ARTICLES

HARNESSING INDUSTRY INFLUENCE

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An essential challenge of the regulatory state is that industry exerts influence that pulls policy in its direction. Observers have long pointed to "captured" regulation that harms the public interest and called for limiting industry influence. The underlying ideal in these calls is uninfluenced regulation that mirrors the public's perspective. However, this aspiration neglects the public's benefit from the information that an industry generates as it influences regulation, as well as the incentive that an industry's benefit from influencing regulation provides it to incur the costs of producing such information. Thus, the standard strategy of insulating regulation against influence creates a tradeoff between closer conformity to the public's perspective and better information.

This Article introduces the general strategy of harnessing industry influence as an alternative to insulation that alleviates this tradeoff. Harnessing entails making regulation preliminarily biased against *industry, with the aim of ultimately unbiased policy as industry influences policy to cancel out the initial bias. With this class of techniques, industry influence is used both to pull regulation in the public's direction and to stimulate information production. Case studies involving the Commodity Futures Trading Commission, the Securities and Exchange Commission, and Hazardous and Solid Waste Amendments of 1984 support the underlying logic of harnessing—moving the initial position of regulation away from industry in these cases yielded more industry information and final policy further from industry's preferences. Further analysis of two specific*

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remedies based on these examples—anti-industry executive appointments and statutory penalty default provisions—suggests that harnessing is workable and politically feasible. The value of harnessing warrants not only reorienting research toward solutions in this category, but also separating industry influence and social harm in the analysis of the problem, rather than conflating them in the concept of "capture."

TABLE OF CONTENTS

INTRODUCTION

One of the enduring challenges of the regulatory state is industry influence[1]—industries often pull regulation in their direction through a variety of means,[2] including contacts with regulators,[3] the revolving door,[4] and the threat of judicial review.[5] This influence can detract from the ideal of regulation serving the public interest,[6] leading to a result commonly described as "capture."[7] Observers have argued that such influence has

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1. The earliest political science study in the contemporary study of industry influence is Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952). *See* William J. Novak, *A Revisionist History of Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE 25, 26 (Daniel Carpenter & David A. Moss eds., 2014) [hereinafter PREVENTING REGULATORY CAPTURE]. Sometimes, though, the work recognized as first in this discipline is MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT. L. REV. 1039, 1060 (1997). In economics, the seminal work is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); *see also, e.g.*, Novak, *supra* note 1, at 26.

2. Pulling decisionmaking in an industry's direction is not the same as causing regulators to select a policy that seems to favor the industry but in fact reflects the public's perspective. *See* Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORN. J.L. & PUB. POL'Y 175, 177 (2011) ("Just because the result is supported by a powerful and organized group does not necessarily imply that it is wrong."). Also, industry influence, as defined here, entails a policy shift; it is not simply input in the regulatory process, *cf. id.* at 189 (characterizing influence in terms of industry input), nor the cultivation of close relationships with regulators, *cf.* Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570 (2012) (defining "capture" as such).

3. *See, e.g.*, BERNSTEIN, *supra* note 1, at 156–60; Reiss, *supra* note 2, at 570. Industries have a variety of avenues for trying to communicate and persuade regulators of their views. Formal channels include participating in advisory committees, submitting comments during rulemaking, and testifying at agency hearings. *See, e.g.*, ANTHONY J. NOWNES, INTEREST GROUPS IN AMERICAN POLITICS 108–10, 113 (2d ed. 2013). Informal channels include personal meetings and social gatherings. *See, e.g.*, *id.* at 108, 121–22.

4. *See, e.g.*, RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES 47–59 (2009); Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1644 (2011).

5. *See, e.g.*, BERNSTEIN, *supra* note 1, at 96–97; Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1333–34 (2010).

6. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 34–35 (1982) (describing public-oriented rationales for regulation); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 304 (2008) (arguing "that, under certain circumstances, administrative agencies can and do vindicate the regulatory interests of 'a diversified mass of individuals'"). *But see* Stigler, *supra* note 1, at 3 ("As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.").

7. *See* Daniel Carpenter & David A. Moss, *Introduction*, *in* PREVENTING REGULATORY CAPTURE 1, 5 (Daniel Carpenter & David A. Moss eds., 2014) (referring to "dozens (if not hundreds) of claims being made about captured regulatory agencies"). For a critical survey

caused policy that seem to be biased toward industry at a number of agencies,[8] and that it has contributed to failures like the 2008 financial crisis and the 2010 Gulf of Mexico oil spill.[9] Based on these detrimental effects, studies on influence have stressed the need to insulate regulation against it and have devised various measures for doing so.[10]

Concerns about harmful industry influence are definitely warranted,[11] but the focus on insulation has obscured the nature of the harm by implying that it derives simply from some amount of influence. Industry influence only necessarily biases regulation if policy would otherwise mirror the public's perspective, as many works assume,[12] or reflect some pro-industry bias already.[13] If, apart from any influence, regulation would instead be biased *against* an industry, a given amount of influence could improve public educing this bias. This possibility points to cultivating a *preliminary anti-industry bias* as another option for addressing deleterious influence.[14]

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of the expansive capture literature, see Jessica Leight, *Public Choice: A Critical Reassessment*, *in* GOVERNMENT AND MARKETS 213, 230–38 (Edward J. Balleisen & David A. Moss eds., 2010).

8. *See*, *e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 65 (2010) (asserting capture of the Consumer Product Safety Commission (CPSC)); Baxter, *supra* note 2, at 181–82 (same for financial regulators); Susan Bisom-Rapp, *Puzzling Evidence from a Troubled Time: Rethinking State Promotion of Safe Work During the Bush Administration*, 14 EMP. RTS. & EMP. POL'Y J. 295, 296 (2010) (Occupational Safety and Health Administration); Amitai Etzioni, *The Capture Theory of Regulations—Revisited*, 46 SOC'Y 319, 321 (2009) (Food and Drug Administration (FDA)); Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 980 (2014) (U.S. Trade Representative (USTR)); Wagner, *supra* note 5, at 1344 (Environmental Protection Agency (EPA)).

9. *See* Carpenter & Moss, *supra* note 7, at 1; Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 221 (2012).

10. *See infra* Part I.B.1–B.2.

11. *See* Carpenter & Moss, *supra* note 7, at 4–5 (stating that "Capture is real and a genuine threat" despite "a lack of solid or thorough evidence" for many claims of capture).

12. *See infra* notes 57–60 and accompanying text.

13. *See* Daniel Carpenter, *Detecting and Measuring Capture*, *in* PREVENTING REGULATORY CAPTURE 57, 62 (Daniel Carpenter & David A. Moss eds., 2014) (discussing pro-industry bias apart from any industry influence). In this case, regulation that would be somewhat biased toward industry becomes more so than before.

14. The shift from observing that regulation would reflect an anti-industry bias apart from industry influence to creating such an anti-industry bias by design is not a trivial one. The same industry that strives to influence the regulatory process might inevitably influence the actors who structure the regulatory process to prevent this initial anti-industry bias. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 229–30 (2003) ("Large corporate interests have, through disproportionate ability to control and manipulate our exterior and interior situations, deeply captured our world."); *see also* Eric A. Posner &

Furthermore, insulation presents a risk of decreasing the amount of information that an industry produces during the policymaking process. Studies have readily recognized the value of industry information as a general matter,[15] but they have rarely observed that an industry produces more information if it can influence regulation.[16] Industry needs access to regulators in order to inform them, and the ability to influence regulation through various activities constitutes a benefit that incentivizes industry to generate costly information for and in these activities. For this reason, insulation can prevent or discourage information production. In contrast, the alternative to establishing a preliminary anti-industry bias entails neither of these adverse informational effects.

Overall, instituting an initial bias against industry may be more effective than insulation as a response to its influence. This institutional design harnesses influence in two ways: the public uses this influence to pull regulation in its direction, as well as in industry's direction, and to stimulate industry to acquire information. The potential outcome is unbiased regulation with more information production than is possible with insulation of regulation that has no preliminary anti-industry bias.

This Article introduces harnessing as a general strategy and illustrates how it enriches the set of possibilities for dealing with industry influence. As an initial matter, Part I shows how the idea of insulation has pervaded

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Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1744 (2013) (noting the danger of "positing nonideal motivations for purposes of diagnosis and then positing idealized motivations for purposes of prescription.").

However, it is not inconsistent to argue that elected leaders might overcome industrial influence of agency officials, even though these leaders themselves are susceptible to influence. First, apprehension about private interests distorting public policy has pervaded American history, *see* Novak, *supra* note 1, at 39–40, which belies the notion that society has been unaware of industry attempts to influence actors in all spheres of government. Moreover, an analysis of the political feasibility of this Article's method for addressing influence suggests that elected officials can succeed at resisting industrial influence in a way that agency officials might not. *See infra* notes 292–299, 320–324 and accompanying text.

15. *See infra* notes 112–117 and accompanying text.

16. One study points to this incentive in terms of an exchange of information in industry's possession for policy more favorable to industry. *See* Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 301–02 (2004). However, "produce" here focuses on generating new information, and the incentive here extends beyond the mechanism of exchange.

Also worth mentioning is a similar logic that the expectation of more favorable regulation can motivate industry to provide more information. *See* Nolan McCarty, *Complexity, Capacity, and Capture*, *in* PREVENTING REGULATORY CAPTURE, 99, 113–14; SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING 236–38 (2013); Reiss, *supra* note 2, at 598. This logic, which ascribes benefits to a regulatory process that is already friendly to industry, is distinct from the present logic, which attributes benefits to industry's ability to *make* policy friendlier. Policy examples supporting the latter theory rather than the former appear *infra* Part III.B.

the literature on this topic, whereas proposals for remedies that harness influence have been largely absent.

Part II begins by setting the foundation for the relationship between influence and information. Compared to earlier works, this Part prioritizes the issue of inducing costly information production over eliciting truthful communication, as well as the understanding of information as a function of influence over the converse. It then applies principles of positive political economy to develop a theory of when and how losses of information and of social welfare stem from two means of insulation: (1) curtailing activities that can cause influence; and (2) mitigating the effect of influence from these activities. It also provides concrete policy examples consistent with the theory. In the case of curtailment, less stringently restricted activities in the United States prove to be those with avowed informational value. As for mitigation, the structure of judicial review of rulemaking before the Administrative Procedure Act (APA) and the method of negotiated rulemaking each evince an association between weakened influence and information losses.

Finally, Part III contends that harnessing can improve regulation in the abstract and in practice. This Part explains how, instead of starting with unbiased regulation and insulating it against industry influence, initially tilting regulation against industry enables greater benefits for the public. Importantly, this method can achieve much of these additional benefits even if the amount of this starting bias cannot be calibrated to align final policy perfectly with the public's perspective. Supporting evidence for the logic underlying harnessing comes from case studies in which moving the starting point of regulation away from industry's preferences led to final regulation more opposed to industry, with more influence, and with more information. The first two, involving the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), suggest executive appointments as a way of preliminarily biasing agencies. The third, taken from the Hazardous and Solid Waste Amendments of 1984 (HSWA), utilized influence with statutory "hammer" provisions, which specify a default policy that applies if a regulator does not have a rule in place by a given deadline.[17] Following these cases, an evaluation of anti-industry appointments and hammers as methods in terms of political feasibility and other factors outside the theory affirms that harnessing is a promising approach. Among other things, this evaluation provides reasons that anti-industry leaders will not simply enact policies

17. *See* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 839 (1998) (defining hammer provisions).

with an anti-industry bias.[18]

With these insights, this Article aims to redirect an extensive literature on industry influence not only by channeling attention to a heretofore relatively unexplored class of solutions, but also by changing the language used to characterize the problem. First, the idea of preventing "capture" is closely associated with insulation[19] and likewise conflates avoiding harm with reducing influence. This conflation is particularly troublesome for this concept with its persistently pejorative connotations.[20] Rather than redefine "capture" so that it is not necessarily harmful,[21] this Article eschews this term (except when discussing other studies) and uses the more neutral term "influence" to signify an industry's act of shifting policy in its direction, separate from the welfare effects.

Second, the importance of information calls for a broader definition of the "public interest." Even with agnosticism about the meaning of the public interest, studies tend to portray it in terms of closeness to what the public wants (or should want), given what the public knows.[22] Properly understood, however, the public interest consists not only of this closeness, which operates on the dimension of political values, because what the public knows is not fixed. Instead, the public interest contains as a second dimension—the quantity or quality of policy-relevant information[23]—whose value in serving the public is generally acknowledged regardless of what one prefers along the dimension of political values.[24] Here, "public interest" refers to what serves the public along both dimensions, whereas

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18. *See infra* notes 312–317 and accompanying text.

19. The connection is especially evident in the title of a recently edited volume, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014), as well as the title of a recent article, *Insulating Agencies: Avoiding Capture Through Institutional Design*, Barkow, *supra* note 8.

20. *See* Baxter, *supra* note 2, at 178; *see also* Carpenter, *supra* note 13, at 64 (noting the "common pattern of claim making . . . that attributes capture to any regulation or regulatory outcome with which the writer does not agree").

21. For recent redefinitions of this sort, *see* David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 335 (2014); Reiss, *supra* note 2, at 579; *see generally* Matthew Wansley, *Virtuous Capture*, 67 Admin. L. Rev. 419 (2015).

22. *See* Carpenter, *supra* note 13, at 60–61; Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013); *see also* Barkow, *supra* note 8, at 18 (describing "the public interest [as] pitted against one-sided powerful interest group pressure").

23. *See* Coglianese et al., *supra* note 16, at 279.

24. *See* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1423 (2011). Separately, even works using a single-dimensional notion of the public interest allude to the value of information elsewhere. *Compare* sources cited *supra* note 22, *with* Barkow, *supra* note 8, at 23; Carpenter, *supra* note 13, at 66; Livermore & Revesz, *supra* note 22, at 1359.

terms like "orientation," "perspective," "preferences," and "views"[25] denote what the public and industry each desire along the first dimension relating to political values.

Two more prefatory points are in order. First, because this Article compares methods for remedying industry-induced bias in regulation, it adopts three of the literature's foundations without proving them: (1) a public perspective exists and serves as a benchmark for ascertaining the direction and magnitude of any policy biases;[26] (2) the industry adheres roughly to a common orientation, even though individual firms might have somewhat different interests;[27] and (3) influence commonly causes significant pro-industry bias in regulation.[28]

Next, even though industry influence can operate on an agency or on elected officials,[29] this Article focuses on the former category of policymakers. Though the theory is valid for both loci of influence, institutional designs are easier to implement for the former than for the latter.[30] Finally, this Article deals primarily with general policy for industry

25. These terms appear respectively, for example, in JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 71 (1960); James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE 71, 79 (Daniel Carpenter & David A. Moss eds., 2014) ("perspectives"); Stephenson, *supra* note 24, at 1425 ("preferences"); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) ("views").

26. Some works claim a lack of an objective "public interest." *See* Baxter, *supra* note 2, at 178; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975). Such claims conflict with normative terms like "disproportionate influence," *see* Baxter, *supra* note 2, at 176, and "bias," *see* Stewart, *supra*, 1713. It is possible to discuss industry influence without reference to a public interest. *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 178 (1990) (rejecting a "public interest" benchmark and defining "capture" as "the adoption . . . of a policy which would not be ratified by an informed polity"). However, doing so fails to address popular and scholarly concerns about this influence.

Instead of rejecting the idea of the public's preferences, it makes more sense to say that they exist but are uncertain or disputed. The theory in this Article is agnostic as to the content of the public's views and acknowledges that what increases conformity with them according to one definition might not according to another.

27. *See generally* LANDIS, *supra* note 25. It may be possible in certain cases to divide industry interests. *See* Coglianese et al., *supra* note 16, at 297–300. However, most of the literature continues to embody the idea that "a small group of producers" unite to strive to influence regulation. *See* Leight, *supra* note 7, at 233.

28. *See* Carpenter & Moss, *supra* note 7, at 12; Stewart, *supra* note 26, at 1685.

29. *See* Baxter, *supra* note 2, at 178–79; Carpenter, *supra* note 13, at 58–59; David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 675 (2013); Merrill, *supra* note 1, at 1069.

30. In particular, campaign finance reform is a natural response for influence of Congress. *See* LAWRENCE LESSIG, REPUBLIC, LOST 151–52, 273–75 (2011). However, such efforts have run into constitutional hurdles. *See, e.g.*, *id.* at 238–39.

as a whole, such as rules and interpretive guidance, though there may be spillovers to adjudication or enforcement.[31] Empirical evidence substantiates that the public has much to gain from managing industry influence of administrative policymaking at a general level.[32]

I. CURRENT FOCUS ON INSULATING AGAINST INFLUENCE

This Part illustrates the prevailing wisdom about industry influence. Again, influence in this Article refers to industry pulling regulation in its direction by any means. Two clarifications are important. First, the "pull" means a policy shift toward industry for reasons unrelated to the merits of a policy question. For example, if an industry credibly shows a regulator that a proposed rule would be much costlier than expected, amending the rule in industry's favor would not automatically indicate influence by the

31. For example, this Article is not specifically advocating anti-industry bias for enforcement officials or administrative law judges. However, leadership changes may affect compliance as well as policy formulation. *See, e.g.*, Ben Protess & Michael J. de la Merced, *Under New Chief, a Feistier S.E.C. Emerges*, N.Y. TIMES (July 19, 2013, 9:09 PM), http://dealbook.nytimes.com/2013/07/19/under-new-chief-a-feistier-s-e-c-emerges/ (describing changes in Securities and Exchange Commission (SEC) enforcement strategies and patterns under Chair Mary Jo White).

