

# REGULATORY MANAGERIALISM AS GASLIGHTING GOVERNMENT

JODI L. SHORT\*

## I

### INTRODUCTION

Articles in this volume define regulatory managerialism as the practice of importing techniques developed in the context of business management into regulatory domains. As many have observed, these techniques—while potentially useful—are embedded in an ideology about government that has been highly corrosive to robust and effective regulation. This article extends the ideological critique of regulatory managerialism by theorizing its discourses and practices as a form of gaslighting that supports and reinforces anti-administrativism in U.S. politics and law, even if unintentionally. An extensive literature documents the broad and deep network of politicians, interest groups, and professionals constructing and pursuing the anti-administrative agenda.<sup>1</sup> I argue that although regulatory managerialism developed largely outside these networks, it echoes, amplifies, and legitimizes anti-administrative narratives about inept and overbearing regulation, and it glosses them with its own distinctive form of gaslighting: demanding that government behave more like a business, but depriving it of the full toolkit necessary to run a successful business.

“Gaslighting is an insidious form of manipulation and psychological control. Victims of gaslighting are deliberately and systematically fed false information that leads them to question what they know to be true, often about themselves.”<sup>2</sup> The construct of gaslighting typically is applied in the context of intimate relationships, but gaslighting tactics also can be trained on populations, resulting in what experts have referred to as “structural gaslighting.”<sup>3</sup> For instance, some

---

Copyright © 2023 by Jodi L. Short.

This Article is also available online at <http://lep.law.duke.edu/>.

\* May Kay Kane Professor of Law at UC Law, San Francisco.

1. *E.g.*, Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015); THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

2. *Gaslighting*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/gaslighting> [<https://perma.cc/FNV6-BR6V>].

3. Ann Crawford-Roberts et al., *George Floyd's Autopsy and the Structural Gaslighting of America*, SCI. AM., (June 6, 2020), [https://blogs.scientificamerican.com/voices/george-floyds-autopsy-and-the-structural-gaslighting-of-america/?gclid=CjwKCAjw-rOaBhA9EiwAUKLV4t3TFSgRjOVHjMCMlmbboNAE2iZ-5IRkJ28AgwC6ib5iTmkyZIQwTxoCRM4QAvD\\_BwE](https://blogs.scientificamerican.com/voices/george-floyds-autopsy-and-the-structural-gaslighting-of-america/?gclid=CjwKCAjw-rOaBhA9EiwAUKLV4t3TFSgRjOVHjMCMlmbboNAE2iZ-5IRkJ28AgwC6ib5iTmkyZIQwTxoCRM4QAvD_BwE) [<https://perma.cc/C2U4-HXET>]; Ria Wolstenholme, *The Hidden Victims of Gaslighting*, BBC FUTURE (Nov. 24, 2020),

have characterized misreporting on George Floyd’s autopsy report as structural gaslighting: the report’s technical language was deployed to suggest that Mr. Floyd had died of underlying medical conditions rather than of asphyxiation by police officer Derek Chauvin, as the world had witnessed on video. Whether interpersonal or structural, gaslighting is, at base, “a fundamentally social phenomenon”<sup>4</sup> that exploits “inequalities in the distribution of social, political, and economic power.”<sup>5</sup> Thus, it provides a useful lens for exploring the way power is wielded in contests over regulation.

As a general matter, gaslighting attacks the target’s core identity and manipulates the target’s reality through techniques such as scapegoating, projection, and lies. Regulatory managerialism discourse and practice makes three moves that mirror classic gaslighting techniques. First, it undermines regulators’ identities by persistently insulting and belittling them. Second, it misattributes blame to government for problems caused by business and then admonishes government regulators to behave more like business managers or entrepreneurs to solve the problems that business created. Third, it deprives would-be regulatory entrepreneurs of the full panoply of managerial tools necessary to run a successful business, setting them up for double failure—both as regulators and as entrepreneurs.

