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The Complexity of Regulatory Capture:

Diagnosis, Causality, and Remediation

Sidney A. Shapiro*

The United States has recently suffered from two extraordinary calamities caused by the failure to regulate effectively: the 2008 Wall Street collapse and the explosion of BP's Deepwater Horizon oil rig. Regulatory capture has been implicated in both failures.¹ This article considers when capture occurs, what causes it, and what can be done about it, all challenging issues.

Deciding whether an agency is captured can be complicated. In some situations, such as the BP oil spill, there is an abject failure to protect the public in circumstances where regulated entities had considerable influence over the agency, suggesting a clear case of capture. In other situations, an agency adopts policies favored by regulated entities, but the regulatory issues are

* University Chair in Law, Wake Forest University. An earlier version of this paper was presented at a symposium on "Blowout: Legal Legacy of the Deepwater Horizon Catastrophe," held at the Roger Williams University School of Law, in April 2011. The author appreciates the comments and suggestions of fellow panelists and members of the audience.

1. See, e.g., Steven M. Davidoff, *The Government's Elite and Regulatory Capture*, N.Y. TIMES DEALBOOK (June 11, 2010, 2:00 PM), <http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/>; Dan Froomkin, *Regulatory Capture of Oil Drilling Agency Exposed In Report*, HUFFINGTON POST (Sept. 9, 2010, 5:48 PM), http://www.huffingtonpost.com/2010/09/08/report-illustrates-regula_n_709681.html.

contestable, making it unclear whether the policies constitute regulatory failure. Section I contends we should also presume capture when the agency consistently adopts policies proposed by regulated entities because this situation suggests a failure to adopt a precautionary approach towards protecting the public.

Section II addresses how capture occurs according to the standard explanation based on public choice economics, which focuses on the relative advantages that regulated entities have over the public in organizing to influence regulatory policies. In this account, regulated entities have used their superior political influence to capture individual agencies and to persuade Congress and the President to adopt procedures that slow the regulatory process and make it more difficult to regulate.

The dynamics of capture, however, are more complex than indicated by public choice analysis. The public choice accounts assume regulators are self-interested, but there is considerable evidence that public officials also have other-regarding motives. Section III explains how regulatory capture can occur despite the desire of public officials to protect the public. It focuses on how regulated entities are able to dominate the presentation of information to agencies, producing information asymmetries that make it more likely agencies will adopt industry-favored policies.

Section IV discusses an additional aspect of capture. Since the 1980s, conservative interests have spent billions of dollars to influence public opinion about government, far outspending progressive interests. Part of this effort is focused on legitimizing markets and delegitimizing the regulation of them. There has also been an effort to reinforce a psychological tendency of individuals to assume that people are responsible for the bad things that happen to them. The reinforcement of this tendency makes people skeptical of the necessity of government regulation, a result described as "deep capture."² These efforts have made it more difficult for progressive interests to rally the public to oppose regulatory capture.

Section V discusses what can be done to decrease capture. The initial problem is to build political momentum for reform, a difficult proposition in light of the successful efforts of conservative interests to influence public opinion against

2. See *infra* notes 123-132 and accompanying text.

government regulation. Assuming there is the political will to act, one option is to make agencies more resistant to capture through institutional redesign. Section V discusses several ways that this may be accomplished, including establishing a strong and vibrant civil service as a bulwark against capture. Increasing transparency in the regulatory process is another option. Section V proposes several ways to make industry domination of the regulatory process more obvious, thereby alerting the public that the regulatory process is being subverted.

I. WHAT IS CAPTURE?

The concept of capture is elusive. It is used both as a description of which interests prevail before an agency and as a normative criticism of agency practice. In the first derivation, capture describes the power relationships in an agency. An agency is captured when regulated entities have substantial influence over policymaking. In the second derivation, it is an accusation that the agency has failed to serve the public interest, as Congress intended. The failure to make this distinction can be problematic, as will be developed.

Both definitions are satisfied when there is a clear failure to protect the public in circumstances where regulated entities had considerable influence over an agency. Consider, for example, the failure of the Mineral Mining Service (MMS) to prevent the BP oil spill. We now know that the oil industry largely drove policy decisions in the agency.³ At the same time, there can be little doubt that the result did not serve the public interest, having resulted in the death of eleven workers and the worst environmental disaster in the United States.⁴

When industry influence does not produce clear regulatory

3. ALYSON FLOURNOY ET AL., CTR. FOR PROGRESSIVE REFORM, *REGULATORY BLOWOUT: HOW REGULATORY FAILURES MADE THE BP DISASTER POSSIBLE, AND HOW THE SYSTEM CAN BE FIXED TO AVOID A RECURRENCE* 3 (2010), available at http://www.progressivereform.org/articles/BP_Reg_Blowout_1007.pdf (noting that “[o]ver the course of several administrations, the MMS was ‘captured’ by the oil industry, and came to see industry, rather than public, as its constituency,” and that this “made regulators particularly subject to pressure and influences from industry,” producing “an appalling lack of energy in its efforts to protect against industry excesses”).

4. Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP's Deepwater Horizon Disaster*, 5 *GOLDEN GATE U. ENVTL. L. J.* 7, 8 (2011).

failure, capture is more difficult to establish because a diagnosis of capture turns on whether the policies adopted by an agency are in the public interest. And, as Lawrence Baxter notes, “[j]ust because the result is supported by a powerful and organized group does not necessarily imply that it is wrong.”⁵ Moreover, there is no operational definition of the “public interest” in the literature. Instead, scholars use the term as a straw man to create a distinction between a captured agency and a non-captured agency.⁶

Without a clear definition of the public interest, it is necessary to sort out whether an agency’s choice of industry-favored policy options is consistent with the goals that Congress set for the agency. In other words, capture, as a normative matter, occurs “whenever a particular sector of the industry, subject to the regulatory regime, has acquired persistent influence disproportionate to the balance of interests envisaged when the regulatory system was established.”⁷ But this requires the difficult tasks of identifying when “influence” is persistent and what “balance of interests” Congress intended.⁸

One way to avoid this difficulty is to define capture as occurring when agencies consistently adopt regulatory policies favored by regulated entities. This definition recognizes that most regulatory statutes are aspirational; they seek the greatest degree of protection that is reasonable taking into account regulatory costs and other considerations.⁹ In other words, the goal of aspirational statutes is to protect the public’s interests to the

5. Lawrence G. Baxter, Essay, “Capture” in *Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL’Y 175, 177 (2011).

6. DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 36-37 (2010).

7. Baxter, *supra* note 5, at 176.

8. *See id.*

9. *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 52 (2003) (explaining how Congress expects agencies to do “the best [they] can” to protect people and the environment); Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1174 (2010) (“regulatory statutes tend to articulate the policy goals or administrative tasks that Congress seeks to accomplish, either explicitly through special sections dedicated to that function or implicitly by express behavioral requirements using aspirational or purposive language.”).

greatest extent possible taking into account other statutory criteria.¹⁰ If Congress intended to maximize the protection of the public, it is objectionable as a normative matter that an agency persistently chooses regulatory policies in response to industry influence. After all, it is a safe bet that the goal of the regulatory industry is to minimize the degree of stringency of regulations, if not avoid regulation altogether.

When we see an agency consistently adopting regulatory policies favored by regulated entities, both the political and normative dimensions of capture appear to be met. This situation therefore raises a presumption of capture, opening the door for the agency or regulated entities to defend the agency's policy choices as the best the agency could do under its mandate to protect the public.

II. PUBLIC CHOICE DYNAMICS

However, once one defines capture, there is also a question of how capture occurs. The public choice literature is the earliest and still dominant explanation of the dynamics of capture. Focusing on a comparative advantage enjoyed by businesses in influencing government, this literature predicts that business interests will influence Congress and agencies in ways that are favorable to them. This section briefly describes the mechanism by which business interests influence government, and how they have used this influence to further their economic interests.