32. One line of evidence points to industries' dominance over other interests in administrative lobbying, perhaps even more so than in legislative lobbying. *See* Frederick J. Boehmke et al., *Business as Usual: Interest Group Access and Representation Across Policy-Making Venues*, 33 J. PUB. POL'Y 3, 5 (2013); *see also* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 123–36 (2011) (documenting that industry dominates participation in various policymaking stages for the eponymous standards); Lee Drutman, *What the Banks' Three-Year War on Dodd-Frank Looks Like*, SUNLIGHT FOUND. (July 22, 2013), http://sunlightfoundation.com/feature/dodd-frank-3-year/ (noting "imbalances" in meetings at three agencies implementing Dodd-Frank between the financial industry and other interests).

Second, there are credible accounts of regulators shifting their orientation toward industry. *See* LANDIS, *supra* note 25, at 71; DAVID BEIM & CHRISTOPHER MCCURDY, FED. RESERVE BANK OF N.Y., DRAFT REPORT ON SYSTEMIC RISK AND BANK SUPERVISION 8 n.2 (2009), http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2009-09-10%20FRBNY%20Report%20on%20Systemic%20Risk%20and%20Bank%20Supervision%20draft.pdf. Beim verified that his coauthored report quotes a senior official at the Federal Reserve Bank of New York describing himself and fellow regulators as "captured." *See This American Life: The Secret Recordings of Carmen Segarra* (NPR radio broadcast Sept. 26, 2014), http://www.thisamericanlife.org/radio-archives/episode/536/transcript.

Finally, there are studies that show policy becoming biased toward industry due to its influence. *See, e.g.*, Barkow, *supra* note 8, at 71 (noting that the CPSC promulgated only seven safety standards in its first ten years); Wagner, *supra* note 5, at 1350 (describing a comparatively "lenient" inspection rule with "no explanation" in the final rule); Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 136–37 (2006) (noting that rules change more in response to comments from business than from other interests even though business comments are not better-informed).

present definition,[33] even though some might say conversationally that the industry had "influenced" the outcome. Second, the present definition refers only to changes in concrete policy decisions, not to industry input[34] or close industry relationships with regulators.[35]

For expositional purposes, it will be convenient to discuss influence in terms of a shift in a regulator's policy position, regardless of her mindset. A regulator might act as though pulled in industry's direction because of growing sympathy with industry,[36] out of self-interest,[37] or despite unwelcome pressure.[38] Figure 1(a) in the Appendix visualizes influence, with the position of regulation (or a regulator) moving toward industry's perspective.

Similarly, insulation does not necessarily mean isolation from industry; instead, it refers only to reducing the magnitude of influence while allowing for industry input. Figure 1(b) illustrates insulation with regulation (or a regulator) starting at the public's orientation. In contrast, harnessing means moving regulation's (or a regulator's) starting point so that she begins with a bias against industry, while allowing industry to attempt to influence her as before. Figure 1(c) portrays this alternative response. Based on the language and policy proposals that appear in scholarship, this Part establishes that insulation as depicted in Figure 1(b) strongly dominates over harnessing in current thinking about influence.

A. Language Corresponding to Insulation

Studies' focus on insulation strategies is evident from the terms they use to characterize undesirable influence, the idea of addressing it, and the ideal of uninfluenced regulators. To begin with, works in this area tend to describe the issue as an overabundance of influence, most explicitly with the words "excessive"[39] and "undue."[40] Similar adjectives include

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33. A very large shift relative to the magnitude of the cost increase might indicate influence. However, the extent of industry influence would be limited to the proportion of the shift not attributable to the cost information.

34. *See* Thaw, *supra* note 21, at 333 (describing influence in terms of "private involvement").

35. *Cf.* Reiss, *supra* note 2, at 570 ("Capture refers to an extremely close relationship between regulators and industry.").

36. *See* LANDIS, *supra* note 25, at 71; Kwak, *supra* note 25, at 79.

37. *See* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089, 1092 (1991); Levine & Forrence, *supra* note 26, at 179.

38. *See* Ernesto Dal Bó & Rafael Di Tella, *Capture by Threat*, 111 J. POL. ECON. 1123, 1124 (2003); Wagner, *supra* note 5, at 1334.

39. *See* PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 4 (1981); Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV.

"disproportionate,"[41] "imbalanced,"[42] and "one-sided."[43] In addition, the concept of "capture" closely associates harm from industry with the fact of influence. Though this concept has proven challenging to define,[44] some works directly describe it in terms of influence,[45] and others closely relate it to influence.[46] Because they typically portray capture as contrary to the public interest,[47] this concept's connection to industry influence arguably reinforces the perceived value of reducing this influence.

Sure enough, these works also use the language of insulation to discuss responses to the influence problem. Most prominently, a recent edited volume on "capture" has as its subtitle *Special Interest Influence and How to*

537, 549 (2012); Baxter, *supra* note 2, at 176; Einer R. Elhuage, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 56 (1991); Thaw, *supra* note 21, at 32.

40. *See* Barkow, *supra* note 8, at 21; Baxter, *supra* note 39, at 551; McDonnell & Merrill, *supra* note 1, at 1066; Schwarcz, *supra* note 4, at 1643; Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 462 (1999); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1451 (2005).

41. *See* Barkow, *supra* note 8, at 23; Baxter, *supra* note 2, at 190; Engstrom, *supra* note 29, at 674; Livermore & Revesz, *supra* note 22, at 1369; Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 348 n.29 (1974); Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1755 (2008); Sinden, *supra* note 40, at 1442–43 n.151; John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 731 (1986).

42. *See* Barkow, *supra* note 8, at 69; Kwak, *supra* note 25, at 96; Sinden, *supra* note 40, at 1449; Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 106 (2002).

43. *See* Barkow, *supra* note 8, at 42; Wagner, *supra* note 5, at 1338.

44. *See* Baxter, *supra* note 2, at 176.

45. *See* Barkow, *supra* note 8, at 21; Baxter, *supra* note 2, at 176; Kaminski, *supra* note 8, at 992; Reiss, *supra* note 2, at 579; Shapiro, *supra* note 9, at 223.

46. *See* Carpenter & Moss, supra note 7, at 12; Kwak, *supra* note 25, at 75; Livermore & Revesz, *supra* note 22, at 1342; Merrill, *supra* note 1, at 1051; Shapiro & Steinzor, *supra* note 40, at 1751; Thaw, *supra* note 21, at 335; Wagner, *supra* note 5, at 1431; Zinn, *supra* note 42, at 110.

47. *See* Carpenter & Moss, *supra* note 7, at 13 (defining capture in terms of "regulation . . . directed away from the public interest and toward the interests of the regulated industry"); Livermore & Revesz, *supra* note 22, at 1343 (defining capture in terms of "organized groups successfully act[ing] to vindicate their interests through government policy at the expense of the public interest"); *see also* CROLEY, *supra* note 6, at 26–29, 10–11 (contrasting captured regulation against "'public interested' regulation"); Barkow, *supra* note 8, at 24 (describing capture in terms of "harm[ing] . . . the collective public interest"); Shapiro, *supra* note 9, at 223 (referring to capture as a situation in which an "agency has failed to serve the public"); Wagner, *supra* note 5, at 1325–26 (defining "information capture" in terms of harms to "diffuse beneficiaries, typically represented by public interest groups"). *But see* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 69 (1992) (describing capture that may help or harm the public interest). Recent works try to portray capture in a positive light but do not define it in terms of policy effects. *See* sources cited *supra* note 21.

Limit It.[48] Equally conspicuous is the idea of "insulating agencies" in the title of another article.[49] Works have approved of "rigorous isolation of regulatory decisions,"[50] of scenarios in which "incentives to influence . . . are diffuse and diluted,"[51] and of regulators "more likely to resist industry arguments."[52]

Beyond promoting isolation in general, studies seem to imply that complete insulation from industry influence—not necessarily industry input—would be ideal. For example, one study seeks "administrative process . . . free from interest group influence."[53] Taken at face value, the notion of "preventing"[54] or "avoiding capture"[55] likewise supports the goal of reducing influence without qualification. Though the literature contains statements acknowledging that this ideal is impossible or at least very difficult to attain,[56] it is hard to find statements that clearly indicate that it would not be desirable. A preference for total insulation also follows from the common assumption that an uninfluenced regulator is aligned with the public's perspective. This benchmark for normal regulation is reflected in invocations of "agencies charged with protecting a diffuse public interest against one-sided interest group pressure,"[57] of agencies with the "ability . . . to engage in public-interested regulation,"[58] of a revamped civil service that is "more capable of finding the public interest on its own,"[59] and of an agency serving as a "central arbiter with incentives to find balance."[60] For such a baseline, the optimal amount of influence is zero.

B. Predominance of Insulation Solutions

Studies' emphasis on insulating regulators shows not only in their general discussion of industry influence, but also in their solutions. Most proposed

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48. CARPENTER & MOSS, *supra* note 1.

49. Barkow, *supra* note 8.

50. *See* Baxter, *supra* note 39, at 540.

51. *See* Livermore & Revesz, *supra* note 22, at 1363.

52. *See* Shapiro, *supra* note 9, at 251; s*ee also* Wagner, *supra* note 5, at 1326 (referring to "agency officials . . . determined to resist [industry] pressure").

53. *See* Wagner, *supra* note 5, at 1328.

54. *See* PREVENTING REGULATORY CAPTURE, *supra* note 1 (title); *see* Barkow, *supra* note 8, at 25 (stating the "goal of preventing capture").

55. Barkow, *supra* note 8 (title); *see* Baxter, *supra* note 39, at 540 (mentioning the "avoidance of 'capture'"); Livermore & Revesz, *supra* note 22, at 1368 (discussing difficulties in "avoid[ing]" capture for individual agencies).

56. *See* Barkow, *supra* note 8, at 23 ("One can never hope to avoid all hints of capture."); Shapiro, *supra* note 9, at 257 (noting the "difficulty of rooting out capture").

57. *See* Barkow, *supra* note 8, at 42.

58. *See* Livermore & Revesz, *supra* note 22, at 1368.

59. *See* Shapiro, *supra* note 9, at 250.

60. *See* Wagner, *supra* note 5, at 1326.

solutions would reduce the ability of industries to pull regulation in their direction, either by curtailing influence activities or by mitigating the effect of influence from these activities. Relatively few solutions would have the effect of preliminarily biasing regulation against industry so that its influence can be harnessed.

1. Proposals to Curtail Industry Activities

Curtailing activities insulates regulation against industry influence by physically preventing it.[61] One general class of solutions in this category is strengthened ethics rules.[62] Within this class, one popular reform is additional revolving door restrictions—limitations on what incoming and outgoing regulators can do with respect to former and prospective employers.[63] For incoming regulators, the risk is sympathy toward former employers.[64] One recommendation for new officials is to prohibit them from working on industry-wide regulations that affect their former employers, as opposed to specific matters affecting only those employers under current law.[65] For the outward direction of the revolving door, the

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61. Reliance on such methods reflects an expectation that entities will generally comply with legal limitations. *See* LESSIG, *supra* note 30, at 103 ("The lobbyist today . . . works extremely hard to live within the letter of the law."); NOWNES, *supra* note 3, at 120 ("Interest group scholars agree that . . . illegal lobbying activities are not common."). This expectation seems reasonable, given that violations tend to be discovered. *See* Christopher Carrigan, *Captured by Disaster? Reinterpreting Regulatory Behavior in the Shadow of the Gulf Oil Spill*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 1, at 239, 242–43 (noting Office of Inspector General findings of violations of gift-giving rules at Minerals Management Service); Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL'Y REV. 10, 14 (2008) (pointing to prison sentences for Jack Abramoff and Duke Cunningham and declaring that "we don't need to be distracted by crimes").

62. *See* PAINTER, *supra* note 4, at 9 (describing the risk of "corruption" by private interests as a motivation for stronger ethics rules).

63. *See*, *e.g.*, Barkow, supra note 8, at 48–49; Kaminski, *supra* note 8, at 1040; David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 514–16 (2012) (listing various observers who have called for further revolving door restrictions). Zaring, however, does not endorse further restrictions in this area. *See* Zaring, *supra* note 63, at 511.

64. *See* PAINTER, *supra* note 4, at 48–49; PROJECT ON GOVERNMENT OVERSIGHT (POGO), DANGEROUS LIAISONS 5, (2013), http://s3.documentcloud.org/documents/602191/20130211-dangerous-liaisons-sec-revolving-door.pdf.

65. *See* PAINTER, *supra* note 4, at 49. Ethics regulations prohibit executive branch employees from working on any "particular matter involving specific parties" involving their former employers for one year. *See* 5 C.F.R. §§ 2635.502(a), (b)(1)(iv), (b)(3) (2015). Such matters include judicial proceedings, contracts, and investigations, but not regulations. *See* §§ 2637.102(a)(7) (2008). The standard one-year limitation is extended to two years when an employee has received an "extraordinary payment" of over $10,000 from her former employer before entering government service. *See* § 2635.503 (2015). Painter suggests banning such payments entirely or preventing officials from participating in matters that

risk is that regulators will act generously toward firms to improve their prospects for post-employment in the industry.[66] A common suggestion here is extending the applicability and length of "cooling off" periods during which former government employees cannot represent a private entity before their former agencies on statutorily specified matters.[67]

Another proposed ethics rules change is removing the exception for "widely attended gatherings" (WAGs) from executive branch gift rules.[68] Ethics rules describe a WAG as a "gathering of mutual interest to a number of parties" for which an official's "attendance is in the interest of the agency because it will further agency programs and operations."[69] Contrary to the nominal limits for regular gifts,[70] government employees may receive a gift of free attendance of any value from the event sponsor, or up to $375 per event from a non-sponsor.[71] This allowance has raised concerns of influence. One commentator argues, "It would be naïve to expect that the event sponsor does not anticipate a benefit in return," at least one which derives from the presence of government officials.[72] Also, the Office of Government Ethics (OGE), which oversees ethics regulations for Executive Branch officials, has pointed to "the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients."[73]

In addition to ethics rules, the idea of limiting communications between industry and regulators commands some support given that such contacts might cause regulators' views to shift toward those of industry.[74] One proposal is for agencies generally to meet less with outside groups.[75] More

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would "have a direct and predictable impact on the former employer who made the payment." *See* PAINTER, *supra* note 4, at 53.

66. *See* PAINTER, *supra* note 4, at 53; POGO, *supra* note 64, at 10.

67. *See* PAINTER, *supra* note 4, at 58–59; *cf.* Kwak, *supra* note 25, at 96 (calling for "extending the period of time during which ex-regulators are prohibited from lobbying their former agencies").

68. *See* PAINTER, *supra* note 4, at 20 ("If an objective of ethics rules . . . is to create distance between government officials and sources of systemic corruption, the [widely attended gatherings (WAGs)] exception may be counterproductive.").

69. *See* 5 C.F.R. § 2635.204(g)(2) (2015).

70. In general, agency officials are limited to receiving a maximum of $20 per gift and $50 per year from any outside source. *See id.* § 2635.204(a).

71. *See id.* § 2635.204(g)(2).

72. *See* PAINTER, *supra* note 4, at 22–23.

73. *See* Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts from Registered Lobbyists and Lobbying Organizations (Amendments Limiting Gifts), 76 Fed. Reg. 56,330, 56,333 (proposed Sept. 13, 2011) (to be codified at 5 C.F.R. pt. 2635).

74. *See* BERNSTEIN, *supra* note 1, at 157; LANDIS, *supra* note 25, at 71; Kwak, *supra* note 25, at 89.

75. *See* RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED

specific recommendations include isolation from stakeholder input as agencies develop rules before formally proposing them and limiting the volume of comments that stakeholders submit after a notice of proposed rulemaking.[76]

2. Proposals to Mitigate Influence from Activities

Other insulation solutions would allow for free industry input but would mitigate the influence from industry's participation. Some remedies would operate on a general level. For example, paying civil servants higher salaries could reduce influence by attracting more individuals outside industry to work for an agency and by providing them a greater incentive to stay there rather than move to the private sector.[77] Another generalized method is publicizing more of agencies' information so that voters can use it to resist industrial influence by effecting policy change.[78] Internal, more direct solutions include installing bureaucrats whose job is to cause their agencies to consider alternative policies and viewpoints[79] and hiring bureaucrats with more diverse perspectives.[80] Even more direct is changing agency leadership so that it reflects a diverse set of interests[81] or so that it meets professional qualifications that imply less susceptibility to industry influence.[82]

DOORS AT THE WHITE HOUSE 64 (2011) (calling for the Office of Information and Regulatory Affairs (OIRA) not to meet with outsiders as it reviews agency rules); Wagner, *supra* note 5, at 1421 (advocating "limiting the number of contacts between agency staff and stakeholders throughout the rulemaking cycle"). Believing that a strict limitation would be circumvented, Wagner suggests achieving this restriction by requiring full disclosure of such contacts. *See* Wagner, *supra* note 5, at 1421 & n.362.

76. *See* Wagner, *supra* note 5, at 1419–20, 1422–26; *cf.* Kaminski, *supra* note 8, at 1043 (recommending the USTR to eliminate "direct informational input" from industry on trade agreements).

77. *See* PAINTER, *supra* note 4, at xviii; Baxter, *supra* note 2, at 195; Shapiro, *supra* note 9, at 251; *see also* Barkow, *supra* note 8, at 49 (suggesting higher salaries as a way to counteract disincentives to enter government service that would arise from post-employment restrictions).

78. *See* Barkow, *supra* note 8, at 59–60; *see also* AYRES & BRAITHWAITE, *supra* note 47, at 57 (describing full access to regulators' information for public interest groups as part of policy of "tripartism").

79. *See* McDonnell & Schwarcz, *supra* note 4, at 1648. These authors' "contrarians" are designed to focus on views currently receiving less attention and to "give adequate voice to a *variety* of points of view." *See id.* at 1649 (emphasis added). This response to the dominant thinking at an agency implies mitigation of industry influence that affects regulators' mindsets.

80. *See* Kwak, *supra* note 25, at 98.

81. *See* Stewart, *supra* note 26, at 1793–94.

82. *See* Barkow, *supra* note 8, at 47–48. The stated goal of this solution is to "create greater insulation." *See id.* at 48.