To be clear, I do not argue, and I do not mean to suggest, that the *entire* discourse and practice of regulatory managerialism is gaslighting. Many of the claims and critiques made by regulatory managerialists have solid factual grounding, and some managerialist practices can be genuinely useful—for instance, the application of rigorous social science research to inform regulatory program design, implementation, and enforcement. Moreover, I do not mean to suggest nefarious intent on the part of individual contributors to regulatory managerialist discourse—I count myself among them. But this facial credibility is what makes the gaslighting that does occur so dangerous. Gaslighting embeds itself in truth to sow confusion that ultimately undermines its target. It wears down the target over time, with a “lie here, a lie there, a snide comment every so often . . . .”<sup>6</sup> I elaborate below how gaslighting has played this role in regulatory managerialism discourse—particularly in contemporary iterations that developed in the late twentieth century such as reinventing government, experimentalism, and new governance. I focus on these discourses because they

---

<https://www.bbc.com/future/article/20201123-what-is-racial-gaslighting> [<https://perma.cc/G454-9FVG>].

4. Paige L. Sweet, *The Sociology of Gaslighting*, 84 AM. SOCIO. REV. 851, 852 (2019).

5. *Id.* at 857.

6. Stephanie A. Sarkis, *11 Red Flags of Gaslighting in a Relationship*, PSYCH. TODAY, <https://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-red-flags-gaslighting-in-relationship> [<https://perma.cc/87KD-WEK7>].

have had “tremendous influence”<sup>7</sup> both in academic and policy circles, and they remain dominant regulatory paradigms today.<sup>8</sup>

The article documents the three dimensions of gaslighting introduced above and draws on the insights that emerge to suggest strategies for combatting government gaslighting. Part II describes how regulatory managerialism undermines regulators’ identities. Part III observes the double-inversion that regulatory managerialism works, blaming government for social and economic problems caused by business while concluding that government must behave more like a business to solve them. Part IV unpacks the managerial toolkit supplied by regulatory managerialism and explains what it lacks and why the tools it contains are defective as applied in the government context. Part V imagines alternative models of good public management that entail giving regulators meaningful access to a broader range of tools, reclaiming those tools as core elements of state governance rather than a stunted form of management, and reasserting the distinctly public character of regulation.

## II

### UNDERMINING REGULATORS’ IDENTITIES

A common gaslighting technique is to attack the target’s identity to undermine the foundations of their sense of self.<sup>9</sup> Attacks on government and regulators are a staple of regulatory managerialism discourse. Prominent books in the field bear titles such as: *Why Government Fails So Often*,<sup>10</sup> *The Problem of Regulatory Unreasonableness*,<sup>11</sup> and *Does Regulation Kill Jobs?*<sup>12</sup> *Reinventing Government*, the foundational work of the reinvention school and the basis for the sweeping regulatory reform project of the 1990s, skewers government as “a hopeless cause”<sup>13</sup> and caricatures regulators as “paper pushers” and “bureaucrats,”<sup>14</sup> who have “cushy job[s]”<sup>15</sup> where they don’t have to work,<sup>16</sup> and who behave with “arrogance”<sup>17</sup> toward those they are supposed to serve.

---

7. Reuel Schiller, *Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market*, in *BEYOND THE NEW DEAL ORDER: U.S. POLITICS FROM THE GREAT DEPRESSION TO THE GREAT RECESSION 172* (Gary Gerstle et al. eds., 2019).

8. *Id.* at 173–74 (documenting that reinvention reforms were “all the rage in the early years of the new millennium” and that “policies associated with New Governance have come to dominate the debate about how to form and reform the administrative state”).

9. See Sarkis, *supra* note 6 (noting gaslighters “attack the foundation of your being”).

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

11. EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

12. CARY COGLIANESE ET AL., *DOES REGULATION KILL JOBS?* (2013).

13. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* 168 (1992).