A. Political Marketplaces

The public choice explanation for capture is well known and

10. See, e.g., 21 U.S.C. §346a(b)(2)(A), (c)(2)(A) (2006) (requiring FDA to be "reasonabl[y] certain[]" that pesticide residues will not harm people); 29 U.S.C. § 651(b) (2006) (empowering Occupational Health and Safety Administration "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions"); 33 U.S.C. § 1251(a)(2) (2006) (EPA is to provide for "protection and propagation of fish, shellfish, and wildlife and . . . recreation"); 42 U.S.C. § 300g-1(b)(4)(A)-(B) (2006) (requiring EPA to set a maximum contaminant level (MCL) for drinking water that comes as close as "feasible" to achieving the level at which no known or anticipate adverse health effects will occur, allowing an adequate degree margin of safety); 42 U.S.C. §7409(a)(2), (b)(1) (2006) (requiring EPA to set primary ambient air quality standards that, allowing for an adequate margin of safety, are requisite to protect the public health).

will be only briefly described here. It models legislative decisions as a marketplace in which interest groups “demand” certain legislative policy outcomes, and legislators favor the outcomes of those groups that offer the most support for reelection in return for these outcomes.¹¹ Business interests are in a better position to influence legislative outcomes than the mass of citizens because it is easier for them to become politically organized.¹² Reflecting this imbalance, business interests obtain legislative outcomes that are favorable to them.¹³

One difficulty with this description is that administrators are not elected, at least at the federal level, and therefore are not in need of electoral support. How then are agencies captured? As will be elaborated below, the literature offers three general answers. Congress can write substantive mandates that favor business interests or procedural requirements that hamstring agencies.¹⁴ Business interests can persuade members of Congress to pressure agencies not to regulate or adopt weak regulations,¹⁵ and can influence the White House to appoint administrators hostile to an agency’s mission.¹⁶ Finally, since administrators, like legislators, are considered to be self-interested, public choice analysis predicts they will adopt policies favored by business interests because they are in a better position than regulatory beneficiaries to assist agency officials in securing their personal preferences.¹⁷

The public choice literature description fails to offer a complete explanation for government behavior because it cannot

11. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21-22 (1991).

12. MANCUR OLSON, *THE LOGIC OF COLLECTION ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-45 (1965).

13. MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS passim* (1981).

14. The previous regulation of prices and exit and entry in transportation markets furnish the canonical illustration. See George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 3 (1971) (“A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”).

15. Steven Croley, *Interest Groups and Public Choice*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 49, 72 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) [hereinafter Croley, *Interest Groups*].

16. See *infra* note 32 and accompanying text.

17. See *infra* notes 35-37 and accompanying text.

account for legislative and administrative actions that have resulted in protection of the public over the strong objection of regulated entities. Public choice dynamics fail for several reasons. First, public officials are not entirely self-interested, and will therefore act to serve the public's interests rather than their own.¹⁸ Second, public interest groups have found ways to overcome some of the collective action problems that stymie the organization of citizens.¹⁹ Third, elected officials, who act as policy entrepreneurs, represent the interests of the politically unorganized public in order to draw attention to an issue and gain their electoral support.²⁰

This is not the place for an extended discussion of when public officials will and will not act in their own self-interest or of what factors affect this behavior.²¹ My point is that public interest dynamics explain capture, even though capture is not automatically produced by these dynamics.²² But, even if capture occurs infrequently, the damage to the public can be severe, as the country's recent experiences with the 2008 Wall Street collapse

18. See Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 598-603 (2011) (noting that there is evidence to support both that public officials are self-interested and other-regarding); see also Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. & ORG. (SPECIAL ISSUE) 167 (1990) (offering a theory explaining public interest outcomes as the result of other-regarding behavior).

19. See Jack L. Walker, *The Origins and Maintenance of Interest Groups in America*, 77 AM. POL. SCI. REV. 390, 397-98 (1983) (explaining that public interest groups have been able to organize and maintain themselves by finding sponsors, reducing the transaction costs of reaching out to potential members, and offering tangible economic benefits that can only be obtained by joining).

20. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 122-23 (2d ed. 1995).

21. For a consideration of this issue, see STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 242-257 (2008) [hereinafter CROLEY, *REGULATION*] (describing and discussing the literature on the success of public choice in predicting government behavior and regulatory outcomes).

22. See Croley, *Interest Groups*, *supra* note 15, at 64-65 ("So, maybe the public choice argument is incomplete, but its most general conclusion nevertheless holds: Rent seeking interest groups rule, at least as an approximation.").

and the BP oil spill indicate.²³ Other recent, but less visible failures to regulate have also led to needless death and destruction.²⁴

B. Pathways to Capture

One of the reasons that capture is a complicated phenomenon is that there are a number of ways by which it occurs. These include substantive legislation that favors business interests, self-interested and ideologically motivated behavior by administrators, the defunding of agencies, and the imposition of procedural obstacles to rulemaking.

1. Industry Oriented Mandates

The usual account of regulatory capture focuses on the failure of agencies to protect the public or the environment. This failure, however, can be pre-ordained because it is built into an agency's mandate. It should be no surprise that corporations are able to use their political muscle to obtain legislation friendly to their economic interests. The United States Code is chock full of tax breaks, subsidies, and regulatory loopholes that are questionable from a public policy perspective.²⁵ When these benefits are delivered by administrative agencies, the agency might be described as captured, but the agency is simply carrying out its defective mandate.²⁶

This form of capture can occur in a more subtle form, as the behavior of MMS illustrates. MMS had a dual mandate. It was responsible for promoting the economic success of oil drilling in the Gulf and for ensuring that drilling was done safely and

23. SIDNEY SHAPIRO, RUTH RUTTENBERG & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, SAVING LIVES, PRESERVING THE ENVIRONMENT, GROWING THE ECONOMY: THE TRUTH ABOUT REGULATION 7 (2011), available at http://www.progressivereform.org/articles/RegBenefits_1109.pdf (estimating the costs of the oil spill as between \$11-100 billion, and that pension funds lost \$2.8 trillion dollars as the result of the Wall Street collapse).

24. *Id.* at 8 (showing the significant costs associated with the failure to regulate day-to-day hazards that impose significant harms on the American public and the environment).

25. See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 361 (1988) (discussing legislation yielding industry rents passed by Congress).

26. Baxter, *supra* note 5, at 177.

without damage to the environment. This institutional “conflict of interest” deterred MMS from being a strong regulator because the result would have been to slow the development of oil resources.²⁷

2. Hostile Administrators

Public choice analysis, which regards agency officials as self-interested,²⁸ predicts officials will choose regulatory policies that further their own careers and interests.²⁹ These interests include retention of their jobs,³⁰ or even better, larger budgets and an increase in personnel,³¹ which yields greater power. Since regulated entities have influence over legislators, including the ones who control the agency’s budget, regulators have an incentive to be friendly to regulated entities, in order to achieve these objectives.³²

Agency officials have an additional incentive to favor industry interests. Because regulators will be seeking employment with regulated entities after government service, or have come from industry and intend to return, they will pull their punches to remain on good terms with future employers. This problem is usually described as the “revolving door” problem to indicate that the movement of government employees in and out of industry creates a type of conflict-of-interest.³³

Anti-regulatory administrators may also have an ideological

27. See FLOURNOY ET AL., *supra* note 3, at 24 (finding that “MMS’s mandate was skewed to advance development of energy resources with insufficient attention to health, safety, and the environment, thereby encouraging this identification of the agency with the industry” and that “the agency was structured without any measures to ensure that those officials charged with permitting and enforcement were completely independent of those charged with collecting revenue for the government from oil and gas operations, thus creating a potential conflict of interests”).

28. Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 CASE W. RES. L. REV. 569, 574 (2006) (“Public choice theory posits that legislators, executive branch officials, and agency administrators are in business for themselves; that is, they are motivated by the same types of incentives that motivate their counterparts in the private sector.”).

29. CROLEY, REGULATION, *supra* note 21, at 26-27.

30. *Id.* at 17.

31. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 197 (1971).

32. CROLEY, REGULATION, *supra* note 21, at 14-25, 53-76.

33. *Id.* at 49.

motivation. Administrators hostile to the missions of their agencies can have a genuine belief in small government, and they may spend their time in office trying to reduce regulation for this other-regarding reason.³⁴ The two motivations – self-interest and ideology – are difficult to distinguish in practice. For example, being loyal to the President’s ideology can enhance an administrator’s post-government employment prospects, making him or her more attractive to think tanks, corporations, and other similar employers.

Tom McGarity has demonstrated how Presidents Reagan and George W. Bush were able to slow, or even stop, regulatory efforts in a number of regulatory agencies by the appointment of administrators hostile to regulation.³⁵ Having won an election, a president who is skeptical of regulation is entitled to appoint administrators who likewise are skeptical of regulation. But this also means that the President is free to reward his business backers, and seek their reelection support, by opposing effective regulatory efforts, very much a public choice dynamic. President Reagan was explicit about this agenda when he appointed a White House Task Force on Regulatory Relief, headed by then Vice-President George H.W. Bush.³⁶ In the administration of George W. Bush, Vice-President Cheney took on this role, but behind the scenes.³⁷

34. See Shapiro & Wright, *supra* note 18, at 605 (noting that anti-regulatory presidential administrations, beginning with the Reagan Administration, selected presidential appointees on the basis of their ideological affinity).