Mitigation could also occur while agencies formulate particular policies. For example, since agencies often use advisory committees, whose balance in viewpoints[83] can offset industry dominance elsewhere,[84] Congress could provide them with powers that exceed a purely "advisory" role.[85] Already, it allows negotiated rulemaking, in which a balanced advisory committee[86] convenes to develop a proposed rule in place of an agency.[87] Second, at least one statute has required an agency to "rely on the recommendations" of an advisory committee rather than merely to receive them.[88]

Still other proposed remedies involve review by other government institutions after an agency has formulated a policy. Studies have considered how review by the Office of Information and Regulatory Affairs (OIRA) and by courts already limits industry influence and might limit it further.[89] Mechanisms consistent with the idea of decreasing industry influence include, respectively, that "OIRA must deal with a large range of interests over time,"[90] and that "Judicial review . . . levels the playing field between concentrated, well-funded interests and less well-funded interests."[91] A related proposal is the creation of an investigative body within the White House specifically designed to investigate and report on

83. *See* 5 U.S.C. App. § 5(b)(2) (2012).

84. *Cf.* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 464–66 (1997) (describing industry influence that resulted from unbalanced committees before the enactment of the Federal Advisory Committee Act (FACA) in 1972).

85. *See* § 2(b)(6) (restricting advisory committees to advisory roles unless otherwise specified).

86. *See* 5 U.S.C. §§ 565(a)(1), 563(a)(3) (requiring negotiated rulemaking committees to comply with FACA and separately calling for balance in representation).

87. *See id.* § 566(a).

88. *See* Thaw, *supra* note 21, at 355–56 (quoting the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, 2024 (1996)). This study characterizes this provision of HIPAA as an "enlightened" use of "capture," which follows from its definition in terms of "engagement of private expertise." *See id.* at 332. However, this arrangement may be characterized in the terms of this Article as mitigation of influence, given that the default alternative would have been allowing the agency to develop its rules with the unrestricted informal input of industrial interests.

89. *See* Kwak, *supra* note 25, at 97 (endorsing enhanced OIRA review); Livermore & Revesz, *supra* note 22, at 1361–62, 1379 (pointing to OIRA's "anticapture function" and ways to use the institution to mitigate influence resulting from agency inaction); M. Elizabeth Magill, *Courts and Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE 397, 404–10, 418 (Daniel Carpenter & David A. Moss eds., 2014) (discussing how courts "inhibit capture" and identifying options for restructuring review to further limit industry influence). *But see* Barkow, *supra* note 8, at 34–35 (arguing that OIRA contributes to industry influence); Shapiro, *supra* note 9, at 240–41 (same); Wagner, *supra* note 5, at 1362–65 (citing judicial review doctrines as a cause for "information capture").

90. *See* Livermore & Revesz, *supra* note 22, at 1363.

91. *See* Magill, *supra* note 89, at 408.

"capture" at agencies to discourage attempts at influence.[92] There are still other methods,[93] but the foregoing list sufficiently shows that mitigation proposals are quite common.

3. Paucity of Proposals to Harness Industry Influence

In contrast to the numerous proposals that would insulate against industry influence, recommendations that would clearly utilize this influence seem rare. Only one work in legal scholarship seems to have presented a harnessing method—the statutory exclusion of economic costs from agency decisionmaking.[94] This exclusion, which applies to listing and protecting endangered species under the Endangered Species Act[95] and to setting National Ambient Air Quality Standards (NAAQS) under the Clean Air Act,[96] has the legal effect of initially biasing the regulatory process against industry;[97] specifically, it places "a thumb on the scale in favor of the weaker party."[98] Then the "inevitable tug toward economic interests" occurs,[99] which means that influence is exploited for public purposes as it brings policy back toward the public's perspective.

Another recommendation that should be popular, given the attention that agency leadership appointments have received in scholarship and journalism,[100] is selecting leaders who are more opposed to industry than the public. However, this idea seems to have appeared only in a single

92. *See* Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 7, 11 (2010).

93. For other solutions designed to mitigate industrial influence, see AYRES & BRAITHWAITE, *supra* note 47, at 57–58 (calling for public interest groups generally to have "a seat at the negotiating table with the firm and agency when deals are made" and to have the same "standing to sue or prosecute" a regulated party as the regulated); Huntington, *supra* note 1, at 508–09 (suggesting that an influenced agency be subsumed into an "agency possessing a broader outlook and broader basis of political support").

94. *See* Sinden, *supra* note 40, at 1411 & n.8 (pointing to exclusion of costs); *id.* at 1440–42 (citing industry influence and "capture" as a reason for this measure); *id.* at 1484 (describing this method's effect of "trumping" private interests).

95. *See* 16 U.S.C. §§ 1533(b)(1)(A), 1538(a)(1)(B) (2012); Sinden, *supra* note 40, at 1491 & n.371.

96. *See* 42 U.S.C. § 7409(b)(1) (2012); Sinden, *supra* note 40, at 1412.

97. The Supreme Court has ruled that agencies cannot overtly factor in costs under these provisions. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (excluding cost considerations for the Endangered Species Act); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 471 (2001) (same for National Ambient Air Quality Standards (NAAQS)).

98. *See* Sinden, *supra* note 40, at 1410.

99. *See id.* at 1494.

100. *See, e.g.*, QUIRK, *supra* note 39, at 17, 215 n.43 (describing one of the "ubiquitous themes in the regulatory literature"); Editorial, *Starting the Regulatory Work*, N.Y. TIMES (Jan. 7, 2009), http://www.nytimes.com/2009/01/08/opinion/08thu1.html (asking how Gensler's "close ties to Wall Street [would] affect his choices" and raising similar concerns for then-Department of the Treasury nominee Timothy Geithner).

public administration article at the margins of the industry influence literature.[101] In contrast, other works advocate leadership that mirrors the public interest and that is, ideally, not susceptible to industry influence.[102]

Then, there is a general technique that is at best ambiguous as to whether it would harness influence—the support of interest groups opposed to industry in the policymaking process.[103] For this strategy to constitute harnessing, it would have to be the case that regulators would produce policy biased against industry if opposed groups were the only ones acting. However, there is awareness that regulators might not be drawn to these opposing interests the way they are drawn to industry,[104] especially given industry's privileged status and preexisting relationships with regulators.[105] Instead, these designs are described as making industry influence more difficult[106] or striving for the same diversity of views for which some mitigation strategies aim.[107]

Overall, unambiguous proposals for using industry influence seem largely absent. Not only have studies seldom proposed biased statutory provisions and appointees, but they also seem to have entirely ignored harnessing analogues to some of the mitigation techniques above. Instead of diversifying employee backgrounds or making stronger use of balanced

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101. *See* Anthony Bertelli & Sven E. Feldmann, *Strategic Appointments*, 17 J. PUB. ADMIN. RES. & THEORY 19, 21 (2007). This work places itself in the context of "the literature on presidential appointments and strategic delegation." *See id.* at 21–23.

102. *See* BERNSTEIN, *supra* note 1, at 289 (calling for leaders with "devotion to the public interest"); *supra* notes 81–82 and accompanying text.

103. *See generally* AYRES & BRAITHWAITE, *supra* note 47, at 54–100 (developing the theory of tripartism, which entails the representation of "public interest groups"); Stewart, *supra* note 26, at 1723–60 (describing how courts expanded opportunities for nonindustrial interest groups to participate in agency policymaking).

104. *See* Stewart, *supra* note 26, at 1757 (mentioning the possibility that agencies might "disregard" the input of anti-industry groups); *see also* LANDIS, *supra* note 25, at 51 (describing contacts with industry as more productive than those with consumers); Robert Schmidt & Jesse Hamilton, *Top Bank Lawyer's E-Mails Show Washington's Inside Game*, BLOOMBERG (Sept. 5, 2013), http://www.bloomberg.com/news/print/2012-09-05/top-bank-lawyer-s-e-mails-show-washington-s-inside-game.html (quoting SEC officials' opposition to an "Investor Advocate" at the SEC); *cf.* McDonnell & Schwarcz, *supra* note 4, at 1652 (acknowledging that agencies might not listen to internal contrarians).

105. *See* Kwak, *supra* note 25, at 85–92.

106. *See* AYRES & BRAITHWAITE, *supra* note 47, at 71 (describing tripartism as a way of multiplying the number of public-aligned stakeholders that it needs to "capture" to shift policy).

107. *See* ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATION 71–6, PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS 1 (1971) (emphasis added) ("Agency decisionmaking benefits from the *additional perspectives* provided by informed public participation."); Carl Tobias, *Reviving Participant Compensation*, 22 CONN. L. REV. 505, 507 (1990) (positing that citizen participation "could improve administrative processes by offering more balanced information and different perspectives"); *supra* notes 79–81 and accompanying text.

advisory committees,[108] one could imagine aiming for employees and committees stacked in favor of interests opposed to industry. This paucity of proposals follows from a conventional wisdom that privileges reduce influence as much as possible.

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If the only goal for regulation were alignment with some notion of the public's perspective, the focus on insulation would not be so problematic. Insulation strategies, if successful, would maximize public welfare by attaining perfect correspondence with the public's policy orientation, and the omission of harnessing strategies would be harmless. However, the amount of information in regulation is also relevant for the public interest. The remainder of this Article presents the theory and empirical examples underlying the conclusion that the public benefits more from policy produced through harnessing than insulation. Whereas insulation produces policy aligned with the public's perspective at the cost of industry information, harnessing can achieve well-aligned policy without this information loss.

II. INFORMATIONAL LIMITATIONS WITH INSULATION STRATEGIES

To be sure, information already figures prominently in studies of influence. All works acknowledge, at least implicitly, that high-quality information is essential for effective regulation,[109] and at least a few characterize well-informed policy as an objective distinct from alignment with the public.[110] The value of information is intuitive, but specific benefits include improvements in decisions in the form of new solutions to problems and reduced uncertainty about policy consequences.[111]

Also, many works recognize that industry is often the best source for at least some of the information that regulators need.[112] In particular, industry is better at identifying problems, devising solutions, and

108. *See supra* notes 79–80, 85–88 and accompanying text; *see also* Wagner, *supra* note 5, at 1415 (calling for an "expert committee" to review technical rules).

109. *See*, *e.g.*, Coglianese et al., *supra* note 16, at 277 ("Information is the lifeblood of regulatory policy."); Reiss, *supra* note 2, at 596 ("Good regulation requires good information.").

110. *See* Barkow, *supra* note 8, at 20–21 (indicating that policymaking should be "guided by information" and "unbiased"); Baxter, *supra* note 2, at 189 (highlighting the importance of "public action" and "informed policy"); Coglianese et al., *supra* note 16, at 339 (describing agency bias and information losses as two types of errors).

111. *See* Coglianese et al., *supra* note 16, at 286–87; s*ee also* Stephenson, *supra* note 24, at 1429 (ascribing value to "information about the likely consequences of different actions" in the face of uncertainty).

112. *See*, *e.g.*, BREYER, *supra* note 6, at 109; Coglianese et al., *supra* note 16, at 285; Reiss, *supra* note 2, at 596; Stewart, *supra* note 26, at 1713–14.

ascertaining the consequences of policy alternatives.[113] Industry's advantage follows from firms' experience with the products and production processes that agencies seek to regulate.[114] This advantage is absolute if regulators lack the expertise to produce the relevant information by themselves.[115] Alternatively, an agency might be able to generate the information, but only at much greater cost than the industry.[116] Interest groups opposed to industry likewise face tougher constraints than industry in terms of technical knowledge and resources for producing policy-relevant information.[117]

Where this Article begins to depart from the scholarship is in the nature of the challenge in obtaining useful information from industry. Other works have pointed to the problem that industry will present biased information[118] or hide unfavorable information.[119] Though this concern is valid, there are reasons to believe that the difficulty is limited. First, studies of lobbying indicate that successful lobbyists are honest and credible;[120] specifically, lobbyists believe that their reputations would suffer if they ever misled government officials.[121] Second, regulators can scrutinize industry claims and often have help from other government agencies or nonindustrial interest groups.[122] Third, agencies have strategies for eliciting truthful communication of information in industry's possession.[123] Fourth, an agency may, in some cases, be able to inspect firms for information or compel them to provide it.[124]

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113. *See* Coglianese et al., *supra* note 16, at 285.

114. *See id.* at 286; Reiss, *supra* note 2, at 597–98.

115. *See* BREYER, *supra* note 6, at 111; Coglianese et al., *supra* note 16, at 287–88.

116. *See* Reiss, *supra* note 2, at 596–97; Stewart, *supra* note 26, at 1714.

117. *See* Wagner, *supra* note 5, at 1379. Nonindustrial interest groups' comparative disadvantage in producing information marks a departure from settings of symmetric information production depicted in Mathias Dewatripont & Jean Tirole, *Advocates*, 107 J. POL. ECON. 1, 1–2 (1999), which depicts the benefits of a neutral arbiter relying on opposing interest groups to generate information instead of gathering information herself.

118. *See* BREYER, *supra* note 6, at 110; CROLEY, *supra* note 6, at 293; Kaminski, *supra* note 8, at 993; Reiss, *supra* note 2, at 599–600; *see also* Baxter, *supra* note 2, at 189 (pointing to interest group comments that are "one-sided, heavily funded, and partisan").

119. *See* CROLEY, *supra* note 6, at 293; Coglianese et al., *supra* note 16, at 288–89; Reiss, *supra* note 2, at 598. Hiding information also includes providing it but mixing it in with large volumes of other information so that it is difficult to find. *See* Wagner, *supra* note 5, at 1400.

120. *See* NOWNES, *supra* note 3, at 93; Conor McGrath, *The Ideal Lobbyist: Personal Characteristics of Effective Lobbyists*, 10 J. COMM. MGMT. 67, 75–76 (2006).

121. *See* McGrath, *supra* note 120, at 75.

122. *See* CROLEY, *supra* note 6, at 294. *But see* Wagner, *supra* note 5, at 1332 (pointing to regulators' and opposing interest groups' struggles to process voluminous industry information).

123. *See generally* Coglianese et al., *supra* note 16, at 301–02 (discussing strategies for regulators to extract information from firms that prefer to withhold it).

124. *See* Barkow, *supra* note 8, at 60. *But see* Reiss, *supra* note 2, at 598 (pointing to

Instead, this Article focuses on a different challenge—ensuring that industry generates information for regulators despite the economic costs to firms for policy research. Though industry may automatically have some knowledge, it still incurs costs to learn more.[125] Also, the improvement in regulation that results from the information yields a benefit for society as a whole,[126] of which industry obtains at most a small share. For this reason, it will tend to produce less information than would be optimal for the public.[127]

Meanwhile, some studies have deemed information provision a cause of industry influence—not because the information is biased, but because of regulators' responses to it.[128] One possible mechanism is that industry representatives develop relationships with regulators as they meet and present information to them.[129] A similar channel of influence is regulators' cognitive bias toward industry information because of its volume.[130] Yet another means is giving industry leverage in judicial challenges or the threat thereof.[131]

However, it is also possible to see the reverse relationship between information and influence—namely, that influence, or at least the potential for it, causes industry to generate costly information. Here, the sense in

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drawbacks of mandatory disclosure).

125. *See* Stephenson, *supra* note 24, at 1430; *see also* Coglianese et al., *supra* note 16, at 286 (distinguishing between "hold[ing]" and "obtain[ing] information).

126. *See* Coglianese et al., *supra* note 16, at 290 & n.44 (describing information in regulation as a public good).

127. *See id.* at 286–87 (remarking that "firms may not have the incentive to acquire information about alternative solutions at the socially optimal level"); *cf.* Stephenson, *supra* note 24, at 1430–31 (arguing that even "public servants who care deeply about making good decisions" will underinvest in information gathering because they incur all the costs but experience only a portion of the benefits to society).

There is a view that industry produces too much information. *See* Wagner, *supra* note 5, at 1325. However, even this work tacitly recognizes the value of information that "meets the needs of the audience and situation." *See id.* at 1329. Furthermore, there is a tension between this study's reference to "information, much of which might be peripheral or even irrelevant," *id.* at 1378, and its use of the phrases "plausible argument" and "material comment," *see id.* at 1364. An industry contention "plausible" or "material" enough to reasonably support a court challenge probably contains valuable information, whereas an agency can probably identify comments that fall short of this standard. For these reasons, underproduction of industry information, rather than overproduction, is a key challenge for regulation.

128. *See* LANDIS, *supra* note 25, at 71; Stewart, *supra* note 26, at 1713–14; *see also* Baxter, *supra* note 2, at 189 (describing industry's "input" and its lobbyists' goal of "aggressively persuad[ing] the regulators").

129. *See* Kwak, *supra* note 25, at 89; *cf.* Kaminski, *supra* note 8, at 994 (suggesting that information biases regulation because of preexisting relationships between regulators and industry representatives).

130. *See* Shapiro, *supra* note 9, at 238.

131. *See* Wagner, *supra* note 5, at 1333–34.

which influence causes information is that of final, rather than efficient causation, and it encompasses two meanings. First, regulators' desire for information motivates industry activity to produce information for them,[132] and these activities may influence policy.[133] More specifically, pure information transmission exists only in the abstract;[134] in practice, it must occur through some sort of activity. Figure 2 depicts influence and information as joint effects of industry activity on different dimensions. Second, the ability for industry to pull regulation in its direction through influence activities constitutes a policy benefit that can incentivize industry to incur the costs to generate more information.[135]

Accepting that influence causes information implies two difficulties with insulation strategies. One is that curtailing activities involving influence and information will likely cause regulators to lose information.[136] The

132. *See* LANDIS, *supra* note 25, at 71 (emphasis added) (stating that "*of necessity* contacts with the industry are frequent"); Kwak, *supra* note 25, at 95 (emphasis added) (acknowledging that "cultural capture is the unavoidable byproduct of *necessary* interactions between human beings").

133. *See supra* note 74 and accompanying text; *see also* Wagner, *supra* note 5, at 1325 (arguing that industry's communication of information forces regulators to respond to its input in ways that favor industry).

