieving a more appropriate balance between traditional command-and-control regulation and collaborative governance. Importantly, the sine qua non of all successful petitions will be a credible showing that a proposed regulatory alternative reliant upon private standard-setting or enforcement will prove equally protective of the public interest as the system it supplements or replaces. When conducted properly, such public-private partnerships create massive efficiencies insofar

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exemptions to wealthy noblemen and capitalists; this progressively weakened the monarchies over time, forcing them to levy taxes on those least able to pay and ultimately leading to earth-shattering cataclysm in France and a gradual slide from great power status in Spain. *Id.* at 339, 353–54. Excessive centralization poses equally grave risks, *id.* at 312–13 (exploring the history of China and concluding that, precisely because it preceded all other nations in forming a modern state, China never developed robust institutions of rule of law or representative government and that the emperor and bureaucracy therefore dominated all aspects of life), yet this history provides a cautionary tale for those who would advocate progressive privatization of state functions.

205. 48 C.F.R. § 7.503(c)(5) (2013) (barring private entities from "determin[ing] . . . agency policy, such as determining the content and application of regulations"). It is legally permissible for agencies to integrate such privately developed standards into federal law inasmuch as any such incorporation by reference requires a separate rulemaking process during which the agency has complete discretion in determining whether to adopt the standard at issue in whole or in part. Bremer, *supra* note 116, at 183–84. Nevertheless, the mere fact that industry groups are responsible for drafting standards that are frequently integrated directly into federal law without any alteration may raise some concerns.

206. *See supra* note 20 and accompanying text.

as they allow the government to leverage expertise developed by the private sector,[207] permitting private entities to participate in designing policies that minimally interfere with free enterprise while still advancing the public good. Moreover, by freeing agency resources that would otherwise be expended engaging in work that already has been performed or could be more effectively accomplished by private sector entities, the proposal would advance efforts of agencies to address risks that may go overlooked under the existing regime. Thus, the suggested expansion of rulemaking petitions would not necessarily represent a move toward greater privatization but rather would encourage a more contemplative, circumspect analysis of the proper roles of the public and private sectors.

B. The Risk of Industry Dominance

As George Stigler and countless other legal and economic scholars have documented over the years, when administrative agencies create avenues for public input, corporations and other business-affiliated groups tend to dominate the process.[208] Commentators have emphasized a variety of causes for this phenomenon. Many have referred to "iron triangles," close relationships that develop between regulated industries, administrative agencies, and congressional committees with jurisdiction over the agencies.[209] The various key players not only develop connections with their counterparts but often move from one sector to another, which can be particularly problematic when government officials seek to curry favor with regulated industries offering lucrative employment opportunities at the end of their term in office.[210] Professor Wendy Wagner has described the problem of "filter failure": regulated parties submit far more information to agencies than do public interest organizations or other non-corporate groups and thereby dominate the terms of the debate.[211] Regardless of the

207. As Emily Bremer's research into privately developed standards used by the Pipeline and Hazardous Materials Safety Administration has shown, even for a relatively small agency, the savings arising from the use of such standards run into the tens of millions of dollars. *Emily S. Bremer, On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279 (2015).

208. Stigler, *supra* note 100, at 3 ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.").

209. Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 382 (1986).

210. *See, e.g.*, Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CALIF. L. REV. 279, 294 (2000); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2058 (2006); Wagner, *supra* note 161, at 1336–37.

211. Wagner, *supra* note 161, at 1324–25 ("[B]ecause rulemaking processes are by their very nature blind to the risks of excessive information, committed as they are to the flow of information and expansive participation, a new phenomenon—called 'information

precise mechanism involved, most would likely agree that industry representatives are more favorably positioned than public interest groups to influence agency decisionmaking processes.

Thus, by expanding the use of rulemaking petitions, agencies arguably would open another nominally neutral channel for citizen participation that, in practice, may come to be dominated by industry. It would be Pollyannaish to assume that public interest groups will achieve a level of participation commensurate with that of business-affiliated organizations, particularly as the benefits to business from regulatory relief are concentrated whereas the benefits to the public from regulatory protections are diffuse.[212] Nevertheless, the proposal would be less susceptible to industry capture than existing mechanisms for challenging agency action. Unlike most methods of citizen participation in agency decisionmaking, which merely call upon stakeholders to highlight flaws in the agency's plan or proffer additional information for the agency to consider, the proposal would actually require petitioners to outline a viable alternative to existing regulations that would prove equally protective of the overall public welfare.