35. Thomas O. McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival* 119, 122 (June 7, 2011) (unpublished manuscript) (on file with author) [hereinafter McGarity, *Freedom to Harm*] (Thorne Auchter (Reagan) and John Henshaw (George W. Bush) at the Occupational Health and Safety Administration); *id.* at 120, 122 (Ford B. Ford (Reagan) and David Laurinski (George W. Bush) at the Mine Safety and Health Administration); *id.* at 137-38, 141 (James Watt (Reagan) and Steven Griles (George W. Bush) at Interior); *id.* at 157, 170 (Arthur Hull Hayes and Frank E. Young (Reagan) and Dan Troy (George W. Bush) at the Food and Drug Administration); *id.* at 194 (Robert Blanchette (Reagan) at the Federal Railroad Administration); *id.* at 197 (Joseph M. Clapp (George W. Bush) at the Federal Motor Carrier Safety Administration); *id.* at 198 (Marion C. Blakey (George W. Bush) at the Federal Aviation Administration).

36. *Id.* at 97.

37. See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* 127-28 (2010)

The success of the White House in slowing or preventing regulation depends on a number of circumstances, particularly whether Congress opposes such efforts.³⁸ Moreover, no White House will be able to head off all regulatory efforts.³⁹ Judicial review also puts a brake on deregulatory efforts.⁴⁰ Still, the appointment of administrators hostile to regulation is now a regular tactic employed to weaken agency regulations and ensure business-friendly regulatory policies.

3. *Insufficient Funding*

While the appointment of administrators hostile to regulation is a well-recognized tactic, another method of capture has received less attention. Budget cuts have prevented agencies from carrying out their regulatory missions.⁴¹

When Rena Steinzor and I examined the budgets of the five largest health and safety agencies,⁴² we found three things to be true. First, with the exception of FDA, none of the agencies had received significant increases in their budgets since 1980.⁴³ FDA has received moderate funding increases, but only to accelerate its process for approving new drugs,⁴⁴ leaving its other functions, such as protecting the food supply, short of money. Second, the regulatory responsibilities of the agencies has substantially increased, putting greater strain on existing resources.⁴⁵ Finally,

(describing Vice-President Cheney's role).

38. See McGarity, *Freedom to Harm*, *supra* note 35, at 113 (noting that after Democrats took control of both houses of Congress in 2007 "[d]eregulation was no longer on the agenda as Congress began the slow process of rebuilding the institutions of responsibility and accountability").

39. Shapiro & Wright, *supra* note 18, at 583.

40. McGarity, *Freedom to Harm*, *supra* note 35, at 142 (noting that during the George W. Bush administration the "EPA lost a surprising number of judicial challenges brought by environmental groups in which the courts held that its actions were prohibited by the plain language of the relevant statutes").

41. STEINZOR & SHAPIRO, *supra* note 37, at 55-56.

42. The agencies were the Consumer Product Safety Commission (CPSC), Environmental Protection Agency (EPA), Food and Drug Administration (FDA), National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA). *Id.* at 65.

43. *Id.*

44. *Id.*

45. *Id.* at 65-66.

all of the agencies have floundered in addressing pressing regulatory problems, a symptom that is attributable in large part to a lack of funding.⁴⁶

The idea of using budget cuts to slow down agency enforcement and rulemaking efforts in administrations hostile to regulation dates back to the Reagan administration, and this tactic was also popular in the George W. Bush administration.⁴⁷ While budget cuts are not normally mentioned as a tool of regulatory capture, they have this impact. Legislators friendly to business interests support the budget cuts, and regulated entities get the benefit of reduced enforcement, or even non-enforcement of the health, safety, and environmental laws.⁴⁸

4. Rulemaking Ossification

Budget cuts reduce regulatory effectiveness, in part, because agencies have been hobbled by a series of procedural hurdles, found both in legislation and a series of presidential orders.⁴⁹ With smaller staffs and less money, agencies find it more difficult to finish regulations because there are more procedural hurdles to overcome,⁵⁰ a phenomenon known as “rulemaking ossification.”⁵¹

46. *Id.* at 5. We found that all of these agencies are dysfunctional, as indicated by their failure to address either pressing catastrophic risks or longer-term systemic risks to people and the environment, *id.* at 6-36, and we found that the lack of funding was responsible. *Id.* at 56.

47. *See, e.g.,* McGarity, Freedom to Harm, *supra* note 35, at 98 (“[e]specially severe cuts to agency enforcement budgets” in the Reagan administration “produced dramatic declines in inspections, citations, and prosecutions”); *id.* at 99-100 (“[r]epeated cuts to agency budgets” in the Reagan administration “caused them to abandon proactive rulemaking except for a few deregulatory initiatives and rules implementing specific statutory mandates”); *id.* at 110 (during its first term, the George W. Bush administration “was able to achieve many of the business community’s goals administratively by weakening existing regulations, slicing regulatory agency budgets, and cutting back on enforcement”).

48. *See* STEINZOR & SHAPIRO, *supra* note 37, at 66-67 (attributing funding shortages in part to anti-regulatory influences).

49. *See* *The Federal Rulemaking Process*, PUBLIC CITIZEN, <http://www.citizen.org/documents/Regulations-Flowchart.pdf> (last visited on Nov. 21, 2011) (providing a map of the complexity of procedural and analytical requirements in rulemaking).

50. *See* Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1437-41 (1992) [hereinafter McGarity, *Ossification*] (indicating the slowdown in rulemaking).

51. *Id.* at 1385-86; *see also* Richard J. Pierce, Jr., *Rulemaking and the*

Nowadays it regularly takes five years or more to finish important regulations.⁵²

Procedures are important to ensuring accountability and fairness in the administrative process, but there has to be a reasonable balance between accountability, fairness, and administrative efficiency.⁵³ For regulatory opponents, however, the goal is to support additional procedures in the name of accountability and fairness, regardless of the impact of additional procedural burdens on regulatory output. Congress' failure to account for administrative efficiency can be attributed to the superior influence that corporations and their allies have in Congress as compared to public interest groups, another outcome of public choice dynamics.

I have previously described this effort to monkey wrench the administrative process as "sophisticated sabotage."⁵⁴ Adding procedures is a politically appealing way to capture regulatory agencies because additional procedures can be sold to the public as important to ensuring accountability and fairness.⁵⁵ Moreover, as I will discuss later, the business community has paved the way for this argument by an extensive and expensive campaign to

Administrative Procedure Act, 32 TULSA L.J. 185, 195 (1996).

52. See McGarity, *Ossification*, *supra* note 50, at 1388-90 (rules take five years or longer); see also CARNEGIE COMMISSION, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 106-09 (1993) (describing causes of the lengthy process); Royal C. Gardner, *Public Participation and Wetlands Regulation*, 10 UCLA J. ENVTL. L. & POL'Y 1, 6 n.28 (1991) (noting that some informal rulemakings can take up to ten years to complete); Scott Schang & Teresa Chan, *Federal Greenhouse Gas Control Options from an Enforcement Perspective*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 87, 115 (2010) (noting that "EPA rulemakings often take several years to be worked into final rules, which then face several additional years of court challenges.").

53. See Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 855 (1975) (insisting that administrative procedure must "comport with efficiency while also ensuring fairness and negating the fear of unchecked centralized power"); see also Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978) (noting that besides ensuring accountability and fairness, "[i]t is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs").

54. See generally THOMAS O. MCGARITY, SIDNEY SHAPIRO & DAVID BOLLIER, *SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION* (2004).

55. See *infra* notes 110-122 and accompanying text (noting that industry dominance in presenting policy information prepares the way for this result).

delegitimize government.⁵⁶

III. INFORMATION CAPTURE

The comparative advantage that regulated entities have in organizing to influence public policy can produce capture through public choice dynamics. But, as noted, the public choice description of policy-making is a partial one because it fails to account for the fact that public officials have other-regarding or public interest motives.⁵⁷ Unfortunately, capture can occur even in these circumstances. The instrument of capture in these circumstances is the dominance of business interests in the presentation of information to the agency.

A. The Asymmetry

A study of registered lobbyists found that eighty-one percent of the lobbyists who sought to influence environmental and natural-resource issues in Congress and the Executive Branch represented business or trade associations, while fifteen percent represented public interest groups.⁵⁸ A similar study of registered lobbyists found that businesses constituted forty-one percent of the total number of lobbyists, trade associations constituted twenty-two percent, and non-profit and citizens groups together constituted fourteen percent.⁵⁹ Other studies confirm this imbalance,⁶⁰ although some studies suggest that public interest

56. See *infra* notes 94-109 and accompanying text.

57. See *supra* note 18 and accompanying text.

58. Scott R. Furlong, *Exploring Interest Group Participation in Executive Branch Policymaking*, in *THE INTEREST GROUP CONNECTION* 282, 290-91 (Paul S. Herrnsen et al. eds., 2d ed. 2005).

59. Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 *J. POL.* 1191, 1195 (2001).

60. See, e.g., Kay Lehman Schlozman & Traci Burch, *Political Voice in an Age of Inequality*, in *AMERICA AT RISK: THREATS TO LIBERAL SELF-GOVERNMENT IN AN AGE OF UNCERTAINTY* 140, 159 (Robert Faulkner & Susan Shell eds., 2009) (of the representatives listed in the *Washington Representatives* directory, corporations are about thirty-five percent, thirteen percent are trade and business groups, and four percent are public interest groups); Kay Lehman Schlozman & John T. Tierney, *More of the Same: Washington Pressure Group Activity in a Decade of Change*, 45 *J. POL.* 351, 375-76 (1983) (of the organizations with a Washington presence, corporations constituted approximately twenty-two percent, trade and business groups constituted thirty-two percent, and citizens groups, civil rights groups,

groups have a somewhat more robust presence in Washington than the previous statistics indicate.⁶¹

1. EPA Rulemaking

This imbalance carries through to participation in rulemaking. When Wendy Wagner and her coauthors examined thirty-nine hazardous air pollutant rulemakings at EPA, they found that industry (companies and industrial associations) participated in substantially more rulemaking proceedings than public interest groups, filed many more comments in each proceeding, and had far more informal contacts with the agency prior to the notice of proposed rulemaking.

Business interests filed an average of eighty-one percent of the total comments concerning each proposed rule.⁶² Moreover, while business interests submitted comments in all thirty-nine rulemakings, public interest groups submitted comments in less than one-half (forty-eight percent) of the rulemakings.⁶³ Finally, when both business and public interest groups filed comments, business interests filed many more comments. Business interests submitted an average of thirty-five comments per rule, while public interest groups filed an average of 2.4 comments per rule.⁶⁴

Business interests also dominated the pre-rule stage. They had an average of 170 times more informal communications with EPA prior to the notice of proposed rulemaking than did public interest groups.⁶⁵ These included meetings, phone calls, and letters. Business interests had an average of eighty-four informal contacts per rule, as compared to 0.7 contacts per rule by public interest groups.⁶⁶

minority organizations, and advocates for the poor constituted twelve percent).

61. See, e.g., FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE* 111 (1998) (finding that for-profit groups make up thirty-eight percent of the interest group population, nonprofit groups make up thirty-three percent, and citizens groups make up twenty-four percent).

62. Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 *ADMIN. L. REV.* 99, 128 (2011).

63. *Id.*

64. *Id.* at 128-29.

65. *Id.* at 125.

66. *Id.*

This study confirmed the results of several earlier studies. Some analysts measured the number of rulemakings in which business and public interest groups participated.⁶⁷ Other studies compared the total number of comments that were filed by business interests and public interest groups.⁶⁸ Business interests dominated the rulemaking process under either measure.

2. OIRA Meetings

A study done for the Center for Progressive Reform (CPR) demonstrates the same imbalance occurs at the Office of Information and Regulatory Affairs (OIRA), when it undertakes the review of agency rules.⁶⁹ The authors studied 6194 separate OIRA “reviews” of regulatory proposals and final rules conducted during the period from October 16, 2001 until June 1, 2011, which precipitated 1080 meetings with OIRA staff involving 5759

67. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 129 (1998) (citing an unpublished dissertation by Cary Coglianese finding that regulated industries constituted fifty-nine percent of all participants in twenty-five significant EPA rules promulgated under the Resource Conservation and Recovery Act (RCRA) between 1989 and 1991, while groups representing environmental and citizen interests constituted four percent); Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005) (finding that twice as many business groups reported that they participated in rulemakings than did public interest groups); see generally Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 ADMIN. & SOC. 325, 338 (1997) (concluding that “certain interest groups have advantages in influencing regulatory policy that other interest groups do not enjoy”).

68. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252-53 (1998) (finding that corporations, public utilities, and trade associations filed between 66.7% and 100% of the comments for eight rulemakings at two agencies); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding that business interests filed fifty-seven percent of the total comments at four agencies, nonbusiness, nongovernmental interests submitted twenty-two percent of the comments, and public interest groups constituted six percent of the previous category).

69. RENA STEINZOR, MICHAEL PATOKA & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, *BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT* (2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

participants.⁷⁰ Sixty-five percent of the meeting participants represented industry interests, which was about five times the number of attendees who represented public interest groups.⁷¹ Nearly ninety-five percent of the lawyers, consultants, and lobbyists who attended these meetings represented business interests as compared to only 2.5% who represented public interest groups.⁷²

At the same time, most of the meetings that occurred involved only industry related representatives. Seventy-three percent of the meetings involved only industry representatives with no public interest participation, while seven percent of the meetings attracted participation from public interest groups but not industry.⁷³ Thus, there were ten times more meetings at OIRA in which there was no public interest present than there were meetings in which there was no industry representative present.

B. The Impact

The empirical evidence indicates that business interests have more lobbyists, participate more frequently in filing rulemaking comments, have far more informal contacts with regulators than do public interest groups, and dominate meetings at OIRA. This dominance undoubtedly leads to capture, but it is difficult to determine the precise extent to which this happens.

1. *Where there is Smoke, There Is Fire*

Knowledgeable observers have long contended asymmetrical information produces capture. In a 1960 report to President Kennedy, James Landis noted that industry dominance has a “daily machine-gun-like impact on both [an] agency and its staff” that tends to create an industry bias in the agency’s outlook.⁷⁴ More recently, Howard Latin has observed:

Industry representatives appear regularly in agency proceedings and can usually afford to offer detailed

70. *Id.* at 5.

71. *Id.* at 19.

72. *Id.* at 18-19.

73. *Id.* at 215.

74. JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 71 (1960).

comments and criticisms on possible agency decisions, while environmental groups intervene on an intermittent basis and the unorganized public seldom participates at all. This routine asymmetry will increase agency responsiveness to industry criticisms. No matter how sincere and public-spirited officials are when appointed, a process of negative feedback will produce shifts toward the positions espoused by regulated parties.⁷⁵

The psychological literature backs up these observations. Psychological testing has revealed that people are subject to an availability heuristic, which causes them to overestimate the probability of events based on the information most immediately available to them.⁷⁶ As a result, if most of the information submitted to an agency reflects an industry view of regulatory issues, regulators are likely to be over-influenced by this experience, leading them to form generalizations that undermine their capacity to visualize other policy alternatives. This means that over time regulators will take on the point of view of industry that it is over-regulated, and they will perceive policy issues through the lens of that perspective.

This potential for information capture is exacerbated by “filter failure,” as Wendy Wagner has explained.⁷⁷ Business oriented groups overwhelm an “overstretched” agency staff with “[a] continuous barrage of letters, telephone calls, meetings, follow-up memoranda, formal comments, post-rule comments, petitions for reconsideration, and notices of appeal . . . over the life cycle of a rulemaking . . .”⁷⁸ Because the agency is required by law to respond to all significant comments,⁷⁹ it cannot “shield itself from

75. Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1673 (1991).

76. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 121 (1993); Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 103, 112 (Thomas Gilovich et al. eds., 2002); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451 (2003).

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

78. *Id.* at 1325.

79. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 245 (2d Cir. 1977) (reversing an FDA regulation governing good practices for

this flood of information and focus on developing its own expert conception of the project.”⁸⁰ In theory, public interest groups could help the agency separate the wheat from the chaff, but they “often lack the time, the resources, or the expertise to continue reviewing all of the information that becomes part of the rulemaking record,” particularly concerning more complex and technical issues.⁸¹

2. Agency Bias

While there appears to be a substantial potential for information capture, the empirical evidence is mixed. Some studies have found that business dominance produces pro-industry outcomes.⁸² Professor Wagner and her coauthors, for example, found that EPA mostly changed rules in the direction favored by industry.⁸³ Moreover, the number of changes that EPA made to weaken a rule increased as the number of industry comments increased.⁸⁴ Other studies have been unable to confirm that industry interests benefit from their dominance of the

whitefish in part because the FDA failed to respond to an important technical comment in its final rule); *see also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding that an “agency must examine the relevant data and articulate a satisfactory explanation for its action”).

80. Wagner et al., *supra* note 62, at 1325.

81. *Id.*

82. *See, e.g.,* Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RES. 336, 349-50 (2007) (finding that when the majority of comments urge less regulation, the agency is more likely to reduce the stringency of the final rule); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 114 (2005) (finding that agencies are likely to alter a proposed rule when comments point in the same direction concerning the stringency of the rule, and that agencies are less likely to change a proposed rule when comments urge changes in opposing directions); Yackee & Yackee, *supra* note 68, at 135-36 (finding that business interests had a greater influence on rules than public interest groups and that comments from business interests predict a greater probability that a final rule will be less stringent than the proposed rule).