14. *Id.* at xv.

15. *Id.* at 78.

16. *Id.* at xv (“My friend doesn’t work; she has a job with the government.”).

17. *Id.* at 167 (“The greatest irritant most people experience in their dealings with government is the arrogance of the bureaucracy.”).

*Regulatory Unreasonableness* posits the dangers of regulatory inspectors who are “trigger-happy,” “malicious,” or “venal.”<sup>18</sup>

This academic rhetoric echoes attacks on regulators by anti-administrative politicians that have built in their intensity over the last several decades. Regulators have been pummeled by the most high-profile politicians—from Ronald Regan’s famous quip, “The nine most terrifying words in the English language are, ‘I’m from the government, and I’m here to help,’”<sup>19</sup> to presidential candidate Donald Trump’s campaign promise to “remove bureaucrats who only know how to kill jobs.”<sup>20</sup> Political attacks on regulators have been vicious and sometimes downright unhinged. Presidential candidate Ron DeSantis vowed at a fundraiser to “start slitting throats on day one” to clear bureaucrats out of the “deep state.”<sup>21</sup> GOP Congressional candidate Ed Thelander of Maine compared the National Oceanic and Atmospheric Administration (NOAA) to “a rapist”<sup>22</sup> for promulgating rules restricting lobster fishing to protect the endangered right whale: “NOAA wants to rape you and your family, and they’re saying ‘pick a child.’”<sup>23</sup>

While the insults peppering regulatory managerialist discourse are not as vulgar or extreme as some of those coming from politicians, they operate as a particularly insidious form of gaslighting precisely because they are not simply broadsides. Indeed, they often appear in the context of texts that purport to help and support regulators. Osborne and Gaebler, for instance, stress in the introduction to *Reinventing Government*: “First, we believe deeply in government.”<sup>24</sup> Gaslighting often operates by tempering slights with positive reinforcement to keep the target off-balance. “This person or entity that is cutting you down, telling you that you don’t have value, is now praising you for something you did. This adds an additional sense of uneasiness.”<sup>25</sup>

The opening lines of *Regulatory Unreasonableness* explain why attacks on regulators are so irresistible and deeply resonant: “Everyone who has ever been subjected to regulation . . . has a stock of horror stories about particular regulatory encounters. These stories enter into the stream of conversation and ultimately into the cultural consciousness that defines and measures the evils of

18. BARDACH & KAGAN, *supra* note 11, at 32.

19. The President’s News Conference, 2 PUB. PAPERS 1081 (Aug. 12, 1986).

20. Tamara Keith et al., *Fact Check: Donald Trump Unveils His Economic Plan In Major Detroit Speech*, NPR ONLINE (Aug. 8, 2016, 11:37 AM), <http://www.npr.org/2016/08/08/488816816/donald-trump-looks-to-turn-the-page-on-bad-week-with-economic-speech> [<https://perma.cc/UC7Z-Z4X9>].

21. Julia Manhcester, *DeSantis Vows to ‘Start Slitting Throats on Day One’*, THE HILL (Aug. 3, 2023), <https://thehill.com/homenews/campaign/4135422-desantis-vows-to-start-slitting-throats-on-day-one/> [<https://perma.cc/WBC9-PDJR>].

22. See, e.g., Chris D’Angelo, *Maine GOP Congressional Candidate Compares Lobster Regulations to Child Rape*, HUFFINGTON POST (Oct. 12, 2022, 7:13 PM), [https://www.huffpost.com/entry/ed-thelander-lobster-regulations-rape\\_n\\_63471fcfe4b0e376dc086ce4](https://www.huffpost.com/entry/ed-thelander-lobster-regulations-rape_n_63471fcfe4b0e376dc086ce4) [<https://perma.cc/Q349-QWCX>].