Indeed, under the existing regime, business-affiliated groups can easily forestall regulatory interference merely by availing themselves of the various public participation mechanisms and endlessly caviling the proposal ultimately adopted through a series of judicial challenges. Though industry groups may not ultimately prevail on the merits, they can prolong the regulatory process by exploiting the various procedural hurdles involved in informal rulemaking.[213] The proposed use of petitions for rulemaking offers a more constructive alternative that could prove attractive to both regulated entities and agencies. If industry groups possessed a viable mechanism for seeking to replace overly burdensome regulatory regimes with more streamlined alternatives, many would likely devote their efforts to devising such alternatives to proposed and existing regulations rather than simply raising various objections that may succeed in delaying, but not preventing, such regulations. For their part, agencies might adopt a less defensive posture, perceiving rulemaking petitions not as an interference with their preferred regulatory approaches but as an invaluable source of

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capture'—is taking hold.") (emphasis omitted).

212. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1518–20 (1987).

213. If pending administrative law reform legislation supported by industry groups such as the Regulations from the Executive in Need of Scrutiny Act, H.R. 367, 113th Cong. (2013), or the Regulatory Accountability Act, H.R. 2122, 113th Cong. (2013), ultimately passes, such groups will undoubtedly invoke the additional procedural protections and protract the process even further.

expertise that facilitates optimal allocation of regulatory resources.

Finally, though existing dynamics involving robust participation by industry groups and anemic, sporadic involvement by public interest organizations[214] are likely to persist, the proposal would preserve significant opportunities for the latter category of groups to provide input. Indeed, much of the disadvantage suffered by public interest organizations under the current regime relates to the exceedingly large number of rulemakings and the specialized expertise required to participate meaningfully in the process, forcing them to prioritize only a handful of high profile regulations.[215] Rulemaking petitions arise much less frequently,[216] and though the number of petitions would likely increase if the changes proposed in this Article were to materialize, public interest groups may well enjoy a more significant opportunity to participate in rulemakings arising from those petitions, particularly if the rulemaking agency actively solicits their input. Furthermore, retrospective review is not a one way ratchet, and it can spark an ongoing dialogue between agencies, industry groups, and public interest organizations concerning the appropriate level of regulation. If the agency recognizes a privately developed standard or a certification regime as providing equivalent protection to existing regulations, yet evidence later emerges showing that the alternative adopted provides weaker public protections, public interest groups are free to apprise the agency of this fact and seek cancellation of the equivalence determination and a reversion to the original agency-designed regime. Public interest organizations are also free to avail themselves of rulemaking petitions to seek stronger protections or new regulations in previously unregulated areas.

C. Protecting Small Industry Players

Private standard-setting creates substantial economic benefits by ensuring a level of uniformity and quality consistency in a given market, but it also implicates the risk of large businesses dominating the process and promoting standards that provide a competitive advantage vis-à-vis smaller market participants.[217] Indeed, though businesses' collaboration with a

214. WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 50 (1992).

215. *See* Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1746 (2012) (highlighting public interest groups' decision to appeal only a handful of disfavored rules for reasons of limited resources).

216. Luneburg, *supra* note 129, at 58.

217. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 34

standard-setting organization to devise industry-wide rules does not inherently comprise unlawful collusion in violation of the Sherman Act,[218] courts have "found antitrust liability in circumstances involving the manipulation of the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals." [219] Regardless of the potential antitrust implications, a process by which private sector entities decide upon the standards by which they are governed or craft enforcement mechanisms for ensuring compliance with such standards or agency-promulgated regulations will generally be dominated by large industry players, which are more likely to have both the resources to dedicate to the process and the clout to influence the outcome. Thus, to the extent that the proposal facilitates greater use of such private sector standard-setting and enforcement mechanisms, it may prove anticompetitive and otherwise disadvantageous to small market participants.

Such anticompetitive concerns cannot be summarily dismissed, yet they are hardly unique to the standard-setting and private enforcement context. As a general matter, large market players have an incentive to advocate for regulations or standards that will promote increased concentration in the relevant market by rendering participation overly costly for smaller enterprises.[220] Hence, large market participants will seek to erect such market barriers by any means available. In the standard-setting context, they will pressure standard-developing organizations to craft standards that will be overly burdensome to smaller participants. In the regulatory context, they will generally attempt to mask their protectionist aims by

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(2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf [hereinafter Promoting Innovation] ("[A]greement among competitors about which standard is best suited for them replaces consumer choice and the competition that otherwise would have occurred in the market to make their product the consumer-chosen standard.").