83. The study found that there were an average of twenty-two significant issues in each rulemaking, EPA on average made changes to the final rule concerning about one-half of these issues, and that eighty-three percent of these changes weakened the rule in some manner. Wagner et al., *supra* note 62, at 130-31.

84. *Id.* at 131.

administrative process.⁸⁵

One potential reason for the mixed evidence is that public interest groups may not be the only entities that represent the interests of the public in a rulemaking proceeding. State and local governments and other non-business, non-government entities also file comments. Further, not all business related comments seek the same ends. Some corporations (or trade associations) may find it in their self-interest to support stronger regulation. Agencies may also vary in their capacity to create their own policy information and to avoid filter failure. However, the defunding of agencies, discussed earlier,⁸⁶ suggests that this capacity is eroding.

3. OIRA Bias

The empirical evidence linking industry dominance of OIRA meetings to pro-industry changes in a rule is also mixed. According to the CPR study discussed earlier, it is common for OIRA to make changes in proposed rules, but it is more likely that a change will occur when a rule is the subject of a meeting. OIRA made changes to eighty-five percent of the proposed rules for which a meeting occurred, while it made changes sixty-six percent of the time that no meeting took place concerning a rule.⁸⁷

Although meetings almost always lead to changes in a rule, we do not know whether the change was significant or insignificant. More importantly, we do not know whether industry dominance of the meetings led OIRA to weaken proposed rules. But we do know that OIRA often intervenes to weaken proposed rules,⁸⁸ and there is evidence that it almost always does

85. See, e.g., SHELDON KAMIENIECKI, CORPORATE AMERICA AND ENVIRONMENTAL POLICY: HOW OFTEN DOES BUSINESS GET ITS WAY? 250-56 (2006) (finding that business groups did not have substantial influence in environmental rulemaking); WESLEY A. MAGAT ET AL., RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR 143-45, 157 (1986) (finding no statistically significant empirical support for the hypothesis that active participation in federal rulemaking by firms results in weaker regulatory standards for those firms); Golden, *supra* note 68, at 260-61 (finding no evidence of "agency capture" despite the dominance of business interests).

86. See *supra* notes 41-48 and accompanying text.

87. STEINZOR, PATOKA, & GOODWIN, *supra* note 69, at 55..

88. David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 355 (2006) (reviewing a range of academic and government reports

so when it makes changes, at least when the changes involve significant rules.⁸⁹

Industry's efforts to influence OIRA may involve preaching to the choir. The desk officers in OIRA, who review proposed and final regulations, reflect the narrow, economic perspective of their training and of the organization in which they work, which is composed almost entirely of economists and leads to a paramount concern about regulatory costs.⁹⁰ This suggests that OIRA may have an anti-regulatory bias regardless of industry domination of the meeting process. Nevertheless, it is likely that industry domination fortifies OIRA's pre-existing bias, and it may well amplify it, for the reasons discussed earlier concerning why asymmetrical information produces capture.⁹¹

IV. DEFLECTING PUBLIC OPPOSITION

While the extent of capture, however it occurs, is unknown, it seems unlikely that it does not occur at all. And, even if industry domination only causes capture some of the time, there is still a problem, putting the public needlessly at risk.⁹² Yet, by and large, capture is unopposed by the public, whose interests are adversely affected. Public choice dynamics may explain this outcome. The public may fail to act because of collective action problems.⁹³ There is another explanation for public passivity. There has been an expensive and extensive campaign by business interest to influence public opinion, and progressive interests have failed to match these efforts. As a result, the business community has headed off public opposition to their efforts to reduce regulation, even when the public would benefit from stricter regulation.

that show that OIRA review slowed and reduced the stringency of environmental, safety, and health regulation in "dozens" of cases).

89. *Id.* at 365 (examining twenty-five rules that a Government Accountability Office (GAO) study found had been significantly affected by OIRA in 2001-2002, and finding that OIRA's recommended changes would have reduced regulatory protections in twenty-four, while the remaining change was neutral).

90. Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 466 (2008).

91. *See supra* notes 74-81 and accompanying text.

92. *See supra* notes 23-24 and accompanying text (arguing that even occasional capture is a problem for the public).

93. *See supra* notes 11-13 and accompanying text.

A. The Air War

Tom McGarity describes the effort to influence public opinion about regulation as the “air war.”⁹⁴ As in an actual military campaign, it is in support of the “ground war,” the direct effort to obtain outcomes favorable to the side sponsoring the air war.⁹⁵ And, as in a military campaign, the air war softens up the enemy to make it more likely that the ground war will succeed. Conservative interests have substantially outspent progressive interests in the air war.

We lack an authoritative estimate of the total amount spent by conservative funders to influence public opinion, but available information suggests the amount is substantial. According to one estimate, conservative foundations and funders spent over one billion dollars in the 1990s to make right-wing theory the foundation of public policy.⁹⁶ Another source estimates that conservative sources spent \$1.8 billion dollars on influencing public policy as of 2001.⁹⁷ According to this source, seventy-nine conservative foundations had supported the activities of 331 organizations that sought to reshape public policy at the federal, state and local levels.⁹⁸ A third analyst estimates there has been roughly three billion dollars spent in support of conservative public policy ideas over thirty years.⁹⁹ The Olin Foundation, alone, invested around fifty million dollars in support of law and economics scholarship, responding to what its executive director called a “‘call to arms’ in ‘defense of capitalism.’”¹⁰⁰

94. McGarity, *Freedom to Harm*, *supra* note 35, at 90.

95. *Id.* at 91.

96. DAVID CALLAHAN, NAT'L COMM. FOR RESPONSIVE PHILANTHROPY, \$1 BILLION FOR IDEAS: CONSERVATIVE THINK TANKS IN THE 1990S (1999), available at <http://www.commonwealinstitute.org/archive/1-billion-for-ideas-conservative-think-tanks-in-the-1990s>; David Callahan, *\$1 Billion for Conservative Ideas*, NATION, Apr. 26, 1999, at 21-23.

97. JEFF KREHELY ET AL., NAT'L COMM. FOR RESPONSIVE PHILANTHROPY, AXIS OF IDEOLOGY: CONSERVATIVE FOUNDATIONS AND PUBLIC POLICY 10 (2004); available at www.commasite.com/FileDownload.cfm?file=Axis_of_Ideology.pdf.

98. *Id.* at 7.

99. Lewis H. Lapham, *Tentacles of Rage: The Republican Propaganda Mill, A Brief History*, HARPER'S MAGAZINE, Sept. 2004, at 31, 32 (citing Rob Stein, a former Democratic Strategist, as the source of the estimate).

100. Martha T. McCluskey, *Thinking With Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1215 (2007) (quoting James

We also lack authoritative data concerning how much progressive interests have spent to influence public opinion, but it appears that conservative funding is significantly greater.¹⁰¹ One political strategist estimates that right-wing think tanks received \$295 million in support between 2003 and 2005, while left-wing think tanks received just \$75 million in the same period.¹⁰² The budgets of the top eight progressive social groups, according to another estimate, totaled less than twenty-five percent of the budgets of the top five conservative think tanks in 1995.¹⁰³ The annual budget of the Institute for Policy Studies, one of the few left-wing multi-issue think tanks, would be enough to run the Heritage Foundation, one of the most prominent multi-issue right-wing think tanks, for about thirteen working days.¹⁰⁴ A study of foundation support estimated that only one percent of total foundation spending went to progressive social movements.¹⁰⁵

This imbalance has occurred despite the fact that liberal foundations, such as the Ford Foundation, spend large amounts of

Piereson, the foundation's second executive director, James Piereson, *Opinion, You Get What You Pay For*, WALL ST. J., July 21, 2004 at A10).

101. See McGarity, *Freedom to Harm*, *supra* note 35, at 384 (noting the necessity to establish a progressive idea infrastructure similar to the one established by conservative forces); *id.* at 386 (noting the reluctance of progressive foundations to fund an idea infrastructure to counter the conservative infrastructure); Eric Alterman, *Think Again: Money Matters, Part II*, CENTER FOR AMERICAN PROGRESS (Oct. 20, 2004), <http://www.americanprogress.org/issues/2004/10/b225778.html> (observing that "[t]he far-right wing enjoys an enormous head start in training and funding its voices to head out and preach their message to the American people . . ." and that "[w]ith hundreds of millions of dollars flying out of conservative coffers in order to mold public opinion, the liberal side will never have the resources to match them").

102. David Teather, *Liberals Pledge Millions to Revive US Left*, GUARDIAN (Aug. 7, 2005, 8:52 PM), <http://www.guardian.co.uk/world/2005/aug/08/usa.davidteather> (quoting Rob Stein).