134. Economic models of information provision adopt this approach. *See, e.g.*, Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 ECONOMETRICA 1431, 1431–32 (1982).

135. This incentive relies on a simplifying assumption that more activity implies more influence and more information. This assumption is intuitive for influence and accords with the proposals to curtail certain activities. *See supra* Part I.B.1.

The positive relationship between activities and information requires more support, given that industry generates much of its information before it communicates it to regulators in activities. One justification for this assumption is that conveying information to regulators, which can be understood as the final step of information production, requires costly effort to be effective. *See* Mathias Dewatripont & Jean Tirole, *Modes of Communication*, 113 J. POL. ECON. 1217, 1219 (2005). Thus, industry representatives plausibly need more contacts with regulators to convey information more clearly. Another stems from the fact that large volumes of activities consume much of regulators' time. *See* Ben Protess & Mac William Bishop, *At Center of Debate over Derivatives, A Gung-Ho Regulator*, N.Y. TIMES (Feb. 10, 2011, 5:35 PM), http://dealbook.nytimes.com/2011/02/10/at-center-of-debate-over-derivatives-a-gung-ho-regulator/ (quoting Commodity Futures Trading Commission (CFTC) Chairman Gary Gensler as saying, "We've had about 475 meetings in five months. And since the lobbyists haven't found us on the weekends (usually), you can do the arithmetic. It's quite a bit."). For this reason, industry representatives have a motivation to strive to contribute to regulators' information at each contact or risk being seen as wasting their time.

136. This idea has been commonly intuited but rarely stated in general terms. Instead, the principle usually appears in statements against particular measures for curtailing activities. *See infra* notes 163–65 and accompanying text. One arguably general statement is the claim that, "It is . . . probably not desirable to strip all interactions between regulated industry and regulatory agencies of their human elements" because these contacts "may . . . promote socially beneficial information sharing." *See* Kwak, *supra* note 25, at 95.

other is that mitigating influence of activities—so that they have zero or little effect on a regulator's position—can discourage industry from engaging in these activities and producing information through them.[137]

These challenges imply not that insulation strategies are generally wrong but that they have significant limitations. The remainder of this Part explicates these limitations and provides practical reasons to think that they are relevant for current policy. Following the influence literature, the modeling of insulation in this Part assumes that an uninfluenced regulator is perfectly aligned with the public.[138] Also, the theoretical discussion of both insulation and harnessing will adopt an assumption analogous to standard assumptions on utility functions in positive political economy. For the public and the industry, the marginal benefit of closeness of policy to its perspective and the marginal benefit of information are falling as each of these quantities increases.[139] That is, the closer policy already is to the industry's perspective, the less the amount of influence and information that results from additional industry activity. Though not necessary to demonstrate the potential value of an initial bias against industry, this assumption of decreasing marginal benefits streamlines the exposition by focusing on the most likely effects of the insulation and harnessing.[140]

A. Curtailment

Identifying problems with restrictions on industry activities is not the same as showing that further restrictions compared to current law would be

The statement qualifies only if stripping human elements is interpreted as restricting personal contacts.

137. *See supra* note 16 for logics that are similar to but not the same as this one.

138. *See supra* notes 57–60 and accompanying text. If the regulator were initially already biased toward industry, then insulation strategies would be even more limited. Meanwhile, a regulator who is initially biased against industry is described in the development of the theory of harnessing. *See infra* Part III.A.

139. *Cf.* Stephenson, *supra* note 25, at 70 n.69 (deeming "standard" and discussing the assumption that political actors have concave utility functions); Stephenson, *supra* note 24, at 1423, 1430 (assuming implicitly that the marginal benefits of additional information are decreasing).

140. Without this assumption, it would still be the case that total insulation of a regulator initially aligned with the public yields unbiased policy at the cost of losses of information, which harnessing avoids. However, it might be the case that total insulation is still welfare-improving over partial insulation, in which case the comparison between harnessing and insulation would be closer. It is highly likely, though, that small biases are relatively unimportant for the public, and that initial amounts of information are quite valuable, given policies that reflect concern about significant losses of information. *See infra notes* 169–75 and accompanying text. Also, this assumption implies that harnessing not only prevents information losses, but also stimulates more information. The case studies in Part III.B, *infra*, are consistent with this logic. For these reasons, this assumption of marginal decreasing benefits is justified.

of limited use. To begin with, not all activities are harmful to curtail. In particular, there is no information cost to curtailing "rent-seeking" activities, like bribes, which involve no information production.[141] However, restricting activities that do generate information can lead to losses of information, and these losses may outweigh the gains from closer alignment with the public's perspective. Furthermore, current law mainly targets rent-seeking activities, so gains from additional curtailment may be modest.

1. Informational Limitations

If industry is prevented from engaging in an activity that produces information along with influence, it will plausibly adapt by engaging in more of other allowed activities,[142] especially since resources they would have spent on the curtailed activity are now available for others. However, any information that the substitute activities generate is likely not to be as much or of as high quality as the information that was lost. First, activities involving a personal element, such as meetings, produce information not just through industry presentations, but through dialogue between regulators and industry representatives.[143] Also, successful communication requires costly effort.[144] Thus, less personal activities may not be able to replicate this type of interactional information. Second, if the alternative activities are less effective at influencing regulators than the curtailed activity,[145] industry will probably not prefer to increase its use of these alternatives enough to compensate for the lost information.[146]

Overall, curtailing such industry activities can be expected to cause information losses that offset gains from better alignment with the public. Given the decreasing marginal benefits assumption,[147] these losses will

141. In fact, such curtailments might improve information if they cause industry to channel its resources into activities that generate information as well as influence.

142. *See* Baxter, *supra* note 2, at 189 ("Resilient solutions to each problem tend toward obsolescence as competing agents learn how to game the structures and processes."); *see also* Livermore & Revesz, *supra* note 22, at 1359 (surmising that preventing industry from meeting with OIRA will cause it to "channel its efforts into more amenable forums").

143. *See* LANDIS, *supra* note 25, at 71 (stating as a "fact that . . . contacts with the industry are . . . generally productive of intelligent ideas"); *see also* Kwak, *supra* note 25, at 95 (emphasis added) ("Close relationships and repeat interactions . . . [can] promote socially beneficial information *sharing*").

144. *See* Dewatripont & Tirole, *supra* note 135, at 1219.

145. If instead, the alternatives exert stronger influence relative to their cost, industry might end up generating more information, but at the cost of policy further away from the public's orientation.

146. This reason is similar to the general potential problem with mitigation, for which Part II.B, *infra*, provides more support.

147. *See supra* notes 139–140 and accompanying text.

eventually outweigh the gains. As permitted levels of activities go to zero, the additional benefits in policy alignment from curtailment are minimal, while the cost of lost information is substantial since there is less of it than when curtailment began.

Therefore, if restricting activities is the sole strategy, it is not optimal to preclude influence entirely. Instead, this strategy of legally limiting activities tends to produce large benefits only if not doing so would leave regulation close to industry's perspective and far from the public's. Though perfectly calibrating legal limits for activities is impossible, the analysis implies that it is optimal to restrict an activity more tightly the more important influence is an effect of the activity compared to information. At the extremes, it makes sense to prohibit pure influence activities but to let industry more freely participate in activities with a strong information component.

2. Information Concerns Reflected in the Law

The theoretical result just developed—that restricting an influence activity is better the less information that activity generates—is quite intuitive. This intuitive appeal may explain why the pattern of activity restrictions in the law appears to conform to this result. For this reason, further restrictions compared to the status quo may yield, at most, marginal policy benefits. One area of conformity is the government's long history of enacting prohibitions or near-prohibitions against pure influence activities. Bribery has been a federal crime since the first set of federal criminal laws enacted in 1790.[148] Other practices became illegal over time after they became prominent—having government employees represent private parties in claims against the government,[149] paying federal employees to obtain government contracts,[150] and having former employers supplement government officials' salaries.[151] Moreover, starting from the Kennedy Administration in 1961, the government has developed "an array of ethics laws, rules, and procedures [with] no precedent in the United States or in any other country in the history of the world."[152] These rules include the current constraints on gifts and financial conflicts of interest.[153]

148. *See* H.R. REP. NO. 80-304, at 2 (1947). The relevant code has been revised a number of times, including a clarification in 1948 that the provision applies to administrative agency officials. *See id.* at 2, A14. The current statute is at 18 U.S.C. § 201 (2012).

149. *See* 18 U.S.C. § 205; G. CALVIN MACKENZIE, SCANDAL PROOF 9–10 (2002).

150. *See id.* §§ 203, 205; MACKENZIE, *supra* note 149, at 10, 61.

151. *See id.* § 209; MACKENZIE, *supra* note 149, at 16.

152. *See* MACKENZIE, *supra* note 149, at 22–23, 35.

153. The statutory basis for the gift regulations of the Office of Government Ethics

Another area is the pattern of rules for federal officials as they leave government employment.[154] Work opportunities after government service may incentivize regulators' acquisition of expertise,[155] and the limitations vary as if they reflect educated guesses about the value of this informational benefit compared with costs of influence. As a baseline, current officials may not negotiate for employment with an entity involved in a "particular matter" in which they are "participat[ing] personally and substantially,"[156] and they may never appear before the government on behalf of an entity for such a matter after leaving office.[157] These total bans are consistent with an expectation that such representation is more likely motivated by an exchange than by information.

If, instead, a particular matter was merely "pending under . . . her official responsibility," the employee is precluded only for two years from representing an entity in that matter.[158] This difference makes sense since less direct participation by an official makes an exchange less likely. However, any employee who is "senior" as defined by statute has a one-year ban on representation on behalf of anyone for *any* matter to her former agency, even if she was not involved in it.[159] Even more senior employees face two-year bans on these representations, extending beyond their agencies to listed categories of officials across the executive branch.[160] The increasingly tight restrictions for increasingly senior employees can be rationalized with the additional risk of influence that derives from their prestige.

With all these restrictions, it is unclear whether any purely rent-seeking activities are left to curtail. Rather, a recent survey of interest group activity finds that information provision is what "lobbying generally is about."[161] Sure enough, all of the recent proposals for further curtailment discussed above[162] at least plausibly entail significant information

(OGE) appears at 5 U.S.C. §§ 7353(a)–(b)(1), (d)(1)(D) (2012), and the regulations appear at 5 C.F.R. §§ 2635.201–05 (2015). The analogous provisions for financial conflicts of interest are 18 U.S.C. § 208 and 5 C.F.R § 2635.401–03. *See generally* PAINTER, *supra* note 4, at 16–26, 38–42 (discussing gift and financial conflict of interest regulations).

154. The rules are more uniform for incoming government employees. However, the extension from one to two years of the ban from working on particular matters involving a former employer following an extraordinary payment, *see supra* note 65, does reflect an analogous increase in likelihood of an exchange.

155. *See* Carpenter, *supra* note 13, at 66.

156. *See* 18 U.S.C. § 208(a) (2012).

157. *See id.* § 207(a)(1).

158. *See id.* § 207(a)(2).

159. *See id.* § 207 (c)(1).

160. *See id.* § 207(d)(1).

161. *See* NOWNES, *supra* note 3, at 91.

162. *See supra* Part I.B.1.

generation. First, the revolving door, in addition to its claimed benefits in the outward direction, for leaving employees, may also have benefits in the inward direction, for entering employees, because new officials who used to be in the private sector bring industry expertise.[163] Second, the OGE has acknowledged that WAGs provide government officials the opportunity to "have an interchange of ideas with a variety of individuals."[164] Third, proposals to limit contacts between regulators and industry representatives face opposition from other studies on influence that point to their informational value.[165]

Even the amount of progress toward adoption of each of the above proposals seems to correspond to the relative strength of the claim for that activity that it results in improved information. For the revolving door, which has arguably the weakest claims to informational benefits, President Obama has imposed additional restrictions on both directions for lobbyists via executive order.[166] For example, a registered lobbyist may not "seek or accept employment with any executive agency that [she] lobbied within the 2 years before the date of [her] appointment," and the one-year ban for senior officials on representing any entity has been extended to two years.[167]

As for WAGs, the OGE proposed a rule in 2011 to prohibit most lobbyists and lobbying organizations from providing gifts of free attendance.[168] Though the OGE has affirmed these events' informational benefits, it has also "perceived some instances over the years in which the WAG exception was used to permit attendance at events, particularly social events, where the nexus to the government's interest was attenuated."[169] The rule met opposition, not only from lobbyists,[170] but also American Bar

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163. *See* H.R. DOC. NO. 87-145, at 2 (1961) (citing the need for "men and women with a broad range of experience, knowledge, and ability" even while promoting stricter ethics rules). The benefits of hiring expert government employees also arguably explain why they are not banned from working on particular matters.

164. *See* Memorandum from OGE on Acceptance of Food and Refreshments by Executive Branch Employees (Oct. 23, 1987), http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=946. *But see* PAINTER, *supra* note 4, at 20 (negatively characterizing information exchange, saying that "the more lobbying goes on at a WAG, the more likely the WAG is to pass under ethics rules").

165. *See* Kwak, *supra* note 25, at 95; Livermore & Revesz, *supra* note 22, at 1359.

166. *See* Exec. Order No. 13,490, 3 C.F.R. 193 (2010).

167. *See id.* at 194. Also, this executive order extends the standard one-year ban on particular matters involving former employees to two years, and to "regulations." *See id.* Lobbyists, in particular, may not work on any particular matter on which they lobbied in the previous two years or "in the specific issue area in which that particular matter falls." *See id.*

168. *See* Amendments Limiting Gifts, 76 Fed. Reg. 56,330, 56,338–339 (Sept. 13, 2011).

169. *See id.* at 56,333.

170. *See* T.W. Farnam, *Lobbyists Oppose Idea to Limit Gift Rules*, WASH. POST, Sept. 27, 2011, at A19; Robert Pear, *Limits on Lobbyists as Hosts? Simply Unworkable, They Say*, N.Y. TIMES (Apr. 6, 2012), http://www.nytimes.com/2012/04/07/us/politics/lobbyists-object-

Association's Section of Administrative Law and Regulatory Practice, which cited WAGs' informational value.[171] As of this writing, the rule shows no sign of being finalized.

Finally, agency contacts indisputably involve information transmission and are not necessarily social like some WAGs; however, there have been no moves to limit contacts. Instead, policies in this area deal just with disclosure. First, lobbyists are only required to provide information about their expenditures and about "specific executive branch actions" involved in their lobbying, and this obligation applies only when they involve sufficiently senior government employees.[172] Lobbying is broadly defined to include "oral or written communication[s],"[173] but lobbyists need not fully account for their contacts. Second, three agencies charged with implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) have voluntarily provided information about meetings with stakeholders.[174] Thus, instead of curbs on contacts, there are only disclosures, and even these are incomplete.[175]

Overall, government policies are consistent with the usefulness of focusing restrictions on activities generating relatively little information compared to influence.[176] Though this consistency does not prove that the current set of restrictions is optimal, it does imply that concerns about

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to-proposed-limits-on-courting-officials.html; D. Mark Renaud & Robert L. Walker, *Ethics Rules We Don't Need*, WASH. POST, Oct. 3, 2011, at A17.

171. *See* Letter from Michael Herz, Chair, Section of Admin. Law and Regulatory Practice, Am. Bar Ass'n (ABA), to Julia Eirinburg, Associate General Counsel, OGE (Nov. 14, 2011), http://www.americanbar.org/content/dam/aba/events/administrative_law/2012/05/ad_law_section_comments_to_oge.authcheckdam.pdf (describing the "costs of isolating executive branch officials").

172. *See* 2 U.S.C. §§ 1602(3), 1604(b) (2012).

173. *See id.* §§ 1602(7)–(8).

174. *See Treasury Policy on Voluntary Disclosure of Meetings on Dodd-Frank Implementation*, DEPT. OF THE TREASURY, https://www.treasury.gov/initiatives/wsr/Pages/transparency.aspx (last updated June 30, 2015); *Communications with the Public*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/newsevents/reform_meetings.htm (last visited Sept. 25, 2015); *External Meetings Archive*, CFTC, http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/ExternalMeetingsArchive/index.htm (last visited Feb. 10, 2016); Drutman, *supra* note 32 (describing these agencies' disclosure policies as voluntary).

175. *See* Shapiro, *supra* note 9, at 253–54 (suggesting agencies to be obligated to log and provide statistics of their meetings).

176. This statement is not a causal claim. There are undoubtedly political explanations underlying the growth in restrictions of activities, *see* MACKENZIE, *supra* note 149, at 23, 52–53, as well as resistance to further restrictions, *see* Pear, *supra* note 170 (noting in connection with the proposed WAG rule that "Mr. Obama has relied on people active in the lobbying industry to raise millions of dollars for his re-election bid."). Still, the availability or lack of plausible arguments that a given activity produces information may explain why opposition to restrictions is more successful for those activities that more obviously yield only influence.

information losses from further curtailments are reasonable. Proponents of new or additional restrictions arguably have the burden of showing that they would yield net policy benefits for the public.

B. Mitigation of Influence

Whereas curtailing some activities automatically implies a loss of industry input, mitigation techniques do not prevent industry from contributing information if it wants to. The hope for insulation through mitigation seems to be that industry would produce as much information as before but not pull regulation in its direction.[177] However, economic theory implies that the regulatory process cannot remove industry's benefits from influence without at least potentially affecting its choice of how much information to generate through its activities. With theory and evidence, this Subpart supports the idea that too much mitigation can disincentivize industry information production. It also provisionally concludes that additional mitigation compared to the status quo cannot ensure large policy benefits.