218. AM. BAR ASS'N, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING 14 (2004) ("Some standard-setting activities may be per se unlawful, but most are not. . . . [S]ince it is well recognized that legitimate standard setting is not only procompetitive but necessary for the proper functioning of modern economies, antitrust law standards/analyses must be carefully crafted to limit liability only to those standards and standard-setting activities in which the anticompetitive effects outweigh the procompetitive effects.").

219. Promoting Innovation, *supra* note 217, at 34–35.

220. *See* K. William Watson & Sallie James, *Regulatory Protectionism: A Hidden Threat to Free Trade*, 723 POL'Y ANALYSIS, No. 723, at 4 (2013) (discussing a similar problem in the international trade context, noting that domestic firms favor disparate product standards as a means of foreclosing market participation by foreign competitors and increasing market concentration). Of course, any regulation or standard will impose compliance costs on all businesses regardless of size, but larger businesses will be more capable of absorbing the expenses—due to greater economies of scale in their operations—or passing them along to consumers.

seeking common cause with more noble-minded organizations that promote strengthened regulations for purposes of enhancing the public welfare.[221]

Thus, promoting more systematic consideration of private sector driven alternatives to traditional regulation is not inherently advantageous to large market players: they will seek to insulate themselves from competition regardless of the identity of the regulating authority. Rather, the relevant question is whether large market participants are more likely to capture a collaborative process or a governmentally driven regulatory system. Producing a definitive answer would require empirical analysis of the two systems, ideally by arranging a controlled experiment whereby one compares market concentration in an area characterized by public-private collaboration to that in a nearly identical area dominated by traditional command-and-control regulations. Such an experiment is far beyond the scope of this Article, but there is reason to suspect that smaller industry players may possess more meaningful opportunities to participate in the former process. For instance, in the private standard-setting context, Circular A-119 requires that a "voluntary consensus standards body," promote "openness, balance of interest, and due process."[222] This stands in contrast to the public comment process involved in informal rulemaking. Although the APA requires agencies to consider the "relevant matter presented" in such comments,[223] the agency need only consider the comments it actually receives and is under no obligation to seek out comments from traditionally underrepresented groups to preserve informational balance.[224]

On the other hand, standard-developing organizations and third-party certifiers are businesses, and they rely upon industry players to fund their

221. *Id.* at 5. This dynamic is often referred to as the "bootleggers and Baptists" phenomenon, in honor of the strange alliance that emerged between illicit alcohol manufacturers (who sought to preserve a black market) and religious teetotalers (who sought to promote a more virtuous society) during prohibition. *Id.* As K. William Watson and Sallie James observe, "The model could just as well be called 'progressives and protectionists,' as it aptly describes the political dynamic in which prominent standard bearers for left-liberal causes to improve welfare through government intervention ride on the shoulders of inefficient, rent-seeking industries." *Id.*

222. OMB Circular A-119; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8554 (Fed. 19, 1998) (alternation from original).

223. 5 U.S.C. § 553(c) (2012).

224. *See* Wagner, *supra* note 161, at 1399 ("Information capture represents the dark side of a transparent, equal, and open system of government: it enables participants to legally undercut one another and manipulate the agency with elaborate information-based strategies.").

operations. To the extent large market participants constitute a more substantial source of funding, they may be more favorably positioned to influence the process.[225] By contrast, a federal agency, notwithstanding its susceptibility to capture by regulated industries, is not beholden to private sector interests for funding and can therefore theoretically act purely in the public interest. Thus, in implementing the proposed expansion of rulemaking petitions, agencies may wish to adopt a number of additional protections to ensure that the perspective of small businesses is reflected in the process. The simplest means of doing so would likely be to require that any rulemaking undertaken in response to a private petition consider the views of small market participants by formally seeking out their comments and perhaps even subsidizing their participation in the process. Alternatively, the agency might require some formal analysis of the impact of a proposed standard or certification process on small business in any associated rulemaking petition. Indeed, the federal government already requires agencies to assess the impacts of their proposed regulations on small entities under the aegis of the RFA,[226] and the petitioning organizations could be tasked with conducting a similar analysis.