103. Sally Covington, *How Conservative Philanthropies and Think Tanks Transform US Policy*, COVERT ACTION Q. (Winter 1998), <http://www.thirdworldtraveler.com/Democracy/ConservThinkTanks.html>.

104. Michael Shuman, *Why Do Progressive Foundations Give too Little to too Many?*, NATION (Jan. 12, 1998), <http://www.tni.org/print/65838> (based on data available at the time).

105. J. Craig Jenkins & Abigail Halcli, *Grassrooting the System? The Development and Impact of Social Movement Philanthropy, 1953-1990*, in PHILANTHROPIC FOUNDATIONS: NEW SCHOLARSHIP, NEW POSSIBILITIES 229, 230 (Ellen Condliffe Lagemann ed., 1999).

money, perhaps even more than conservative foundations.¹⁰⁶ But, unlike conservative supporters, liberal foundations have not spent their money on creating and developing an intellectual infrastructure to influence public opinion about government and its programs.¹⁰⁷ Instead, they have sponsored research to improve social and regulatory programs, without considering the need to defend these programs to the public.¹⁰⁸

Conservative voices will claim that their ideas are winning because of their popularity with the public. This would be a more credible claim if the battle to influence the public were not so one-sided. As Andrew Rich notes, “conservatives are still winning in the war of ideas, and that success cannot be chalked up only to the power of their ideas. It is because these ideas have a winning organization behind them.”¹⁰⁹

B. Frame Contests

One consequence of the disparity in funding can be seen in the battle over framing public policy issues. A “policy frame” is a heuristic used to organize, interpret and make sense of complex policy issues.¹¹⁰ When individuals use different policy frames to

106. Robert O. Bothwell, *The Decline of Progressive Policy and the New Philanthropy: Progressive Foundations and Other Alternatives to Mainstream Foundations Are Created and Become Substantial, But Fail to Reverse the Policy Decline*, COMM-ORG (2003), <http://comm-org.wisc.edu/papers2003/bothwell/bothwell.htm> (noting that the Ford Foundation gives away more than \$400 million dollars per year).

107. *Id.*

108. *Id.*; see also Andrew Rich, *War of Ideas: Why Mainstream and Liberal Foundations and the Think Tanks They Support Are Losing in the War of Ideas in American Politics*, STAN. SOC. INNOVATION REV., Spring 2005, at 18 (“Nonconservative foundations – what might be labeled ‘middle of the road,’ ‘mainline,’ or ‘liberal foundations’ – have devoted far more resources than conservatives to influencing thinking about public policy. This spending simply has not been as deliberate or effective.”); Shuman, *supra* note 104 (“progressive funders have much to learn from the right, and need to start radically rethinking their practices and priorities”); Convington, *supra* note 103 (“In funding a policy movement rather than specific program areas, [key conservative foundations] distinguish themselves from the philanthropic mainstream, which has long maintained a pragmatic, non-ideological and field-specific approach to the grant making enterprise.”).

109. Rich, *supra* note 108, at 25.

110. See Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 690 (2000) [hereinafter Shapiro, *Counter-Reformation*] (discussing how

integrate facts, values, theories and interests, they end up supporting different public policies. Different interests therefore compete to have their policy frame to dominate public opinion.¹¹¹

Policy frames are established through “policy stories” that identify a social problem and what conditions caused the problem. The goal of a policy story is to characterize the problem and the source of the problem in a manner that supports the political interests of the group telling the story.¹¹² Interest groups “look for causes not only to understand how the world works but to assign responsibility for problems.”¹¹³ The goal is to “tell a story in which one set of people are oppressors and another are victims.”¹¹⁴ This makes political conflicts something more than “empirical claims about sequences of events. They are fights about the possibility of control and the assignment of responsibility.”¹¹⁵

Progressive framing efforts are a version of a generic story that blames safety, health and environmental risks on the irresponsible behavior of the business community. The “solution” suggested by the story is additional regulation, which is the goal of the public interest groups telling the story.¹¹⁶

Conservative interests tell a counter-story. They propose that excessive government regulation has reduced economic growth and individual freedom. The “solution” suggested by the story is less regulation, which is the goal of the corporate interests telling the story.¹¹⁷ Consider, for example, the recent effort by regulatory opponents to blame regulation for the country’s slow economic

framing works).

111. Charlotte Ryan & Samuel Alexander, *“Reframing” The Presentation of Environmental Law and Policy*, 33 B.C. ENVTL. AFF. L. REV. 563, 568 (2006). Like other heuristics, policy frames are selective in the sense that they emphasize some aspects of reality and relegate other aspects to the background. Individuals are often not aware that this is occurring. *Id.* at 567.

112. Shapiro, *Counter-Reformation*, *supra* note 110, at 690.

113. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 189 (Revised ed. 2002).

114. *Id.*

115. *Id.* at 197.

116. See Shapiro, *Counter-Reformation*, *supra* note 110, at 692-94 (describing the policy story used by environmental and consumer interests).

117. *Id.* at 697-703 (describing the policy story used by anti-regulatory forces).

recovery.¹¹⁸ This accusation, which is captured by their description “job killing regulation,” seeks to deflect the public from remembering that it was the lack of regulation of Wall Street that precipitated the very recession from which the country is trying to recover.¹¹⁹

Conservative interests have been able to displace the policy frame that progressives used in the 1960s to obtain public support for government regulation, and replace it with one that delegitimizes government and deters support for additional regulation.¹²⁰ In this manner, the national agenda has been shifted from its focus on the undesirable conduct of corporations to the undesirable conduct of the government.¹²¹ For example, although there is no empirical support to back up the claim that regulation kills jobs,¹²² the public is less likely to hear this rebuttal if public interest groups are underfinanced.

The success of regulatory opponents in establishing their policy frames exacerbates the collective action problems that prevent the public from organizing to achieve more regulatory protection. Not only is it difficult and expensive to mobilize the public, the public is less likely to recognize when their self-interest lies in supporting additional and more effective regulation. This lack of recognition assists conservative interests in achieving and maintaining capture through the various mechanisms described earlier.

C. Deep Capture

The lack of public opposition to efforts to reduce or eliminate government regulation is related to the conservative funding

118. See, e.g., Susan Duclos, *Obama's Answer to Job Killing Regulations? ADD 350+ MORE!!!*, WAKE UP AMERICA (Aug. 4, 2011, 1:26 PM), <http://www.wakeupamericans-spree.blogspot.com/2011/08/obamas-answer-to-job-killing.html>.

119. See McGarity, *Freedom to Harm*, *supra* note 35, at 357 (“That the business community’s influence infrastructure could credibly invoke a recession caused by lax regulation of financial institutions to support deregulation was a testament to the success of its idea infrastructure in molding public perceptions about the proper role of government . . .”).

120. *Id.* at 8-9.

121. Shapiro, *Counter-Reformation*, *supra* note 110, at 702.

122. See SHAPIRO ET AL., *supra* note 23, at 15-17 (discussing the lack of evidence that regulation causes job losses).

advantage in framing public policy issues. Jon Hanson and David Yosifon suggest another way that the conservative air war has laid the groundwork for regulatory capture.¹²³

They focus on the psychological tendency of individuals to consider human behavior as resulting from the choices that people freely make, known as “individual dispositions.”¹²⁴ Like other heuristics, this one helps people to filter information. It is easier to attribute outcomes to individual disposition than it is to sort out the extent to which outside forces have influenced individual behavior.¹²⁵ Like other heuristics, it can lead to attribution errors. Individuals miss the extent to which behavior results from “situational factors,” such as the manipulation of individuals by others. The result is “situational factors are cognitively hidden (often in plain sight), easily camouflaged and naturalized as mere background.”¹²⁶

The fact that individuals are prone to miss situational factors makes it attractive for conservative interests to use their funding advantage to reinforce individual disposition as a way of gaining power.¹²⁷ Conservative interests gain power because the reinforcement of individual dispositionalism leads people to believe that government regulation is unnecessary. This frame of mind, for example, leads individuals to believe they make free choices in market transactions, creating a presumption against regulation. After all, if consumers make free choices in markets, government regulation will reduce consumer welfare.¹²⁸ Regulation is not even justified to reduce health and safety risks because individuals “are presumed to be choosing the inevitable

123. 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 (2003).

124. *Id.* at 136-37.

125. *Id.* at 137.

126. *Id.* at 195.

127. *See id.*

128. If consumers are dispositionalist, they act according to a set of preferences that only they can know about. The only way to maximize consumer welfare is therefore to allow consumers to purchase whatever products and services they prefer. As profit-making entities, corporations have a strong interest in the satisfaction of consumer preferences, and, when they are profitable, this indicates that corporations are serving the public's interests. “In short, profit-maximizing corporations act in the public interest.” *Id.* at 226-27.

risks that gave rise to those harms.”¹²⁹ And even if regulation is sometimes justified, there is a high burden on the government to defend its actions.