23. *Id.*

24. OSBORNE & GAEBLER, *supra* note 13, at xviii. They go on to clarify that their “intention is to bash *bureaucracies*, not bureaucrats.” *Id.*

25. Sarkis, *supra* note 6.

regulation.”<sup>26</sup> The authors admit that such “[h]orror stories may not represent the modal pattern of regulatory agency activity, and may in fact mask good that is achieved.”<sup>27</sup> Yet, stories of endless red tape, interminable jaunts through labyrinthine automated phone trees, thickets of indecipherable rules, and incompetent or malicious regulators are irresistible because they sate a deep-seated desire to simplify the situationally and politically complex reasons that we cannot always satisfy our wants.<sup>28</sup> Of course, these frustrating impediments exist in corporations as well. Everyone has a story about getting lost in the abyss of a never-ending private sector phone tree while trying to get a customer service matter handled—or being unable to locate any customer service representative whatsoever for assistance with online platform services. But as in other areas, government is held to a different set of demands and standards than the private sector,<sup>29</sup> and this is a form of gaslighting.

Civil servants have internalized attacks on them in ways that are at best demoralizing and at worst debilitating. Studies of the Environmental Protection Agency (EPA) document that deregulatory politics and rhetoric have “had a severely negative impact on staff morale”<sup>30</sup> and enforcement activities.<sup>31</sup> Another study details how a “battered civil service” undermines the mission of multiple health and safety agencies.<sup>32</sup> Recent reporting describes the EPA workforce as “beat down,” “dispirited,” and “traumatized” by assaults leveled at the agency during the Trump administration, undermining the agency’s ability to advance the ambitious regulatory agenda of the succeeding Biden administration.<sup>33</sup> And these impacts are self-reproducing because the demonization of government workers saps “any passion for public service.”<sup>34</sup>

Alongside relentless digs at regulators gapes a yawning lack of discussion about what it means to be a public servant or to regulate in the public interest.

---

26. BARDACH & KAGAN, *supra* note 11, at 7.

27. *Id.* See also Paul Almond, *The Dangers of Hanging Baskets: Regulatory Myths and Media Representations of Health and Safety Regulation*, 36 J. L. & SOC’Y 352 (2009) (explaining media circulation of negative “myths” about regulation makes effective regulation more difficult).

28. “When we can’t get our wants met, we at least want an explanation. Our endless, repetitive stories about ‘bureaucracy’ are the form that explanation takes in the modern world.” BEN KAFKA, *THE DEMON OF WRITING: POWERS AND FAILURES OF PAPERWORK* 79 (2012).

29. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L. J. 100, 157 (2018) (describing how transparency laws help private companies shield their own information from public view while focusing costly scrutiny on the government, impeding regulators’ ability to investigate private sector abuses).

30. THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* 103 (2013).

31. See generally JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* (rev. ed. 2012).

32. 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* 194 (2010).

33. Lisa Friedman, *Depleted Under Trump, a ‘Traumatized’ E.P.A. Struggles With Its Mission*, N.Y. TIMES (Jan. 23, 2023) <https://www.nytimes.com/2023/01/23/climate/environmental-protection-agency-epa-funding.html> [<https://perma.cc/G9DK-HBWG>].

34. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 12–13 (2017).

This omission denies the identity that many regulators would embrace for themselves and ignores the extensive public administration literature on these subjects.<sup>35</sup> In a seminal work published at the height of the New Deal, one of the founders of modern political science situated the normative basis for public administration in the administrator's pursuit of the public interest:

The *public interest* is the standard that guides the administrator in executing the law. This is the verbal symbol designed to introduce unity, order, and objectivity into administration. This concept is to the bureaucracy what the "due process" clause is to the judiciary. Its abstract meaning is vague but its application has far-reaching effects.<sup>36</sup>

Decades of subsequent scholarship have grappled with what it means to regulate in the public interest.<sup>37</sup> At the end of the twentieth century, around the same time that regulatory managerialism was gaining steam, a group of political scientists at Virginia Tech issued the *Blacksburg Manifesto*, calling for a renewed dialogue about the distinctively public character of public administration.<sup>38</sup> These intellectual currents—to which I return in Part V—have been largely lost in the flood of regulatory managerialism.