1. Informational Limitations

In general, economic logic implies that industry's willingness to engage in its activities, including those that generate information, varies with its ability to influence regulators through those activities. The simplest case to consider is when an institutional design weakens influence across all activities. The key result is that an intermediate difficulty of influence more strongly motivates activities, and therefore information production, than not only relatively high difficulties, but also relatively low difficulties.[178] Both follow from the logic, stated above, that benefits of moving policy toward industry's position motivate it to produce costly information,[179] albeit in different ways. The demotivating effect of high difficulty is fairly straightforward to explain. In the extreme case, zero ability to influence implies no marginal benefits besides its own private benefit from the additional knowledge.[180] For low difficulty, the more complex explanation is that relatively little of an activity is necessary to bring the regulator very close to the industry's orientation, after which point, the marginal benefits from influence are minimal, leaving little but industry's private benefit from

177. *See* Baxter, *supra* note 2, at 189.

178. This general result omits nuances from recalibration among activities in response to mitigation. However, substitution effects from one activity to another would have to be quite strong to overturn the result.

179. *See supra* note 135 and accompanying text.

180. *See supra* notes 125–127 and accompanying text.

the information.[181]

As in the case of curtailment, information losses from mitigation beyond an intermediate difficulty eventually outweigh gains from reduced influence if the decreasing marginal benefits assumption applies.[182] Information is maximized when industry activity can bias policy to some degree from the public's perspective but minimized when this activity has no potential to bias policy. Thus, there is some intermediate strength of influence that is optimal within the confines of mitigation strategies.

For mitigation that affects a single activity, the same results apply for that activity, though different results apply for other activities toward which industry might substitute. Specifically, a reduction in strength toward zero can be expected to induce industry to reallocate resources to the remaining activities. However, the extent to which it will want to engage in more of the other activities will depend on the effectiveness of these alternatives. Thus, *some* activities must be effective at influencing policy in order to avoid information losses from mitigating a single activity.

Combining this analysis with that of curtailment suggests that a roughly optimal combination of insulation strategies has three elements: (1) prohibiting pure influence activities; (2) restricting other activities with only a small informational component; and (3) mitigating the remaining ones if industry would otherwise obtain regulation quite close to its preferences. Again, perfect calibration is not possible, but the general principle is that the more biased regulation will otherwise be toward industry, the more likely mitigation will serve the public interest.

2. Illustrations of Information Losses

The possibility of losses from mitigation is not nearly as intuitive as from curtailment, so current government policy for mitigation is less likely to approximate the optimal mix than current policy for curtailment. Instead, cases of information losses from weakened influence would be useful. Appropriate policy examples are somewhat challenging to find. It is difficult to determine the strength of industry influence,[183] the amount of information before and after mitigation,[184] and whether the weakening of

181. *See* Laurence Tai, *Regulatory Capture and Quality* 22 (Harv. Univ. Edmond J. Safra Ctr. for Ethics, Working Paper No. 66, 2015), http://ssrn.com/abstract=2617012.

182. *See supra* note 140 and accompanying text.

183. For example, the Office of the Comptroller of the Currency's liberalization of banking has been portrayed both as promoting the public interest and as producing "capture." *Compare* CROLEY, *supra* note 6, at 228–36, *with* Kwak, *supra* note 25, at 71–73.

184. *Cf.* Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, *in* PREVENTING REGULATORY CAPTURE 365, 367 (Daniel Carpenter & David A. Moss eds., 2014) (studying examples of less-influenced regulation but

influence occurred in the range in which the theory predicts decreases in information.

However, the following two cases involve mitigation to nearly zero—one for a single activity, the other for all activities. The theoretical result would be a minimum of information from the mitigated activities. As long as the counterfactual does not involve policy very close to the regulator's view, which also entails little information production, a decrease in information associated with mitigation would support the theory.

The first setting is pre-APA rulemaking. In general, a court is most likely to invalidate an agency rule either because the agency lacks the authority to enact the rule or because it has not sufficiently considered the policy the rule would effectuate.[185] If an industry strives to bring about influence through the threat of judicial challenges, information about the merits of the policy are far less relevant for the first kind of challenge than for the second. Thus, statutory judicial challenges are essentially a pure-influence activity, whereas policy-based judicial challenges also generate information.

Reading history in reverse, one can say that, compared to today's rulemaking, influence through policy-based challenges was mitigated in the decades before the APA,[186] albeit not because of industry influence issues. From 1946, the APA's text required agencies to allow the "submission of written data" in notice-and-comment rulemaking.[187] Since then, requirements for an agency's rulemaking record have only grown.[188] In recent decades, rulemaking has been explicitly subject to some level of substantive review,[189] based on the APA provision precluding rules that are

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"not consider[ing] the extent to which the underlying forms of . . . regulation are socially desirable.").

185. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 382 (1986); *see also* Magill, *supra* note 89, at 409 ("If the court reviews the agency's decision . . . the agency must defend its choice as supported by the records (in the case of a factual finding); as a permissible choice under the statute; and/or as well reasoned in light of the alternatives and the objections raised to the proposed course of action.").

186. This sort of influence was mitigated, rather than formally restricted, as aggrieved parties were free to attempt to file sufficiency challenges to rulemaking. There are "some" cases in which industries effectively forced agencies to rely on their information to defend their rules and a small number of instances in which their challenges were successful. *See* S. DOC. NO. 77-8, at 116 (1941).

187. *See* Administrative Procedure Act (APA), 5 U.S.C. § 553(c) (2012).

188. *Compare* Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN L. REV. 1, 34–36 (2002) (requiring agencies to maintain a record, disclose all relevant material, and provide sufficient explanation for a final rule); *with* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31–32 (1947) (claiming that the APA "does not require the formulation of rules upon the exclusive basis of any 'record'"). Today's greater obligations allow more opportunity for informational influence.

189. Before explicitly reviewing rules substantively, courts would sometimes use statutory

"arbitrary" or "capricious."[190] In contrast, pre-APA rules could not generally be challenged on policy grounds. Agencies during this era were not required to consult with stakeholders before issuing rules,[191] nor were their rules usually subject to judicial challenge on the basis that they were substantively deficient.[192] Instead, the strongest reason for setting aside a rule was that it exceeded an agency's statutory authority or even constitutional bounds.[193]

According to the theory above, regulated firms unable to influence the content of a rule on the basis of its reasoning will substitute toward some other form of activities. However, influencing regulators through implicit payments in exchange for policy benefits or through social interactions seems to have been difficult. Marver Bernstein portrays agencies not subject to these forms influence in his classic study of independent commissions:

> The agency ordinarily begins its administrative career in an aggressive, crusading spirit. It may resolve to meet the opposition of the regulated with firmness in order to promote the public interest. . . . In view of the high hopes for administrative regulation and the great faith placed in the commission as an agent of reform, commissioners are urged to define their role in expansive rather than restrictive terms.[194]

Against such a "crusading" agency, substitute activities that do not entail trying to win over the regulator would include judicial challenges to the agency's authority.[195] It turns out that such challenges were quite frequent. Bernstein notes that independent agencies could "accomplish little until the Supreme Court . . . passed on the validity and constitutionality of its powers and authority," and that industries would claim that agencies have "no ability to exercise discretionary authority and adjudicate disputes."[196] A

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interpretation to implicitly correct the substance of rules. *See* Merrill, *supra* note 1, at 1087.

190. *See* 5 U.S.C. § 706(2)(A). The doctrine of so-called "hard-look" substantive review was "solidified" in Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983). *See* Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 152 (2006).

191. *See* S. DOC. NO. 77-8, at 103–05 (1941) (describing instances of agencies' voluntary consultations with stakeholders); *id.* at 105 ("Consultation cannot be prescribed by legislation.").

192. *See id.* at 116–17 (describing statutes with more searching review and this kind of intervention as a "novel type of judicial review"). *But see id.* at 116 (referring to a few pre-APA organic statutes allowing for judicial challenges based on substance).

193. *See id.* at 115–16.

194. BERNSTEIN, *supra* note 1, at 80.

195. Undoubtedly, an industry would engage in other activities. However, the general pattern seems to be one in which influence took the form of "attacks," rather than collusion or cultural influences. *See id.* at 95–96.

196. *See* BERNSTEIN, *supra* note 1, at 81, 96.

recent analysis of the SEC at its founding similarly argues that the securities industry was willing to challenge the SEC's statutory authority.[197] It notes that the industry had a good chance of success, given the Supreme Court's invalidation of two other New Deal statutes.[198] Unrelated to the merits of SEC decisionmaking, such a challenge would not have yielded much policy-relevant information.[199]

Though this example describes rulemaking of a different era, it still has relevance today, given the theory that industry pulls policy toward its interests with the threat of judicial review of the substance of rules.[200] It implies that mitigating this form of influence might not eliminate court challenges but simply shift them toward issues of agency authority.[201]

The second setting is negotiated rulemaking in the present day, in which an agency convenes a committee to seek consensus on a proposed rule.[202] Though originally intended to speed up rulemaking by making judicial review less likely,[203] negotiated rulemaking is also a mitigation method since it uses a balanced committee to reach consensus on a proposed rule.[204]

Though not mainly focused on the question of whether it reduces the effectiveness of influence in industry participation,[205] the limited empirical evidence provides support for the intuition that more direct participation by nonindustrial interests reduces the strength of influence.[206] First,

197. *See* GAILMARD & PATTY, *supra* note 16, at 257.

198. *See id.*

199. *See id.* Though this source focuses on the provision of information in firms' possession rather than generation of information, it is in agreement with the present argument to the extent that a statutory challenge would have yielded losses of information.

200. *See* Wagner, *supra* note 5, at 1333–34 (noting that even if an agency strives to resist industry pressure, industry's threat of legal challenges to the agency's regulation is enough to affect its actions).

201. In particular, the idea of restructuring judicial review to account for imbalances, *see id.* at 1406–13, would seem orthogonal to challenges that the agency's statutory basis for a rule is unsound.

202. *See* 5 U.S.C. § 563(a)(7) (2012).

203. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261–62 (1997) (citing the potential to avert judicial review challenges as one of the main reasons for using negotiated rulemaking); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 21 (1982) (referring to "rulemaking procedures that take several years to complete at the agency level and, in the event judicial review is sought, another year or two in the courts").

204. *See supra* notes 83–88 and accompanying text.

205. *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 944 & n.4 (2006) (setting forth empirical studies that focus on questions of whether negotiated rulemaking decreases rulemaking time and judicial challenges or increases satisfaction or the likelihood of consensus, as opposed to whether negotiated rulemaking reduces the relative influence of industry).

206. *But see* Juliet A. Williams, *The Delegation Dilemma: Negotiated Rulemaking in Perspective*, 17 POL'Y STUD. REV. 125, 137 (2000) (asserting the opposite intuition, according to which

participants, including EPA officials, perceive greater satisfaction from negotiated rulemaking than from conventional rulemaking.[207] Second, there is rather less of a perception that the content of regulation reflects disproportionate influence by any one party.[208]

If negotiated rulemaking succeeds in producing a consensus, then influence has been mitigated across all activities, at least up to the proposed rule stage.[209] Such total mitigation would be expected to result in information losses. Both theory and evidence point to this effect for negotiated rulemaking.[210] Philip Harter, the foremost advocate for this procedure, surmises that a proposed rule will be "generated not through development of enormous factual material, but through the agreement of the parties on the relevant facts and issues."[211] Harter's characterization of information implies that the most important facts will come to light. However, critics have pointed to three potential drawbacks: (1) participants may neglect to discuss key issues;[212] (2) agencies may not focus on using

negotiated rulemaking is merely another form of "delegation [that] facilitates interest group capture of government").

207. *See* Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 603 (2000). Coglianese has criticized this finding on the grounds that the sample for negotiated rulemaking contains EPA officials, who are more likely to be satisfied with rulemakings, whereas the conventional rulemaking sample does not. *See* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 431–32 & n.223 (2001). If EPA officials' satisfaction is helping to drive this result, then their satisfaction in negotiated rulemaking could further support the idea that this procedure mitigates influence.

208. *See* Langbein & Kerwin, *supra* note 207, at 609 exhibit 4. Instead of content, participants who perceived disproportionate influence saw it in the process. *See id.* This finding suggests that such participants were unable to point to any problems with the proposed rule itself. Meanwhile, this study's results concerning whether there is disproportionate influence and from whom are not significant. *See id.* at 609 exhibit 4, 610. This absence of a result is arguably best understood as a willingness by many participants to claim other parties exercised undue influence, even when they cannot show how this influence changed the rule's content.

209. In particular, the presence of representatives from interest groups opposed to industry would be expected to reduce the social influence of the industry representatives: it would "mak[e] relationships more explicit and less informal." *See* Kwak, *supra* note 25, at 96. Also, since the statutory charge for negotiated rulemaking is to achieve a consensus, *see* 5 U.S.C. § 566(a) (2012), regulators and regulated firms lack at least the formal power to carry out collusive bargains.

210. *But cf.* Langbein & Kerwin, *supra* note 207, at 605, 606 exhibit 3 (showing that more participants learned new things in negotiated rulemaking than in conventional rulemaking). However, much of the information is not about the consequences of the policy. *See id.* In any case, this result does not directly address the question of how much information the EPA obtained from industry.

211. *See* Harter, *supra* note 203, at 106.

212. *See* Coglianese, *supra* note 207, at 439–41 (arguing that the search for consensus can prevent an adequate discussion of relevant issues).

information generated to make a reasoned decision;[213] and (3) industry may be discouraged from developing new solutions.[214] Though the reasons offered for these potential problems differ from the motivation that comes from the ability to bring about influence, this motivation is plausibly another cause for these adverse effects.

Examples of negotiated rulemaking support these expectations. In one instance, the Environmental Protection Agency (EPA) allowed methyl tertiary butyl ether (MTBE) to be added to gasoline for the sake of reducing smog, but then MTBE had to be banned after it was found to be leaking into and contaminating groundwater.[215] At the state level, California's rule to cap retail electricity prices but not wholesale prices seemed satisfactory when wholesale prices were low, but later caused problems for utility companies when wholesale prices rose beyond predictions.[216] In another negotiated rulemaking, an EPA official was aware that industry was deliberately choosing not to raise an important issue about equipment leaks.[217] Though this third example deals with information provision rather than information production, it indicates that industry is thinking about information in the context of negotiated rulemaking.[218]

These two settings—pre-APA independent commission rulemaking and negotiated rulemaking—indicate not only that it is possible to go too far with mitigation, but also that information losses can be quite significant. To be sure, these examples do not militate against lesser degrees of mitigation. On the other hand, at least a few observers have surmised that industry biases regulation only some of the way toward its position.[219] If

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213. *See* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1381–82 (1997) (suggesting that the facts are less relevant to the final decision).

214. *See* Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 200–01 (1999) (arguing negotiated rulemaking may be inadvisable because of its apparent inability to spur innovation in the regulated industry, which may require the implicit threat of a strict standard to be motivated).

215. *See* Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 69, 74 (Rosemary O'Leary & Lisa B. Bingham, eds., 2003).

216. *See id.*

217. *See* Coglianese, *supra* note 207, at 439–40.

218. Though the fact that an official knew about withheld information might indicate other cases in which regulators are unaware of hidden information, an alternative interpretation is that regulators are sufficiently sophisticated not to be substantially misled by selective presentation of information by industry. *Cf.* CROLEY, *supra* note 6, at 294 (disputing the notion that "regulated interests can fool agencies").

219. *See* Carpenter & Moss, *supra* note 7, at 12 ("When capture exists, it appears to be empirically *limited* rather than empirically *pervasive*."); Sinden, *supra* note 40, at 1442 n.151 ("Clearly, 'agency capture' is probably never complete.").

this assessment is accurate, it would imply that large policy gains for the public from new mitigation efforts are not a given. Even if this assessment understates the extent of bias toward industry, it would still be helpful for evaluating mitigation if, rather than simply alleging industry influence in a given situation, future studies provide some sense as to the magnitude of influence.[220]

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Overall, this Part has revealed a dilemma for the standard insulation strategy—it cannot achieve perfect alignment with the public's preferences without sacrificing information that also serves the public interest. Taken far enough, curtailment prevents industry from generating information in the targeted activities while mitigation disincentivizes industry from doing so. As long as an uninfluenced regulator is expected to embody the public's view, these information challenges are unavoidable. The last Part illustrates how harnessing strategies can alleviate these difficulties.

III. VALUE OF HARNESSING INFLUENCE

As long as a regulator's original position is the public's perspective, a policy shift toward industry can only count as a loss for the public to be weighed against the gains from any associated information. However, if the regulator starts out biased against industry, then influence will initially benefit the public by removing this bias. Moreover, because information is bound with and motivates influence in activities, protecting industry's opportunity and ability to influence regulators preserves and even increases the associated information. Thus, preliminarily biasing regulation against industry means that any influence that follows will be utilized to yield closer alignment with the public and additional information.

This Part moves from theory to practice for harnessing in three steps. First, it outlines the potential policy benefits of preliminary biasing regulation against industry, both in the abstract and compared to a given status quo. Next, it shows that these benefits are empirically plausible with cases in which moving the regulator's starting point away from industry increased industry information and produced policy further away from industry. Finally, it provides arguments for the viability of specific strategies for harnessing influence more consciously and systematically.

A. Potential Benefits Compared to Insulation

The foundational step for analyzing the potential payoff of harnessing is

220. *Cf.* Bagley, *supra* note 92, at 5 ("Capture is a question of degree."); Carpenter & Moss, *supra* note 7, at 21–22 (same).

to determine the effect on the final position of regulation and on the amount of information resulting from a shift in a regulator's initial position away from the industry's view. As able to influence regulators as before, the industry will continue to engage in influence activities, but not enough to pull regulation to the same final position as before. This result holds, given the reasonable assumption that its marginal influence from additional activities decreases as it increases the level of these activities.[221] Then pulling regulation all the way to the previous final position requires additional activity that is less effective at influencing the regulator and therefore not worth the cost. Therefore, final regulation should move away from industry's preferences.

Also, industry can be expected to engage in more activity than before and thus produce more information. This effect follows from the decreasing marginal benefits assumption,[222] which, read in reverse, implies that the marginal cost of further deviation from industry's perspective increases. This circumstance seems highly plausible given the large scale of industry activities designed to influence regulation.[223] The reason for this result is that engaging in only the same level of activity as before would cause its marginal benefit from the last unit of activity to exceed its marginal cost, which means that it would benefit from increasing its activities.