Dispositionalism also leads citizens to distrust regulators because it supports public choice arguments that government officials cannot be trusted.¹³⁰ The assumption is that regulators, like others, are free to choose to act in self-interested ways. The fact that public servants may be substantially motivated by professionalism and agency culture to serve the public is not apparent because a dispositionalist outlook causes citizens to overlook the influence that organizational culture and professional training can have on people.¹³¹

When business efforts to reinforce dispositionalism are successful, they lead to what Hanson and Yosifon describe as “deep capture,” which operates differently than the shallow capture that results from public choice dynamics. Whereas shallow capture attempts to exploit individual self-interest, deep capture targets “the way that people think and the way that they think they think.”¹³²

The public is unlikely to understand how situational factors impact behavior “*unless* the situation is thrust upon us in the form of another hard-to-miss actor”¹³³ This means citizens are more likely to see the need for regulation when there is some crisis that suggests corporations have acted in ways that have endangered the public. It is therefore not an accident that most new regulatory legislation passed by Congress comes after such a crisis.¹³⁴ For example, Congress enacted additional regulation of the financial sector after the recent catastrophic collapse on Wall Street.¹³⁵

Nevertheless, the strong hold that dispositionalism has on the public is indicated by the fact that business interests have found it

129. *Id.* at 227.

130. *Id.*

131. *See supra* note 18 and accompanying text (discussing the other-regarding motives of public servants and the sources of these motives).

132. Hanson & Yosifon, *supra* note 123, at 214.

133. *Id.* at 157.

134. *See* McGarity, Freedom to Harm, *supra* note 35, at 329 (relating how strong regulatory legislation follows a profound crisis).

135. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

worthwhile to engage in a concerted campaign to blame government regulation for the recession that was actually caused by the failure to regulate Wall Street.¹³⁶ Moreover, despite the largest oil spill in American history, legislative efforts to address deepwater drilling died in the Senate, indicating that not every crisis is sufficient to generate reform legislation.¹³⁷

V. SOLUTIONS

Given the breadth and depth of capture, and the political influence of business interests, remediation will not be easy. The first step is for progressive forces to convince the public of the need for reform. The difficulty is that the conservative air war has dulled the public's enthusiasm to establish more effective regulatory programs. Sustained support for stronger regulation is not likely to occur until progressive interests establish an alternative idea infrastructure that can compete successfully in the air war. There have been steps in this direction, but so far these efforts have fallen short of the intensive campaign by conservative interests.¹³⁸

Assuming there is the necessary political will to act, two general approaches are available. Regulatory agencies can be made more resistant to the influence of business interests, and there are transparency measures that would alert the public to the potential existence of regulatory capture.

A. Make Agencies More Resistant to Capture

When the political will to act exists, there are a number of ways that Congress can make agencies more resistant to capture. Rachel Barkow recommends permitting agencies to submit their own budgets to Congress (making them less susceptible to White House political pressure on behalf of business interests);¹³⁹ establishing qualifications for administrators (limiting the

136. See *supra* note 119 and accompanying text.

137. See McGarity, *Freedom to Harm*, *supra* note 35, at 343 (discussing the failure to pass legislation to regulate offshore drilling).

138. *Id.* at 384-85 (discussing progressive efforts to fight the air war).

139. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 43 (2010). The same goal could be accomplished by requiring regulated entities to pay fees to support an agency budget. *Id.* at 44.

President's ability to appoint administrators based solely on their anti-regulatory ideology);¹⁴⁰ establishing agencies with broad jurisdictions (making them more likely to resist political pressure from any one set of interests);¹⁴¹ eliminating statutory conflicts of interest (which require agencies to promote and regulate an industry);¹⁴² limiting preemption (allowing state regulators to fill regulatory gaps);¹⁴³ and making wider use of public advocates (who represent otherwise unrepresented citizens in regulatory proceedings).¹⁴⁴

Lawrence Baxter also suggests how we might make agencies more resistant to capture.¹⁴⁵ We could finance weaker interest groups or have them represented by state attorney generals or other surrogates (making the regulatory process more pluralistic);¹⁴⁶ revive the concept of private attorney generals (ensuring citizens can challenge captured agencies in court);¹⁴⁷ rotate key officials (to decrease their susceptibility to capture);¹⁴⁸ establish stronger ethical rules (to forbid post-government employment that leads to capture);¹⁴⁹ and rely more on Inspector Generals or similar private, independent entities (to spot and reveal capture).¹⁵⁰

I find all of these suggestions worthy of serious consideration, and I would add one more. An expert and professional civil service is more likely to have other-regarding motivations and is more likely to avoid information capture. With an effective civil service, an agency has a greater capacity to vet the validity of industry policy proposals, and to decide for itself which policies best advance the goals of its regulatory mandates. In short, the country needs to make the civil service more capable of finding the public interest on its own.

140. *Id.* at 45-49.

141. *Id.* at 50.

142. *Id.* at 50-51.

143. *Id.* at 53-55.

144. *Id.* at 62-63.

145. Baxter, *supra* note 5, at 190-99. Baxter stresses that the regulatory process is dynamic and that efforts to avoid capture should be reassessed and adjusted over time. *Id.* at 188-90.

146. *Id.* at 191-92.

147. *Id.* at 192.

148. *Id.* at 196-97.

149. *Id.* at 197-98.

150. *Id.* at 198-99.

The public choice literature assumes that regulatory officials are self-interested, but there is considerable evidence that public officials also have other-regarding motives.¹⁵¹ It is possible to design bureaucratic institutions to take advantage of, and strengthen, these other-regarding motives.¹⁵² A civil servant with a strong commitment to public service is more likely to resist industry arguments to weaken regulations unless he or she can independently verify that such policies in fact serve the public at large.¹⁵³

Expert and capable civil servants are also more likely to avoid information capture. Rather than depending on the expertise of industry, they will have their own expertise. Likewise, effective civil servants will be in a position to seek out their own sources of information, rather than relying on the information brought to them.

Finally, the creation of an effective civil service should reduce the revolving door. Agencies will not find it necessary to hire persons from industry in order to gain the expertise they need to regulate. And those in government service will have less incentive to move to private industry if the civil service becomes an attractive career, one in which they can expect market levels of compensation and the opportunity for advancement.

This is a tall order. As mentioned earlier, regulatory agencies are seriously underfunded.¹⁵⁴ Nevertheless, nothing less than a complete overhaul of the civil service system is necessary. Unless and until we pay civil servants compensation closer to what they can earn in the private sector, the best and brightest will continue to leave for the greener pastures of industry.¹⁵⁵ As well, it is

151. See *supra* note 18 and accompanying text.

152. See Shapiro & Wright, *supra* note 18, at 587 (noting public managers can “influence employee behavior by creating and maintaining an organizational culture that promotes a mission orientation, a sense of public service, and professionalism”).

153. See *id.* at 616 (“When agency professionals, operating within the parameters of their training and experience, present their understanding of the law, science, and technology to agency leadership, they speak truth to power.”).

154. See *supra* notes 41-48 and accompanying text.

155. STEINZOR & SHAPIRO, *supra* note 37, at 210-211 (documenting pay disparities); Baxter, *supra* note 5, at 195 (noting the need to pay higher compensation).

necessary to change how raises and promotions are determined.¹⁵⁶

This is not all. An even more difficult step is to get our political leaders to stop bashing the bureaucracy. John Kennedy, with this declaration, “Ask not what your country can do for you—ask what you can do for your country,”¹⁵⁷ is about the last political leader to consider government service as a noble calling.¹⁵⁸ The failure to regard the civil service as important to our nation’s destiny discourages bright, young people from joining government and makes it difficult to retain them, if hired.¹⁵⁹

B. Make Agencies More Transparent

Louis Brandeis famously observed, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁶⁰ He saw transparency as effective in deterring capture because it exposed to voters that their public officials have overlooked their interests in favor of promoting the interests of regulated entities.

More disclosure remains a viable solution. First, it would decrease the collective action costs of public interest groups. In the absence of legislatively mandated disclosures, it is up to pro-regulatory interests to ferret out and publicize information that indicates regulatory capture, an expensive proposition. Second, we know that individuals are less likely to retain their dispositionalist outlook if there is evidence that situational factors are responsible for social problems. More disclosure should therefore make it more difficult for conservative interests to

156. STEINZOR & SHAPIRO, *supra* note 37, at 210-211.

157. President John F. Kennedy, Inaugural Address (Jan. 20, 1961), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY: CONTAINING THE PUBLIC MESSAGES, SPEECHS, AND STATEMENTS OF THE PRESIDENT, JANUARY 20 TO DECEMBER 31, 1961, at 1, 3 (1962).