### III

#### INVERSION OF BLAME AND IDENTITY

Another core gaslighting tactic is scapegoating, an inversion of reality which assigns blame or failure to another to deflect attention or responsibility away

35. See, e.g., BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 113–47, 149 (2019) (providing historical evidence that progressive ideas about the state's role in securing "freedom through regulatory and welfare laws implemented by public-spirited officials" shaped self-conceptions of public officials); Clarke E. Cochran, *Political Science and "The Public Interest"*, 36 J. POL. 327, 344 (1974) (arguing that the public interest "has a psychological value for each administrator", reminding them of their public-facing duties); Charles T. Goodsell, *Public Administration and the Public Interest*, in *REFOUNDING PUBLIC ADMINISTRATION* 103 (1990) (the function served by orienting administrators to serve the public interest is "one of establishing a normative frame of reference, of subtly conditioning the terms of public policy discussion, and of giving higher-order purposiveness a more elevated position of attention than it would otherwise occupy"); Thomas J. Barth, *The Public Interest and Administrative Discretion*, 22 AM. REV. PUB. ADMIN. 289, 289 (1992) (noting that the concept of public interest "has powerful symbolic and instrumental value for guiding the principled exercise of administrative discretion").

36. PENDLETON HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 23 (1936).

37. See generally, e.g., Emmette S. Redford, *The Protection of the Public Interest with Special Reference to Administrative Regulation*, 48 AM. POL. SCI. REV. 1103, 1108 (1954); Frank J. Sorauf, *Public Interest Reconsidered*, J. POLITICS 639 (1957); WAYNE A.R. LEYS & CHARNER MARQUIS PERRY, *PHILOSOPHY AND THE PUBLIC INTEREST*, A DOCUMENT 17 (1959); Gerhard Colm, *In Defense of the Public Interest*, 27 SOC. RSCH. 295, 306–07 (1960); Anthony Downs, *The Public Interest: Its Meaning in a Democracy*, 29 SOC. RSCH. 1 (1962); GERHART NIEMEYER, *Public Interest and Private Utility*, in *THE PUBLIC INTEREST* 1, 4 (Carl J. Friedrich ed., 1962); R. A. Musgrave, *The Public Interest: Efficiency in the Creation and Maintenance of Material Welfare*, in *THE PUBLIC INTEREST* 107, 107 (Carl J. Friedrich ed., 1962); R. E. FLATHMAN, *THE PUBLIC INTEREST: AN ESSAY CONCERNING THE NORMATIVE DISCOURSE OF POLITICS* (1966); VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS* (1970); Cochran, *supra* note 35; Daniel A. Farber, *Review: Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021 (1989); Carol W. Lewis, *In Pursuit of the Public Interest*, 66 PUB. ADMIN. REV. 694 (2006); Mark Squillace, *Restoring the Public Interest in Western Water Law*, 2020 UTAH L. REV. 627, 638 (2020); Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. REG. 759 (2023).

38. Gary L. Wamsley, et al., *The Public Administration and the Governance Process: Refocusing the American Dialogue*, in *A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE* 293, 300 (Ralph C. Chandler, ed., 1987) (quoting Wallace S. Sayre).