Figure 3 depicts the overall comparison between harnessing and insulation. The public is better off when final regulation, represented by black circles, is closer to its perspective and when the amount of information is greater. Scenario 1 represents the optimal combination of insulation strategies in moderation when the regulator starts to align with the public, discussed above.[224] Scenario 2 reflects additional insulation compared to Scenario 1 so that industry cannot influence regulation at all. The result is perfect alignment with the public's orientation, but at the cost of information. In contrast, Scenario 3 is the result of harnessing compared to Scenario 1. Like total insulation, harnessing can produce policy that agrees with the public's views. However, harnessing increases information production and is thus better for the public than Scenarios 1 and 2.

Admittedly, this theoretical benefit of harnessing does not alone make it an important strategy in practice. The reason is that the theory cannot

221. For example, this assumption would imply that the first closed-door meeting with regulators is more effective than the second or third. At the limit, this assumption must be correct, or else influence would threaten to pull the regulator's position beyond industry's perspective rather than just to its perspective.

222. *See supra* note 140 and accompanying text.

223. *See supra* note 32 and accompanying text.

224. *See supra* Part II.B.I.

specify the magnitude of effects on information and on the position of final regulation for different concrete strategies. In particular, the extent to which a given amount of harnessing moves a final regulation is unclear, precluding perfect calibration of policy at the public's perspective.

Given a regulator with a starting position at the public's orientation, the relative value of harnessing and insulation depends on how strongly policy is biased toward industry. If the status quo policy is very close to what industry prefers, mitigation would stimulate information and would be important alongside harnessing.[225] If, instead, the status quo reflects only intermediate influence and bias, the effective combination of insulation measures already in place may be relatively close to optimal within the constraints of regulator who starts out unbiased. In this situation, harnessing presents the most promise for welfare improvements by stimulating information while moving policy toward the public's views. In these two cases, uncertainties about the effect of harnessing are less problematic because there is a significant margin of error for achieving major gains. For example, if the final regulation were somewhat biased from the public's views in one direction or the other, it would still be an improvement over the status quo because it would come with less bias and more information.

The remaining case involves a status quo with no initial bias and no influence. In theory, the public can gain quite a bit from allowing some influence and then applying harnessing to return policy somewhere near its position. However, these prospective benefits are qualified not only by uncertainty about the effect of harnessing, but also by the effect of reducing insulation.[226] Though this combination of strategies would increase information, it would also almost certainly introduce some amount of policy bias. Here, it would be important to have some sense that the available informational gains are large before attempting to redesign a regulatory policymaking process this way.

The foregoing survey suggests that harnessing is quite useful when the possible gains from closer alignment with the public and additional information production are relatively large. The impression from some studies that industry moderately biases policy[227] would indicate significant space for moving policy closer to the public. Meanwhile, the examples that

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225. The importance of curtailment is less obvious, given that pure influence activities seem heavily constrained already, *see supra* notes 148–53 and accompanying text, and since other activities could be mitigated as well as curtailed.

226. Though there are also uncertainties from both mitigation and harnessing when the status quo is strongly biased toward industry, uncertainty for mitigation points in favor of harnessing since harnessing more consistently produces informational benefits.

227. *See supra* note 219 and accompanying text.

follow reinforce the case that much information is at stake in restructuring the regulatory process in response to influence.

B. Illustrations Pointing to Harnessing's Informational Value

The benefits of harnessing derive empirical support from cases showing that an increase in the initial distance between a regulator and industry produces policy that is further from the industry's orientation, that still reflects influence, and that is better-informed than before. Though only the last example clearly presents an initial regulator position biased against industry, all of them are relevant since these three observed characteristics of the final policies apply regardless of where one places the public's perspective. All three cases end up showing large informational gains, which is significant not only for the value of harnessing but also because it contradicts other studies' expectations that a greater distance between a regulator and industry reduces information.[228]

1. CFTC Under Gary Gensler

Among leaders of financial regulatory agencies following the 2008 crisis, Gary Gensler, the CFTC Chairman from 2009 to 2014, seems to have had policy preferences further from the financial industry's than most other regulators at the time, as well as other potential candidates for this position. At the end of his tenure, a *New York Times* article called him a "hard-charging chairman" and quoted one of his fellow commissioners characterizing him as a "force of nature."[229] With a similar tone, an article in *Reuters* called him a "Wall Street scourge" and quoted former Representative Barney Frank as saying, "With regards to members of the Senate who support regulation, he's made a bunch of friends. He's clearly alienated a lot of the bankers."[230]

The CFTC's policies under Gensler's leadership seem correspondingly further from what regulated firms would have preferred. Specifically, the CFTC completed fifty of the sixty regulations required under Dodd-Frank, which reflects substantially more progress than any other U.S. financial

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228. *See* GAILMARD & PATTY, *supra* note 16, at 237–38; McCarty, *supra* note 16, at 113; Reiss, *supra* note 2, at 598. These works, however, assume a fixed position for the regulator.

229. *See* Ben Protess, *Regulator of Wall Street Loses its Hard-Charging Chairman*, N.Y. TIMES (Jan. 2, 2014, 8:46 PM), http://dealbook.nytimes.com/2014/01/02/regulator-of-wall-street-loses-its-hard-charging-chairman/?_r=0.

230. *See* Douwe Miedema, *Swaps Regulator Gensler: Banker Turned Wall Street Scourge*, REUTERS (Jan. 3, 2014), http://www.reuters.com/assets/print?aid=USBREA020OC20140103.

regulatory agency[231] or European regulators.[232] Other than the media characterizations of this chair, one sign that these regulations were stricter as a whole than the financial industry wanted is that they triggered five lawsuits against the CFTC.[233]

The fear of stricter regulation with Gensler at the helm arguably drove firms to engage in more activities to shift the CFTC's position and to generate more information. Some influence did occur and can be inferred from his compromises on various policies. For example, in a rule requiring financial firms to consult multiple banks when looking for a price for a derivatives contract,[234] Gensler and another commissioner had sought for firms to consult at least five banks, but the Commission ended up lowering the requirement to two banks for the first fifteen months after enactment, and three banks afterward.[235] Another example is an agency guidance that extended CFTC regulations to overseas trades.[236] Here, Gensler compromised on the final policy with financial firms by allowing a delay in the onset of this guidance, permitting European regulation to substitute in the future, and providing an additional comment period.[237] Beyond these specific instances, a shift in the agency's position from its initial position can be seen in the unanimous votes that a majority of its Dodd-Frank regulations received,[238] which implies acceptance from its less aggressive Republican commissioners.[239]

This influence came with large quantities of information from industry, presented at numerous meetings that firms held with commissioners. In an interview five months following Dodd-Frank's passage, Gensler reported 475 total meetings and estimated that over 90% were with "larger institutions or corporations."[240] At three years after enactment, the CFTC

231. DODD-FRANK PROGRESS REPORT 2014, DAVIS POLK & WARDWELL LLP 5 (2014), http://www.davispolk.com/download.php?file=sites/default/files/Jan2014_Dodd.Frank_.Progress.Report_0.pdf.

232. *See* Miedema, *supra* note 230.

233. *See* Protess, *supra* note 229.

234. *See* Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476, 33,497 (June 4, 2013) (codified at 17 C.F.R. pt. 37).

235. *See* Ben Protess, *Regulators Tighten Rules on Trading of Derivatives*, N.Y. TIMES, May 17, 2013, at B8.

236. *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,292 (July 26, 2013).

237. *See* Ben Protess, *U.S. Regulators Approve Stricter Trading Rules Overseas*, N.Y. TIMES (July 12, 2013), http://dealbook.nytimes.com/2013/07/12/u-s-regulators-approve-stricter-trading-rules-abroad/.

238. *See* Protess, *supra* note 229.

239. *See* 7 U.S.C. § 2(a)(2)(A) (2012) (preventing more than three members of the Commission from belonging to the same political party).

240. *See* Protess & Bishop, *supra* note 135.

had held over 2200 meetings, with financial firms present at about three quarters of them.[241] In addition, these firms held over four times as many meetings at the CFTC as at two other agencies entrusted with implementing the Dodd-Frank Act—the Department of the Treasury and the Federal Reserve[242]—which suggests that Gensler's stance stimulated more information production than a more moderate chair would have induced. This case, along with the next one, suggests there is value in appointing agency heads opposed to industry's preferences, perhaps even more opposed than the public.

2. Contrasting SEC Rulemakings

A stark contrast between two SEC rulemakings also supports the proposition that an initial agency position further from industry's orientation results in policy decisions that are more opposed to industry and come with more industry information. The first regulation, the SEC's April 2004 net capital rule,[243] showed initial closeness between the commissioners and firms, a policy correspondingly close to these firms' desires, and relatively little information generation about the potential effects of the rule. The second, a set of rules for money market funds promulgated in August 2014,[244] was associated with more initial distance between the agency and firms, more influence, and more information.

For the first rule, the general policy issue was how much capital to require firms to hold as a percentage of total indebtedness, in part so they can satisfy their customers' immediate claims,[245] similar to how consumer banks keep reserves for customer withdrawals. The 2004 rule allowed the largest broker-dealers (securities trading firms) to use mathematical models to help calculate this percentage rather than the formulas given by the standard rule.[246] Since the use of such models was voluntary,[247] the rule was designed to enable firms to retain less capital for a given level of indebtedness.[248]

241. *See* Drutman, *supra* note 32.

242. *See id.*

243. Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities (Alternative Net Capital Requirements), 69 Fed. Reg. 34,428 (June 21, 2004) (codified at 17 C.F.R. pts. 200, 240).

244. Money Market Fund Reform; Amendments to Form PF (Money Market Fund Reform), 79 Fed. Reg. 47,736 (Aug. 14, 2014) (codified at 17 C.F.R. pts. 230, 239, 270, 274, 279).

245. *See* Steven L. Molinari & Nelson S. Kibler, *Broker-Dealers' Financial Responsibility under the Uniform Net Capital Rule—A Case for Liquidity*, 72 GEO. L.J. 1, 18 (1983).

246. *See* Alternative Net Capital Requirements, 69 Fed. Reg. at 34,428.

247. *See id.*

248. *See id.* at 34,455 (referring to "lower deductions from net capital" for the same assets

Initial closeness between the SEC and the broker-dealers that benefited from the rule can be inferred in part from the general deregulatory climate of the George W. Bush Administration.[249] The commissioners were especially likely to show initial sympathy since the rule also reflected concern about these firms' competitiveness in European markets.[250] Specifically, the relaxation of net capital requirements was coupled with new SEC supervisory authority over the broker-dealers' parent companies, which allowed them to escape European regulation,[251] but which the agency did not rigorously exercise after the rule's enactment.[252] Additionally, the vote for the rule was unanimous, with support of commissioners of both political parties.[253]

This initial closeness would imply that these broker-dealers did not need much in terms of activities, including informational ones, to obtain policies closer to what they wanted. The quick turnaround for the regulation, just six months after notice of proposed rulemaking,[254] is consistent with the relative lack of activity. These facts suggest a policy with little influence that was quite close to what the broker-dealers wanted both before and after any activities they undertook.

Also, the commissioners' discussion before voting for the rule implies that firms produced little information about its potential consequences—though the commissioners were aware that the rule might leave broker-dealers without enough net capital, they did not seem willing to inquire further into the issue.[255] One more piece of evidence that the rule was not that well-informed is the length of its preamble, which, at thirty-three

in calculating the required amount of capital).

249. *See* Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt*, N.Y. TIMES (Oct. 2, 2008), http://www.nytimes.com/2008/10/03/business/03sec.html. This article has been cited for erroneously portraying the net capital rule as a cause of the 2008 financial crisis. *See* Andrew W. Lo, *Reading about the Financial Crisis: A Twenty-One-Book Review*, 50 J. ECON. LITERATURE 151, 175–76 (2012). However, this alleged aspect of the rule is not under consideration here.

Though a general policy of deregulation might appear to be a sign of influence, one needs additional proof to establish it when pro-business presidents are in power. *See* Carpenter, *supra* note 13, at 66–67. Instead, the correct interpretation of the commissioners' inclinations is that their initial preferences were close to industry's to begin with.

250. *See* Labaton, *supra* note 249.

251. *See* Alternative Net Capital Requirements, 69 Fed. Reg. 34,428, 34,429 (June 21, 2004) (codified at 17 C.F.R. pts. 200, 240).

252. *See* Labaton, *supra* note 249.

253. *See id.*

254. *See* Alternative Net Capital Requirements, 69 Fed. Reg. at 34,429. The rule does not appear on any of the SEC's semiannual regulatory agendas preceding the proposed rule, suggesting that the SEC conceived of the rule only during the second half of 2003.

255. *See* Labaton, *supra* note 249.

pages,[256] is relatively short for a financial regulation.

The second rule strives to prevent runs on money market funds like those that some funds experienced during the 2008 financial crisis.[257] Specifically, it requires some types of funds to list a floating net asset value instead of a fixed price of one dollar per share and allows all funds to restrict redemptions under conditions relating to the liquidity of their assets.[258] This rule differs from the net capital rule in the SEC's initial position, the amount of influence, and the amount of information.

Here, the SEC had different leadership, and thus arguably an initial position relatively far from firms that sponsor money market funds. Such a position can be inferred in part from the fact that the SEC was considering a *second* set of restrictions following the 2008 financial crisis, after regulations it had enacted in 2010.[259] In fact, former Chair Mary Schapiro had sought these additional regulations as early as 2012 but was not able to obtain sufficient support from enough other commissioners then.[260] Further evidence for such an initial position comes from a dissenter in the vote on the 2014 rule who argued that it was not sufficiently robust.[261] As with the CFTC under Gensler's leadership, an initial SEC position further away from industry's preferences seems to have produced a policy that was further from at least some regulated firms' views than the net capital rule was from the broker-dealers' position. Firms lobbied against additional money market rules in 2012,[262] which implies that they preferred the status quo. However, the SEC did eventually promulgate a second rule for these funds.

Since it was delayed by two years and was not as strong as the originally planned rule—which would have applied the floating net asset value rule to all money market funds[263]—significant influence seems to have taken place, arguably more of it than for the net capital rule. However, this influence

256. *See* Alternative Net Capital Requirements, 69 Fed. Reg. at 34,461 (marking the start of the text of the rule).

257. *See* Money Market Fund Reform, 79 Fed. Reg. 47,736, 47,746 (Aug. 14, 2014) (codified at 17 C.F.R. pts. 230, 239, 270, 274, 279).

258. *See id.* at 47,739. Specifically, the floating net asset value requirement applies to funds for institutional investors that do not primarily invest in government securities, and not to retail funds. *See id.*

259. *See id.* at 47,745–46.

260. *See* Nathaniel Popper, *Changes to Money Market Funds Stall,* N.Y. TIMES (Aug. 22, 2012), http://www.nytimes.com/2012/08/23/business/sec-calls-off-vote-on-fund-regulation.html.

261. *See* William Alden, *After Split Vote, S.E.C. Approves Rules on Money Market Funds*, N.Y. TIMES (July 23, 2014, 4:04 PM), http://dealbook.nytimes.com/2014/07/23/s-e-c-approves-rules-on-money-market-funds/.

262. *See* POGO, *supra* note 64, at 3–5.

263. *See* Alden, *supra* note 261.

came with more information from fund sponsors than the broker-dealers produced for the net capital rule. The preamble to the rule refers many times to comments submitted by these firms, along with other stakeholders.[264] Also, this preamble is 221 pages long,[265] more than six times as long as the net capital rule's preamble. Moreover, lobbying in the form of letters and meetings with SEC officials,[266] which presumably continued until the rule was finalized, supports the idea that firms produced more information for it than for the net capital rule.

3. Hazardous and Solid Waste Amendments

Congress passed HSWA to strengthen the Resource Conservation and Recovery Act (RCRA) of 1976.[267] Among other implementation problems, the EPA had missed various deadlines for promulgating regulations.[268] Furthermore, Reagan Administration appointees committed to deregulation ended up implementing RCRA.[269] These appointees effectively brought EPA's initial views close to that of industry's.[270]

HSWA, as a whole, can be understood as a legislative attempt to move the EPA's initial position away from industry's orientation as it passed with support from both parties in Congress but not President Reagan.[271] Furthermore, it contained a number of hammer provisions that very pointedly had this effect.[272] HSWA's hammer provisions required the EPA to promulgate conditions under which waste disposal of different kinds of substances on land would be legal, and the default upon missing the deadline was that land disposal of those substances would be entirely banned.[273] A complete ban on disposal reflected a position quite far from the waste management industry's orientation, and even the public's. As a statutory default, it moved the EPA's initial position in the direction of

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264. *See* Money Market Fund Reform, 79 Fed. Reg. 47,736 *passim* (Aug. 14, 2014) (codified at 17 C.F.R. pts. 230, 239, 270, 274, 279).

265. *See id.* at 47,957 (marking the start of the text of the rule).

266. *See* POGO, *supra* note 64, at 3–4.

267. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012); *see* RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION 7 (1987).

268. *See* FORTUNA & LENNETT, *supra* note 267, at 10–11, 13.

269. *See id.* at 12.

270. *See supra* note 249 (outlining the principle underlying why these appointees do not indicate industry influence).

271. *See* FORTUNA & LENNETT, *supra* note 267, at 7.

272. *See* 42 U.S.C. §§ 6924(d)(1)–(2), (e)(1)–(2), (g)(1), (5), (6)(C) (setting out the hammer provisions); Erik H. Corwin, Note, *Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984*, 29 HARV. J. ON LEGIS. 517, 533 (1992) (pointing out hammer provisions in the Hazardous and Solid Waste Amendments of 1984).