158. See STEINZOR & SHAPIRO, *supra* note 37, at 126-129 (noting the almost universal tendency of presidents and other elected officials to engage in “bureaucracy bashing”).

159. See R. Sam Garrett, James A. Thurber, A. Lee Fritschler & David H. Rosenbloom, *Assessing the Impact of Bureaucracy Bashing by Electoral Campaigns*, 66 PUB. ADMIN. REV. 228, 234 (2006) (a 2006 study on the effects of bureaucrat bashing found that senior managers in the government repeatedly said that “bashing creates permanent and overwhelming negative mental frames and political symbols for career bureaucrats, which affects morale, recruitment, training, and overall work environment”).

160. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1913).

sustain deep capture.

Michael Levine and Jennifer Forrence suggest that greater transparency also deters self-interested behavior by government officials.¹⁶¹ They observe how legislators and regulators present themselves, respectively, as public servants and civil servants to the public. This behavior indicates their commitment to the general welfare, which Levine and Forrence contend produces greater self-satisfaction than if government officials portrayed themselves as beholden to regulated entities.¹⁶² If this characterization is correct, public officials will avoid self-interested behavior because exposure of such behavior will be humiliating to those involved. For legislators, it will also threaten their reelection because they will have been revealed as lying to the public.¹⁶³

There are two types of disclosures that could reduce the extent of capture. The first, and easier to achieve, would indicate the extent of industry influence in agency policymaking. The second type would measure agency outputs to determine whether an agency is falling short of its statutory responsibilities. Neither type of disclosure would prove that capture has occurred, but both would raise a red flag that something is amiss.

1. Measures of Interest Group Influence

Agency administrators should be required to disclose their calendars, indicating with whom they have met, the institutional affiliation of those persons, and a sufficient description of the content of the meeting that the public can ascertain the purpose of the meeting and the regulatory action to which it relates. There is no current legal requirement that administrators keep a public calendar, although officials at some agencies, such as the EPA, do so.¹⁶⁴

Agencies should also be required to compile summary

161. Levine & Forrence, *supra* note 18, at 185-91.

162. *Id.* at 175.

163. *Id.* at 186.

164. *See, e.g.*, Senior Managers Schedule: Lisa P. Jackson, Administrator, Environmental Protection Agency, U.S. ENVTL. PROT. AGENCY, http://yosemite.epa.gov/opa/admpress.nsf/Calendars_1?OpenView&RestrictToCategory=Lisa%20P.%20Jackson.%20Administrator,%20Environmental%20Protection%20Agency (last visited Nov. 25, 2011).

statistics regarding the meetings subject to the public calendar requirement. The statistics should indicate by category, such as rulemaking, enforcement, etc., the number of meetings that have taken place between the agency and business interests, public interest groups, state and local officials, etc.

Finally, agencies should keep and publish statistics on who files rulemaking comments. It is a huge task to develop these types of statistics if the agency does not publish them, which is why there should be a requirement that it do so.

At a time when agency resources are shrinking,¹⁶⁵ I hesitate to recommend an extensive program of data collection and publication. But costs can be minimized by building the collection of this information into the electronic submission of written materials to the agency. Anyone who submits written documents to the agency can be required to answer some basic questions concerning their identity, such as corporation, trade association, etc. Agency personnel can spot check the accuracy of the information. Similarly, agency staff can report on meetings by entering data into a website in a manner that will permit the publication of statistics about the meetings.

2. *Measures of Agency Success*

Government can produce other types of information that would give the public a better read on whether regulatory agencies are fulfilling their mission to protect the public. Rachel Barkow recommends that agencies should have the “authority to study and publicize data that will be of interest to the public and help energize the public to overcome collective action problems and rally behind [an] agency.”¹⁶⁶ For example, a consumer protection agency could identify dangerous products and serves as a means of generating public support for regulatory policies that industry would oppose.¹⁶⁷

Rena Steinzor and I have proposed another type of transparency that would also alert the public to capture. We proposed that agencies should develop, publish and update regulatory “metrics” that would measure the extent to which each

165. *See supra* notes 41 and accompanying text.

166. Barkow, *supra* note 139, at 59.

167. *Id.* at 59-60.

agency has fallen short of legislatively mandated goals.¹⁶⁸ Metrics would be published on an agency website in a manner that makes them easy to find and interpret.¹⁶⁹

For example, the Clean Air Act (CAA) requires the EPA to identify “criteria air pollutants,” establish regulations that limit public exposure to these pollutants, and to oversee the development of “state implementation plans,” which specify how each state will bring its air quality into compliance with the emissions limitations.¹⁷⁰ The type of metric that we have in mind would reveal the extent to which the air across the country meets the regulatory limitations. This would be revealed in a manner that is easy to interpret, such as whether the air is 50 percent in compliance, or 60 percent in compliance, etc.

Over time, the public could assess whether EPA is making reasonable progress towards 100 percent compliance. If the agency has been stuck at the same percentage for a number of years, or the air is getting worse, these disclosures would alert Congress, the White House, and others with oversight authority—as well as advocacy groups, the media, and the public—that EPA is failing to succeed in its statutory mission.

It would not be easy to devise appropriate metrics or to obtain the information that would be necessary to derive the appropriate statistics, two problems that Professor Steinzor and I have discussed.¹⁷¹ But it is worth doing, not only as an antidote to capture, but to push legislators and the President into fixing other problems with the regulatory system, if they are preventing effective regulation.

VI. CONCLUSIONS

Despite the considerable attention paid to the concept of regulatory capture, it remains difficult to determine when it occurs, what causes it, and what to do about it. Despite these difficulties, it is crucial to understand the dynamics of capture and to find ways of heading it off. When there is under-regulation due

168. STEINZOR & SHAPIRO, *supra* note 37, at 185-191.

169. *Id.* at 190.

170. See 42 U.S.C. § 7408 (2006) (requiring the EPA to publish a list of air pollutants); *id.* § 7409 (requiring the EPA to establish primary and secondary ambient air quality standards).

171. STEINZOR & SHAPIRO, *supra* note 37, at 185-191.

to capture, these results can be devastating, as the country's recent experiences with the 2008 Wall Street collapse and the BP oil spill demonstrate.

Capture is easy to diagnose when an agency is obviously influenced by regulated entities and the policies it produces clearly fail to protect the public. But restricting capture to this definition misses subtler forms of capture in which the public interest is thwarted by the consistent adoption of minimally sufficient protection policies as a result of industry influence. This situation also constitutes capture concerning environmental, health, and safety statutes. In these statutes, Congress has mandated the greatest degree of protection that is achievable taking into account costs and other considerations. When an agency consistently falls short of meeting its precautionary mandate because of industry influence, it has been captured by that influence.

Capture, however defined, is not easily remedied because industry influence can result in multiple sources of capture. These include passage of substantive legislation that favors business interests, self-interested and ideological behavior by administrators, the defunding of agencies, and the imposition of procedural obstacles to rulemaking. More recently, we have become aware that there can be information capture, which occurs when most (and sometimes all) of the information concerning proposed regulations available to an agency and OIRA comes from industry sources. Moreover, capture has persisted because business interests have successfully deflected potential public opposition through an expensive and extensive public relations campaign to delegitimize government which progressive interests have failed to match.

Assuming there is the necessary political will to begin to address the causes of capture, one option is to make agencies more resistant to capture through institutional redesign. A number of useful strategies to accomplish this goal have been proposed, but prior analysis has overlooked the potential of rebuilding the civil service as a strong bulwark against capture. This potential is often overlooked because of the assumption in the public choice literature that the civil service is self-interested and therefore easily captured. This ignores how organizational culture and professionalism can reinforce the other-regarding motives of civil

servants, making them an effective counter-point to business influence.

Another option is to increase transparency in the regulatory process. Government can produce information that would give the public a better read on whether regulatory agencies are fulfilling their mission to protect the public. This essay proposes two such approaches. First, Congress should require agencies to publish information concerning the number of times they meet with industry-related groups as compared to interest groups representing consumers and other members of the public. Second, Congress should require that agencies develop, publish and update regulatory “metrics” that would measure the extent to which each agency has fallen short of legislatively mandated goals. Over time, these measurements would alert the public to when agencies are stalled in their efforts to protect the public or are backsliding in such efforts.

As a best-selling novelist once remarked, “Nothing that’s worthwhile is ever easy.”¹⁷² Unfortunately, this remark describes all too well the difficulty of rooting out capture. But the protection of the American public depends on it.

172. NICOLAS SPARKS, *MESSAGE IN A BOTTLE* (1998).