from oneself.<sup>39</sup> Regulatory managerialism discourse works a double inversion: first, it attributes to government problems caused by business; then, it admonishes government to behave more like a business to solve them. For instance, one of the great failings of government identified by Osborne and Gaebler in *Reinventing Government* is that the public provision of services creates dependency, which undermines civic virtue and empowerment.<sup>40</sup> “It should come as no surprise,” they say, “that welfare dependency, alcohol dependency, and drug dependency are among our most serious problems.”<sup>41</sup> In an astonishing inversion of reality, they blame these problems on *government failures* rather than on the affirmative *business strategies* that produced them: paying workers poverty wages and aggressively marketing addictive substances to vulnerable populations. This mirrors the scapegoating and projection that characterizes gaslighting in intimate relationships: “They are a drug user or a cheater, yet they are constantly accusing you of that. This is done so often that you start trying to defend yourself and are distracted from the gaslighter’s own behavior.”<sup>42</sup> Political strategies likewise employ this tactic, notoriously Karl Rove’s “Tactic #3: Accuse Your Opponent of What He/She Is Going to Accuse You Of.”<sup>43</sup>

Having laid society’s “most serious problems” at the feet of government, regulatory managerialism offers regulators a silver-bullet solution: become “public entrepreneurs”<sup>44</sup> who preside over “entrepreneurial governments.”<sup>45</sup> What is a public entrepreneur? Public entrepreneurs “use resources in new ways to maximize productivity and effectiveness.”<sup>46</sup> Public entrepreneurs “seek opportunities.”<sup>47</sup> Public entrepreneurs are nimble and flexible and equipped to respond to changing social and economic conditions in a postindustrial, knowledge-based global economy.

That all sounds very appealing and, indeed, many regulators have eagerly embraced the entrepreneurial identity as an attractive alternative to the prevailing caricature of them as bureaucratic “paper pushers.”<sup>48</sup> The problem is

39. *Gaslighting Part 2*, CTR. FOR RELATIONAL RECOVERY, <https://www.relationalrecovery.com/gaslighting-part-2/> [https://perma.cc/2A8Q-2CJB] (quoting *Scapegoatism*, DICTIONARY.COM, <https://www.dictionary.com/browse/scapegoatism> [https://perma.cc/3FB6-JXSJ]).

40. OSBORNE & GAEBLER, *supra* note 13, at xv, 51 (“My friend doesn’t work; she has a job with the government”).

41. *Id.* at 51.

42. Sarkis, *supra* note 6.

43. Art Silverblatt et al., *Deciphering Karl Rove’s Playbook: Campaign Tactics and Response Strategies* (unpublished manuscript) (available at <http://web.archive.org/web/20120510030543/http://www.webster.edu/medialiteracy/journal/FINALKARLROVE.pdf> [https://perma.cc/N2QT-9F74]).

44. OSBORNE & GAEBLER, *supra* note 13, at xi.

45. *Id.* at xvii.

46. *Id.* at xix.

47. *Id.* at xx.

48. OSBORNE & GAEBLER, *supra* note 143, at xv. For an example of regulators’ embrace of entrepreneurial management, see ENV’T PROT. AGENCY, *Continuous Improvement*, <https://www.epa.gov/continuous-improvement> [https://perma.cc/L5D9-ES4C] (last updated June 15, 2023) (discussing EPA’s embrace of “lean” management techniques).

that regulatory managerialism supplies the entrepreneurial identity without supplying the full managerial toolkit required to be a successful entrepreneur. A significant body of scholarship has critiqued regulatory managerialism for its impoverished vision of government.<sup>49</sup> Less recognized is that regulatory managerialism also presents an impoverished vision of *management*. The next Part describes the deficiencies in the managerial toolkit provided to regulators and argues that we should understand them as a form of gaslighting.

## IV

### THE DEFECTIVE AND INCOMPLETE MANAGERIAL TOOLKIT

Regulatory managerialism mines management theory for tools and techniques that can be employed to improve government. But the managerial toolkit its advocates provide to government regulators looks very different than the managerial toolkit business managers use. First, the core management tools provided to regulatory managers are defective because they lack the features and functionality these same tools have when business managers use them. Second, many tools that are central to the business manager's kit are missing from the regulatory manager's kit. Because regulatory managerialism either degrades or omits key techniques, ideas, and competencies that are essential to management theory and to the successful management of a business in practice, it sets up regulators for double-failure—both as bureaucrats and as entrepreneurs. This set-up for inevitable failure is a form of gaslighting.