273. *See* Corwin, *supra* note 272, at 534–36.

stricter controls on waste. It also reversed the usual incentives for litigation by opposing interests. When no regulation means the status quo, regulated firms gain and nonindustrial interests lose from a legal challenge that delays the onset of a rule.[274] In contrast, a hammer provision adverse to industry causes firms to want a regulation to stand but makes nonindustrial groups more eager to mount a legal challenge and provides the latter with a stronger bargaining position.[275]

The EPA did meet all the hammer provision deadlines.[276] Given the deregulatory ideology of the early EPA leaders in the Reagan Administration,[277] as well as delays that occurred in the early years of RCRA under the Carter Administration,[278] the policies that EPA enacted must be stricter than what the industry would have preferred. At the same time, the policies were less severe for the firms than the land disposal ban would have been, so some influence must have occurred.[279] Moreover, this movement in both the initial and final preferences of the agency came with more information: as one observer noted at the time, "They have induced all of the regulated community to produce treatment data in volumes and in timeframes that the Agency could not have accomplished otherwise. The regulated community now finds it in their interest to contribute to, not merely carp about, the standard-setting process."[280] This assessment reflects the logic that the industry was impelled by the threat of very adverse regulation to produce additional information.[281]

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Together, these three examples provide further support for the general

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274. *See* Wagner, *supra* note 5, at 1391 & n.267.

275. This dynamic can also mitigate any tendency on the part of a regulator to promulgate an industry-friendly rule, since a substantively inadequate rule risks a judicial remand.

276. *See* Corwin, *supra* note 272, at 539.

277. William Ruckelshaus, who succeeded Anne Gorsuch as EPA Administrator, was less an advocate of deregulation. However, his views can be characterized as moderate and not as pro-environment as the land disposal ban would imply. *See* MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? 138 (2000) (observing that he had worked as a corporate lobbyist and "could hardly be viewed as a tree-hugging liberal").

278. *See* FORTUNA & LENNETT, *supra* note 267, at 10–11.

279. *See* Zinn, *supra* note 42, at 114 (observing that regulated firms "encourage[d] EPA to adopt more palatable rules").

280. *Resource Conservation and Recovery Act Reauthorization—Part 1: Hearing Before the Subcomm. on Transp. and Hazardous Waste of the H. Comm. on Energy and Commerce*, 101st Cong. 399 (1990) (statement of Richard C. Fortuna, Executive Director, Hazardous Waste Treatment Council).

281. *Cf.* Caldart & Ashford, *supra* note 214, at 200 ("The regulated industry . . . [may] require a dramatic impetus, such as the promulgation of an unexpectedly stringent standard (or the fear that such a standard will be promulgated) before it will be motivated to innovate. . . ."). Here, however, extra motivation comes from the potential for influence.

theory that the ability to effectuate influence is important for stimulating activities that also produce information, as well as for the specific claim that harnessing, unlike insulation, moves policy away from industry's preferences without information losses. Though these shifts in initial regulator positions were not designed as efforts to address influence, they point to the possibility of effectuating such shifts more deliberately.

C. Possible Institutional Designs

There are a variety of possible ways to make industry influence useful for the public, even if not all of them have been proposed before.[282] The examples above suggest a preliminary focus on executive appointments and statutory hammer provisions.[283] These two methods represent also two general categories for harnessing measures: regulator selection and policy design, respectively.[284] The discussion of these techniques deals with challenges that extend beyond the confines of the theory, which relate to whether the techniques could realistically be implemented and whether they would have the desired effects. The goal here is not to demonstrate conclusively that these particular measures would be effective. Instead, in light of the dearth of harnessing proposals so far,[285] the goal is to defend them sufficiently to support additional research on these and other harnessing methods.

1. Harnessing via Selection: Executive Appointments

The President and the Senate have regular opportunities to preliminarily

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282. *See supra* Part I.B.3.

283. One other technique discussed above was the exclusion of factors favoring industry. *See supra* notes 94–99 and accompanying text. However, one study has suggested that the exclusion of costs in the NAAQS context has led to less stringent standards than cost-benefit analysis would have stated. *See* Michael Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184 (2014). Thus, this method has already received substantial attention and is not discussed further here.

284. A third potential category is incentivizing regulators to move their initial position to a place on the opposite side of the public as compared to industry's. However, no obvious candidates come to mind. The idea that interest groups incentivize regulators to shift policy in their favor, including through the revolving door, *see* Laffont & Tirole, *supra* note 37, at 1090–91, applies readily to industry, but less so to opposing interest groups, who cannot offer matching rewards, *see* Barkow, *supra* note 8, at 65; Sinden, *supra* note 40, at 1509–10. Also, centralized review of regulation remains reactive and cannot systematically cause the starting point of regulations to be further from industry. *See* Livermore & Revesz, *supra* note 22, at 1382 (emphasis added) ("OIRA can perform a *limited* but important role in examining agency inaction through the review of petitions for rulemaking"). The limitation to a reactive role applies to the proposal for a White House body to investigate agencies for signs of capture. *See supra* note 92 and accompanying text.

285. *See supra* Part I.B.3.

bias regulation against industry by appointing agency leaders with this kind of bias. In applying this technique, the President, who tends to represent the public,[286] would nominate individuals with views that diverge from her own. Various studies have documented cases in which she has done so,[287] so there is no reason that she could not at least consider appointing individuals who would have the effect of harnessing industry influence. However, there are questions as to whether such appointments are politically feasible and whether they would generate more information as they move policy away from industry's preferences.

Industries will resist any attempt to appoint agency leaders who are clearly biased against them, just as they strive to influence regulatory policy outcomes.[288] They are known to lobby for their preferred bureaucratic appointments,[289] and they may succeed. For example, the banking industry appears to have exerted political pressure to prevent Elizabeth Warren's nomination to head the Consumer Financial Protection Bureau.[290] Thus, it is reasonable to wonder whether appointments are primarily an opportunity for influence rather than a solution for it.[291]

In practice, however, it seems that industries do not consistently secure appointees who are friendly to their interests. In the cases above of Gary Gensler and SEC commissioners who imposed the latest restrictions on money market funds, the relevant industries needed to engage in influencing the rulemaking process rather than simply relying on the appointments process for likeminded leaders. Beyond these examples, other studies of agency heads have identified past leaders with positions further from industry than the president who appointed them, and thereby possibly biased against industry. Examples include chairmen of the Federal

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286. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001); *see also* Carpenter, *supra* note 13, at 66–67 (contending that those claiming "capture" under a pro-business president need to show that "the electorate's preferences . . . were somehow being distorted by the electoral process").

287. *See* GAILMARD & PATTY, *supra* note 16, at 254–55, 269; Bertelli & Feldmann, *supra* note 101, at 19; Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEG. STUD. 95, 95–96 (2014); Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2222 (2012).

288. *Cf.* Posner & Vermeule, *supra* note 14, at 1745 (noting that the assumptions underlying behavior for solutions and problems may be inconsistent with each other).

289. *See* NOWNES, *supra* note 3, at 110–13; *see also* GAILMARD & PATTY, *supra* note 16, at 254 (indicating that disapproval by the securities industry caused Franklin Roosevelt to appoint a less pro-regulatory chair for the SEC).

290. *See* Editorial, *Consumers vs. the Banks*, N.Y. TIMES (July 24, 2011), http://www.nytimes.com/2011/07/25/opinion/25mon1.html.

291. *See, e.g.*, David Sirota, *Obama Gift-Wraps the SEC*, SALON (Feb. 11, 2013), http://www.salon.com/2013/02/11/obama_gift_wraps_the_sec (calling SEC Chair nominee Mary Jo White and the Senate Banking Committee examples of "regulatory capture").

Trade Commission of the 1970s[292] and administrators of the EPA, including William Ruckelshaus,[293] William Reilly,[294] and Lisa Jackson.[295] On a larger scale, Paul Quirk's classic study on industry influence in regulation finds that substantially more appointees had "anti-industry" viewpoints than "pro-industry" and "moderate" viewpoints combined.[296] Quirk concludes that the notion that industry successfully influences executive appointments is "emphatically not substantiated."[297] Furthermore, an appointee with ties to an industry does not necessarily hold an initial position close to that of industry. For example, when President Obama nominated Mary Jo White for SEC Chair, critics claimed that she could not regulate Wall Street robustly since she had served financial firms and their executives as clients in legal practice.[298] However, she seems to have made the SEC a more aggressive regulator than before.[299]

It remains to be explained why industries would be relatively more successful in influencing a regulator for favorable policy than in securing favorable appointees. The reason may be that appointments are much less frequent and more prominent than decisions by regulators. One implication of this numerical contrast is that media attention is much more likely for a given appointment than for a regulatory action.[300] For example,

292. *See* Bubb & Warren, *supra* note 287, at 125–27.

293. *See id.* at 128.

294. *See* Bertelli & Feldmann, *supra* note 101, at 19.

295. *See* Bubb & Warren, *supra* note 287, at 96.

296. *See* QUIRK, *supra* note 39, at 49.

297. *See id.* at 61.

298. *See* John Cassidy, *Two Reasons Why Mary Jo White Is a Bad Choice for the SEC*, NEW YORKER (Jan. 25 2013), http://www.newyorker.com/news/john-cassidy/two-reasons-why-mary-jo-white-is-a-bad-choice-for-the-s-e-c; William D. Cohan, *Mary Jo White Spins the SEC's Revolving Door*, BLOOMBERG (Mar. 17, 2013, 6:30 PM), http://www.bloomberg.com/news/articles/2013-03-17/mary-jo-white-spins-the-sec-s-revolving-door; Sirota, *supra* note 291; Andrew Ross Sorkin, *Nominee for 'Sheriff' Has Worn Banks' Hat*, N.Y. TIMES (Jan. 28, 2013, 9:35 PM), http://dealbook.nytimes.com/2013/01/28/nominee-for-sheriff-has-worn-banks-hat/.

299. *See* Dave Michaels, *SEC's Mary Jo White Defies Political Meddling in Year One*, BLOOMBERG (Apr. 11, 2014, 11:33 AM), http://www.bloomberg.com/news/articles/2014-04-11/sec-s-mary-jo-white-defies-political-meddling-in-year-one (noting efforts to strengthen enforcement); Protess & de la Merced, *supra* note 31 (stating that White's "recent actions have started to assuage some concerns" "about her connections to Wall Street"). *But see* Jesse Eisinger, *Once-Powerful, Mary Jo White's S.E.C. Now Seen as Sluggish and Ineffective*, N.Y. TIMES (Aug. 13, 2014, 12:00 PM), http://dealbook.nytimes.com/2014/08/13/once-powerful-the-s-e-c-is-seen-as-sluggish-and-ineffective/?_r=0 (arguing that the SEC has not regulated strictly enough under her leadership).

300. *See* Wagner, *supra* note 5, at 1377–78 (suggesting that most rules do not attract media attention).

compared to extended *New York Times* coverage of White's nomination,[301] no one from that newspaper or any other major media organization covered the net capital rule at the time the SEC promulgated it.[302] Another implication is that nonindustrial interest groups with limited resources should find it easier to participate in the appointments process than to provide input for all regulations. As President Obama entered office, groups representing labor, the environment, and "other traditional liberal interest[s]" readily proposed nominees to him.[303] In contrast, a study of interest group participation in EPA rulemaking finds that environmental interest groups submitted comments for less than half of proposed rules, whereas industrial groups always submitted comments.[304] These intuitive patterns of media and nonindustrial group behavior support the coherence of treating executive appointments as an opportunity for harnessing influence that happens later in policymaking, rather than as a product of influence at an earlier stage.

Distinct from any political challenges is the substantive issue of whether such leaders can actually induce more industry information production. First, these leaders might lack the expertise or experience that comes from working in or with an industry to produce well-informed policy. After all, the need for this knowledge is an informational justification for the inward direction of the revolving door.[305] Though such knowledge does not necessarily cause a regulator to have a starting point close to industry's,[306] it

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301. *See* Editorial, *Mary Jo White at the S.E.C.*, N.Y. TIMES (Feb. 7, 2013), http://www.nytimes.com/2013/02/08/opinion/mary-jo-white-at-the-sec.html; Ben Protess, *Nominee to Lead the S.E.C. Vows an 'Unrelenting' Fight on Fraud*, N.Y. TIMES (Mar. 12, 2013), http://query.nytimes.com/gst/fullpage.html?res=9B07E5DF1438F931A25750C0A9659D8B63; Sorkin, *supra* note 298.

302. *See* Labaton, *supra* note 249.

303. *See* NOWNES, *supra* note 3, at 111–12.

304. *See* Wagner et al., *supra* note 32, at 128.

305. *See* Carpenter, *supra* note 13, at 66 (pointing to the possibility that "there are few other sources of expertise outside of the regulated industry"); *supra* note 163 and accompanying text.

306. Mary Jo White's experience lends support to this proposition: her background as a lawyer, with the occupation's ethical commitment to zealously represent each client, may have enabled her to adopt the government's position upon reentering government service as SEC Chair. *See Nominations of: Richard Cordray and Mary Jo White: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. 23–24 (2013) (containing responses to senators' questions by Mary Jo White, Nominee for the Chair of the SEC, and remarking that "when you are a lawyer, you represent different kinds of clients, and you are ethically bound to represent them to the best of your ability," and declaring that "if I am confirmed, the American public will be my client, and I will work as zealously as is possible on behalf of them").

Also, Gary Gensler, described above, was a partner for Goldman Sachs before entering government service. *See Chairman Gary Gensler*, CFTC, http://www.cftc.gov/about/commissioners/garygensler/index.htm (last visited Sept. 29, 2015).

is at least reasonable to suppose that candidates' initial closeness to industry correlates positively with their expertise or experience.

However, greater expertise and experience do not necessarily yield better-informed policymaking and might even lead to poorer decisionmaking based on overconfidence.[307] Failed models of financial risk leading up to the 2008 crisis illustrate this potential difficulty.[308] One study points out, "Even deeply considered and deliberate decisions guided by the most sophisticated understandings of the economy may go badly wrong."[309] Furthermore, it argues "the illusion of science created false confidence . . . in financial regulators."[310] The relevant regulators presumably understood the models, which "were the work of the best and the brightest engaged in trying to understand financial markets."[311] This example suggests that any initial bias toward industry stemming from deep experience with industry may not come with effectively better information for policy.

One other potential risk is that leaders with an anti-industry bias will make regulation extremely difficult to influence,[312] so that industry would be discouraged from producing information. However, two considerations militate against this possibility. First, given the observation that many appointees' mindsets change after they start work,[313] some leaders will personally not remain as zealous as before. Second, even a persistently zealous leader will face "an enormously complex and restrictive set of constraints on executive action"[314] and, for rulemaking, "multiple levels of probing review by courts and the political branches."[315] Gensler and Schapiro, while not necessarily zealots, did encounter difficulties pushing through their preferred policies.[316] Even the most determined anti-industry

307. *See* McDonnell & Schwarcz, *supra* note 4, at 1639 ("Overconfidence in one's abilities to identify problems and prescribe solutions . . . is particularly prevalent among 'experts,' such as those who tend to drive regulatory policy.").

308. *See id.* at 1641–42.

309. *Id.* at 1641.

310. *See id.* at 1642.

311. *See id.*

312. *See* AYRES & BRAITHWAITE, *supra* note 47, at 75–78 (discussing the effect of "zealous" nonindustrial groups who cannot be influenced); *cf.* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1292–1303 (2006) (detailing and dispensing with arguments that agencies as a whole might be overzealous and regulate industry too strictly).

313. *See* LANDIS, *supra* note 25, at 71; JAMES Q. WILSON, BUREAUCRACY 199, 261–63 (1989).

314. *See* WILSON, *supra* note 313, at 199, 261–63.

315. *See* Livermore & Revesz, *supra* note 22, at 1354; *cf.* AYRES & BRAITHWAITE, *supra* note 47, at 77 (referring to the need to persuade a judge for zealous regulation to take effect).

316. *See supra* notes 234–237, 260 and accompanying text.

leader cannot ignore information from industry.[317] Therefore, a change in leadership seems unlikely by itself to minimize opportunities for industry influence.

2. Harnessing via Policy Design: Statutory Hammer Provisions

Despite the success of HSWA hammers in inducing industry information production, these provisions have rarely been used since then.[318] Their infrequency may indicate that Congress is unwilling to include them in legislation or reflect an expectation that they will not have their intended effect.

First, congressional reluctance may result from industrial pressure; in particular, one line of interest group theory suggests that industry influence of regulation operates through lawmakers, including by causing them to enact statutes allowing broad discretion.[319] However, legislators may, as an initial matter, grant authority to agencies to limit rather than to enable such influence.[320] Supporting this proposition is the apparent fact that, though industry influence can reduce the net benefits of regulatory statutes, these regimes' existence seems usually better than their absence.[321] This result points to some success in resisting industry pressure at the legislative stage.[322]

Moreover, if lawmakers want to address any industry influence that stems from administrative discretion, there is no political reason they cannot statutorily constrain it. At least some members of Congress have

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317. *See* Wagner, *supra* note 5, at 1326, 1351; *cf.* AYRES & BRAITHWAITE, *supra* note 47, at 77 (noting that a zealous public interest group needs to fight against the weight of evidence from the industry and the agency).

318. The only other hammer noted in legal scholarship that serves as a penalty default for industry is in the Maximum Available Control Technology provisions in the Clean Air Act, discussed *infra* notes 329–33 and accompanying text. Other hammers are less harsh to industry. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 13–14 (5th ed. 2012) (pointing to hammers that would allow food importers to register unrestrictedly or withhold agency budgets); M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 150–51 (1995) (describing the FDA's proposed rules as the default).

319. *See* THEODORE J. LOWI, THE END OF LIBERALISM 112–13 (2d ed. 1979); Posner, *supra* note 41, at 350–51.

320. *See* Novak, *supra* note 1, at 44 ("In the late nineteenth and early twentieth centuries, the independent regulatory commissions offered a new, historical check and balance to offset economic corruption and public legislative capture.").

321. *See* Carpenter & Moss, *supra* note 7, at 11–12.