In short, the concern that large market participants will come to dominate any process that is driven by private sector entities, though not trivial, is perhaps somewhat overwrought, given that such entities also enjoy significant advantages under an agency-driven regulatory regime. The question of whether large industry concerns would exert greater dominance over smaller competitors under the proposed system is an empirical one that is outside the scope of the present Article, but a merely theoretical analysis suggests that small industry participants may actually enjoy enhanced opportunities for participation in a private sector oriented system. Nevertheless, agencies should consider instituting explicit protections to ensure that smaller players have a voice in the process, thereby diminishing the likelihood that the proposed system will devolve into a coalition of rent-seeking industries colluding to insulate themselves from competition and

225. In the standards context, whether large industry players will possess an inherent advantage vis-à-vis their smaller counterparts will largely depend on the business model of the standard-developing organization. If the standard is relatively inexpensive and is sold for a flat fee, small businesses likely will not suffer a competitive disadvantage insofar as the standard-developing organization will seek a standard that will obtain wide acceptance throughout the relevant industry. If, by contrast, the standard is relatively costly and is purchased predominantly by large market participants, major players will enjoy a competitive advantage in influencing the process.

226. 5 U.S.C. § 603(a) (requiring agencies to conduct a "regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities," for rules that may impact such entities).

thereby stifling the "creative destruction" that constitutes the engine of capitalist economic expansion.[227]

CONCLUSION

Beginning in the Progressive Era of the late 19th century, the U.S. economy transitioned from a period of virtually unbridled capitalism fueled by the expansion of the frontier and the rise of industrialism to an era of increasing governmental regulation designed to curb the excesses of laissez-faire and to correct perceived failures of the free market.[228] The process, however, was not one of uniform governmental expansion but rather one of punctuated equilibrium, whereby the level of overall regulation remained roughly consistent (or even slowly diminished) until a major crisis calling for a governmental response emerged. In the course of a century or more, the corpus of regulations expanded to its current turgid state, though brief periods of modest, somewhat haphazard deregulation, such as the "Reagan Revolution" of the 1980s, interrupted the pattern at certain points.

Retrospective review represents a concerted effort to reflect upon the substantial body of regulations that has accreted over the decades as this process has played out, separating regulations that merit preservation from those that have become anachronistic and should be streamlined or eliminated. Most regulations serve a useful purpose, yet changed market conditions and other unforeseen circumstances have called into question the continuing justifiability of others. Though governmental officials and scholars alike recognize the need for such a system for reassessing current regulations, existing proposals have unfortunately proven somewhat ineffective. The system of self-review erected by EOs 13,563 and 13,610, the RFA, and other agency-specific statutes has been inadequate insofar as agencies lack sufficient incentives and resources to reconsider their previous decisions and implement modifications as appropriate. Proposals for an

227. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 183 (2012) ("Technological innovation makes human societies prosperous, but also involves the replacement of the old with the new, and the destruction of economic privileges and political power of certain people."); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 82–83 (Harper 3d ed. 1950) ("Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary. . . . The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers' goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.").

228. JAMES C. BENNETT & MICHAEL J. LOTUS, AMERICA 3.0: REBOOTING AMERICAN PROSPERITY IN THE 21ST CENTURY—WHY AMERICA'S GREATEST DAYS ARE YET TO COME 150–74 (2013).

independent agency tasked with conducting such reviews are more promising, but such a body would likely lack the nuanced familiarity with individual regulations that regulatory agencies possess.

This Article proposes another option designed to supplement the existing framework: expanding the use of petitions for rulemaking to identify public-private alternatives to governmentally driven rule-writing and enforcement. The proposal both creates a strong impetus for reform by enhancing the participation of regulated entities and erects a system by which government can leverage the expertise that resides in the private sector. Of course, expanding participation by private sector entities raises the risk of industry capture, and the proposal would include explicit protections designed to ensure that regulatory protections are not diluted and that large businesses do not dominate the process. Such a system would not only alleviate regulatory burdens but also free agency resources to focus on previously underappreciated risks. Ideally, by preserving an ongoing dialogue between agencies, regulated entities, public interest organizations, and the broader citizenry, the proposal would represent at least a modest step away from the crisis and response model toward a regime that more comprehensively assesses existing risks; determines the optimal mechanism for addressing those risks, considering both public and private sector alternatives; and then periodically reassesses the solutions adopted to measure ongoing effectiveness and institute reforms as needed. As it evolves over time, such a proposal could move the national discussion beyond the hackneyed, irreconcilable debates involving allegations of a failed regulatory state on the left and regulatory overreach on the right and create a more participatory model by which government agencies and private stakeholders collaborate to preserve robust public welfare protections while minimizing the associated burdens on regulated parties.

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