322. *See* Sinden, *supra* note 40, at 1446–52 (describing how Congress is able to enact regulatory statutes despite industrial power); *cf.* AYRES & BRAITHWAITE, *supra* note 47, at 59 (positing that a regulatory regime would not emerge without the activity of an interest group opposed to business). *But see* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 5 (1963) (arguing that industries desired the enactment of Progressive-era regulatory statutes).

stated a desire to prevent regulatory bias.[323] Meanwhile, regulatory statutes vary in the amount of discretion they allow agencies,[324] and some, like Dodd-Frank, have very detailed substantive provisions. Thus, legislators' aversion to enacting specific measures, like hammers, is not likely due to industry pressure.

Rather, this aversion may stem from a lack of expertise[325] or a wish to avoid responsibility for failures that occur as agencies strive to implement detailed statutes.[326] However, expertise and blame-avoidance arguments apply with much less force for hammer provisions than for other specific provisions. If hammer provisions work as intended and induce agencies to produce alternative policies, they should never take effect, and the electorate would have no reason to blame members of Congress. Even if an agency misses a deadline and the hammer falls, legislators could equally blame it as when it misses a deadline without a hammer.[327] Thus, political challenges to hammer provisions seem surmountable.

Instead, congressional reluctance to draft hammer provisions may stem from the social welfare consequences of a missed deadline. Because regulators routinely fail to promulgate regulations in time for deadlines that are unaccompanied by hammers,[328] this possibility is real. A missed hammer deadline produces a dilemma. If the hammer goes into effect according to design, society will have to live with the default policy. If not, the status quo, which is likely more favorable to industry, will remain in place.

A hammer that has resulted in the equivalent of missed deadlines is a provision requiring facilities subject to Maximum Achievable Control

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323. *See Improving Financial Institution Supervision: Examining and Addressing Regulatory Capture: Hearing Before the Subcomm. on Fin. Insts. and Consumer Protection of the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. (2014); *Protecting the Public Interest: Understanding the Threat of Agency Capture*: *Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. (2010); BERNSTEIN, *supra* note 1, at 157–60 (quoting transcripts of hearings indicating Senators' concerns about industry influence).

324. *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381–82 (1989).

325. *See* Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 339 (Daniel A. Farber & Anne Joseph O'Connell, eds. 2010) (describing agencies' expertise advantage over Congress as "a central premise of the administrative state"); Stewart, *supra* note 26, at 1695.

326. *See, e.g.*, D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION 3 (1991); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 10 (1993).

327. *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 39, 44 (2008) (discussing blame dynamics in the context of agency inaction, including with respect to deadlines).

328. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PENN. L. REV. 923, 949 & n.84 (2008); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 78 (1997).

Technology (MACT) rules under the Clean Air Act Amendments of 1990 to apply individually to state governments for permits to emit a given pollutant if the EPA "fail[ed] to promulgate a standard."[329] In this case, the EPA promulgated regulations before the deadline, but the D.C. Circuit vacated several of these regulations.[330] Years after these decisions, the EPA proposed a rule to clarify that if a rule has been vacated, it is as though the EPA had never enacted a rule in the first place.[331] In such a case, the hammer applies.[332] Apparently, the notion that a promulgated but vacated rule could avoid the need for permits was a viable interpretation, as some state governments had chosen not to require permits after the EPA rules were vacated.[333]

This example does not negate the case for hammer provisions but does indicate the need for careful design. First, instead of looking to statutory language or relying on an agency's regulation, a reviewing court should always enforce a hammer provision when there is no regulation at any point after the deadline. Otherwise, an agency could promulgate an obviously deficient rule to avoid a statutory hammer and expect it to be vacated if it preferred the status quo. Second, because a court may find that a rule should be vacated despite an agency's good-faith efforts, an ideal hammer will consist of policies that society can temporarily live with while the agency formulates a satisfactory rule. Finally, though budget concerns were not obviously at issue with the MACT provisions, Congress needs to provide enough funding to make it realistic for the agency to promulgate regulations on time that will withstand judicial scrutiny. Following the enactment of HSWA, Congress did increase the EPA's budget for implementing regulations in this area.[334] On the other hand, resource limitations seem to prevent agencies from meeting all of their statutory obligations.[335] Though budgetary considerations may limit the amount of policymaking that agencies can reasonably do under the threat of hammer provisions, it should still be possible for Congress to enact significantly more of them than it has so far.

329. *See* Clean Air Act Amendments of 1990, 42 U.S.C. § 7412(j)(2) (2012).

330. *See* Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 75 Fed. Reg. 15,655, 15,657 (proposed Mar. 30, 2010) (to be codified at 40 C.F.R. pt. 63).

331. *See id.* at 15,658.

332. *Id.*

333. *See The Hammer Falls Again as U.S. EPA Proposes Revisions to "MACT Hammer" Provisions*, ALL4 INC. (Apr. 2010), http://www.all4inc.com/the-hammer-falls-again-as-us-epa-proposes-revisions-to-mact-hammer-regulations.

334. *See* Corwin, *supra* note 272, at 539–40.

335. *See* Biber, *supra* note 327, at 17; Pierce, *supra* note 328, at 64.

CONCLUSION

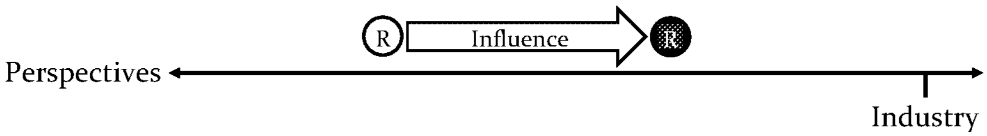
As long as the need exists to constrain industry behavior for the sake of the public interest, the regulatory state will encounter efforts by industries to pull policy in their direction. The conventional approach to addressing this challenge has been to reduce industries' ability to influence regulation, with uninfluenced regulation in alignment with the public perspective as the implicit ideal. Following this approach, a body of scholarship with a public interest commitment has ironically misdirected its focus on insulation solutions with less potential benefit for the public than harnessing methods.

With theory and evidence, this Article has shown the limitations of insulation and unveiled harnessing as an alternative that can overcome these limitations. First, curtailing activities that produce both influence and information can be expected to cause losses of the latter, and the current pattern of restrictions of various activities reflects this principle. Second, mitigating influence from activities can reduce the benefits to industry from influence and thus the incentive to generate the costly information that often effectuates this influence. Information losses from negotiated rulemaking and pre-APA judicial review of rulemaking illustrate the importance of this incentive in practice. In contrast, the strategy of harnessing can enhance industry information production, along with making final policy less biased toward industry. Though they do not reflect conscious attempts to harness influence, the CFTC, SEC, and HSWA case studies present instances in which moving the initial position of regulation away from industry yielded decisions further away from industry's perspective, causing it to produce more information, even as industry more strongly pulled policy in its direction.

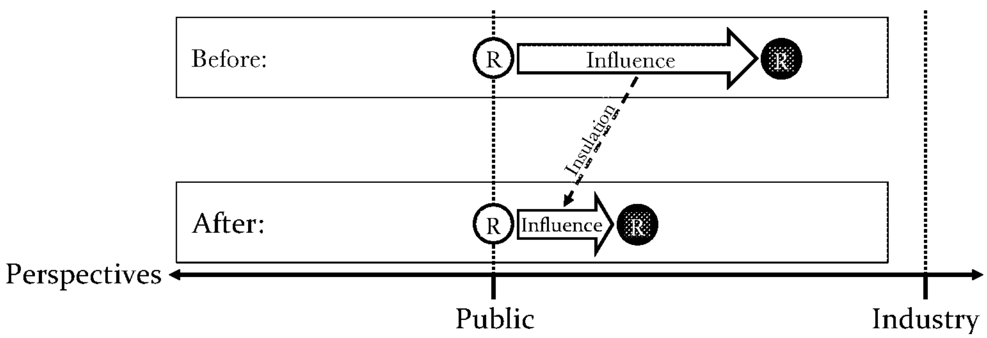
To be clear, insulation is not generally wrong, and, as the analysis of anti-industry executive appointments and hammer provisions reveals, harnessing is no panacea. Nonetheless, in the current context of fairly comprehensive restrictions on pure influence activities and the likelihood that regulation is commonly only partially biased toward industry, moving the initial position of regulation away from industry can yield marginal benefits comparable to or even greater than additional insulation measures. Given the scarce attention that harnessing has received so far relative to insulation, future research should treat these two general strategies in a more balanced fashion. Particularly helpful would be work that compares and improves the design of various techniques for harnessing—not just with agency leadership or statutory defaults, but also, for example, with civil servants and advisory committees.

At a more fundamental conceptual level, this Article clarifies the relationship between industry influence and the public interest, as well as the definition of the latter. First, though this influence might produce a pro-industry bias in regulation, it can also cancel out an anti-industry bias that would otherwise obtain. Second, this influence often comes with information, the quality of which is an often-neglected dimension of the public interest. Overall, industry influence is not intrinsically harmful, as the term "capture" and the emphasis on insulation suggest. Instead, influence is a phenomenon quite distinct from its welfare effects, and the institutional context helps determine whether it is something to be resisted, encouraged, or harnessed.

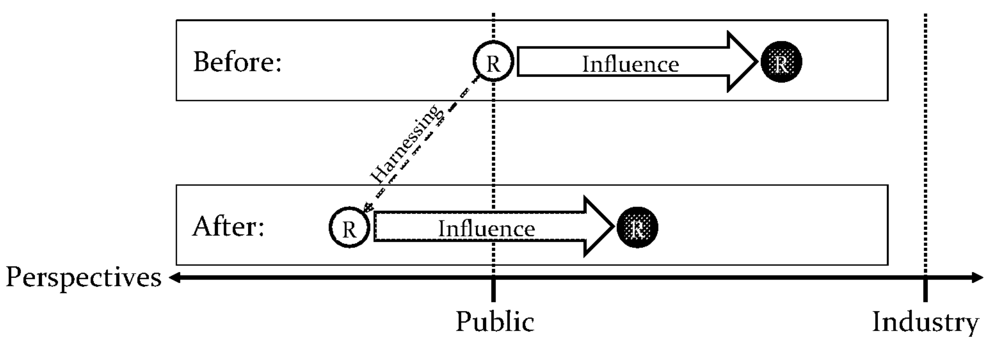
APPENDIX: FIGURES



(a) Influence: Industry pulls regulation toward its perspective.



(b) Insulation: Industry is less able to influence regulation than before.



(c) Harnessing: The starting position of regulation moves away from the industry's perspective so that it becomes initially biased against industry.

Key: R Uninfluenced Regulation R Influenced Regulation

Figure 1: Influence, Insulation, and Harnessing

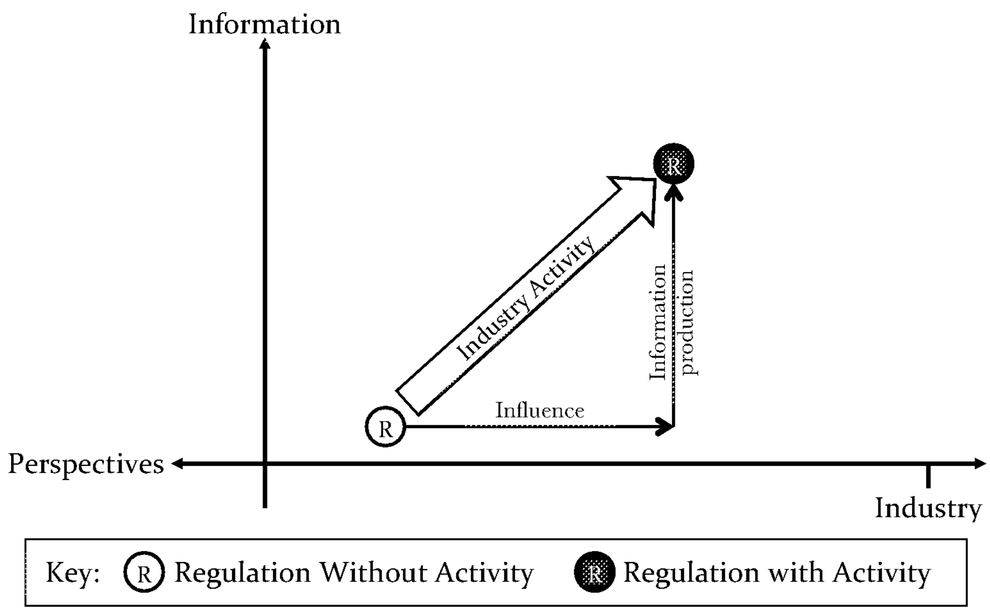
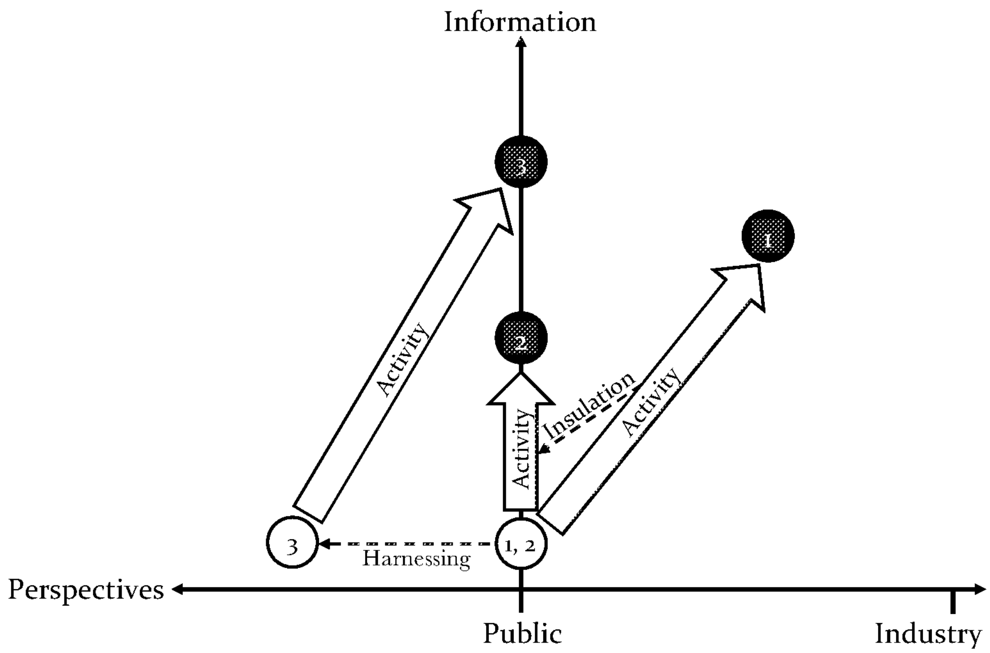


Figure 2: Influence and Information Production as Joint Effects of Industry Activity



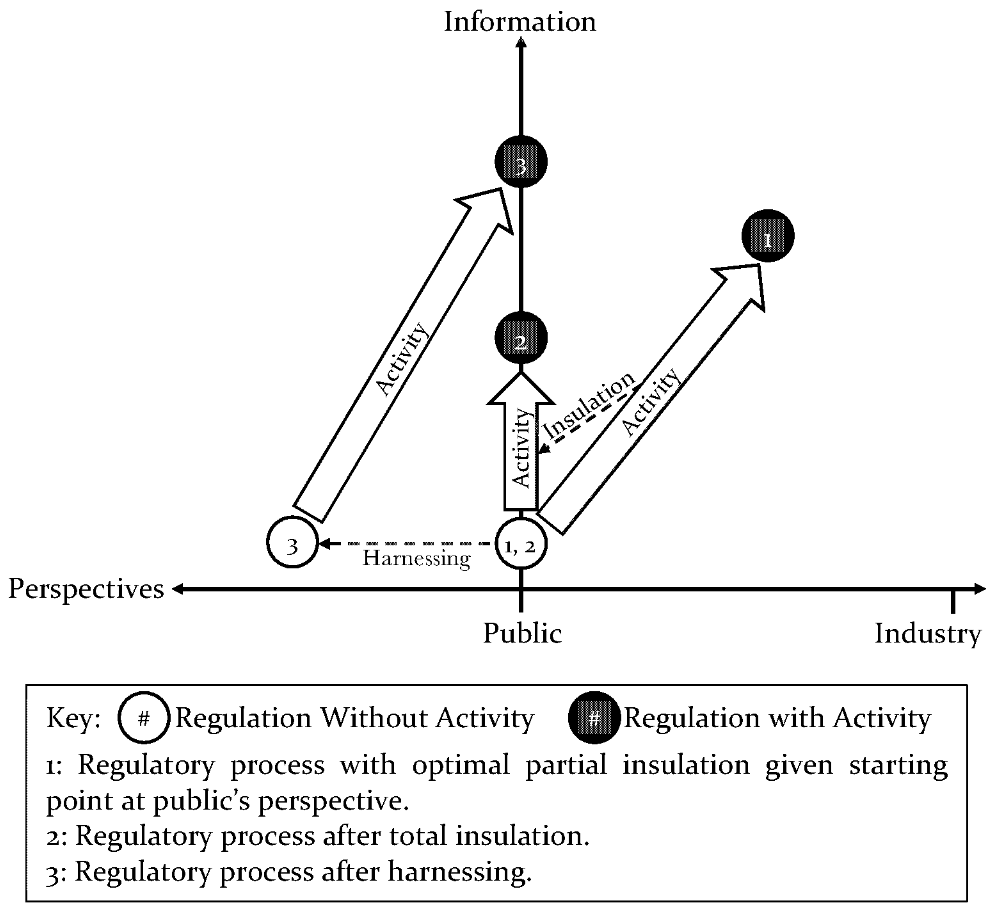
Key: # Regulation Without Activity # Regulation with Activity

1: Regulatory process with optimal partial insulation given starting point at public's perspective.

2: Regulatory process after total insulation.

3: Regulatory process after harnessing.

Figure 3: Harnessing versus Insulation



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