#### A. Defective Tools

Four broad categories of managerial tools dominate the regulatory managerialism toolkit: competition, outsourcing, customer focus, and quantifiable outcomes-based performance measurement. To be sure, these tools are essential to business management theory and practice. However, although they are included in the regulatory manager's toolkit, such tools lose important features and functionality in the regulatory context for reasons described below.

---

49. See generally, e.g., ARI EZRA WALDMAN, *INDUSTRY UNBOUND: THE INSIDE STORY OF PRIVACY, DATA, AND CORPORATE POWER* (2021); JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* (2019); LAUREN EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016); Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CAL. L. REV. 1221 (2022); Ari Ezra Waldman, *Outsourcing Privacy*, 96 NOTRE DAME L. REV. REFLECTION 194 (2021); NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* (1999); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PENN. L. REV. 541 (2008); Douglas NeJaime, *When New Governance Fails*, 70 OH. ST. L.J. 323 (2009); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239 (2010); Amy Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 501 (2008); Steve Tombs & David Whyte, *Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK*, 7 REG. & GOV. 61 (2013); Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012).

## 1. Competition

In theories of regulatory managerialism, lack of competition is the crux of government's problems. Economic critiques of regulation long have attributed government failure to the "absence of sustained competition."<sup>50</sup> In a chapter on "Competitive Government," Osborne and Gaebler opine that "perhaps more than any other concept in this book, [competition] holds the key that will unlock the bureaucratic gridlock that hamstrings so many public agencies."<sup>51</sup> In new governance scholarship, competition is "a means for continuous change and improvement."<sup>52</sup> Consequently, regulatory managerialism admonishes regulators to "inject competition" into the domains they serve.<sup>53</sup> Regulators can inject competition by encouraging private contractors to compete against government agencies to supply goods and services, by fostering competition among multiple private contractors, or by generating competition among different government agencies. Competition is said to promote efficiency, cost-effectiveness, innovation, and responsiveness to the needs of customers, as well as boosting the "pride and morale of public employees."<sup>54</sup>

Regulatory managerialism borrows this understanding of competition from academic economists, who tend to "see many competitors as indicative of and desirable for competition."<sup>55</sup> This is very different from the perspective of management scholars, who "prefer[] fewer competitors for the prospects of a focal firm."<sup>56</sup> Moreover, while "economists are interested in sharpening the process of competition, management scholars seek to help managers blunt its effects on a specific firm."<sup>57</sup> For instance, renowned management scholar Peter Drucker proposes strategies to achieve market or industry dominance,<sup>58</sup> including the ecological niche strategy, which "aims at making its successful practitioners immune to competition and unlikely to be challenged."<sup>59</sup> He also advises companies to maintain their dominant market positions by behaving like a "benevolent monopolist": one that "cuts his prices before a competitor can cut them. And he makes his product obsolete and introduces new product before a competitor can do so."<sup>60</sup> Such management strategies equip companies with tools

---

50. Charles Wolf, Jr., *A Theory of "Non-Market" Failures*, PUB. INT. 114, 119 (1979) (available at [https://www.nationalaffairs.com/public\\_interest/detail/a-theory-of-non-market-failures](https://www.nationalaffairs.com/public_interest/detail/a-theory-of-non-market-failures) [<https://perma.cc/E3Z2-AYFP>]).

51. OSBORNE & GAEBLER, *supra* note 13, at 79–80.

52. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 380 (2004).

53. OSBORNE & GAEBLER, *supra* note 13, at 76.

54. *Id.* at 84.

55. Stefan Arora-Jonsson et al., *A New Understanding of Competition*, in COMPETITION: WHAT IT IS AND WHY IT HAPPENS 1, 8 (Stefan Arora-Jonsson et al. eds., 2021).

56. *Id.*

57. *Id.*

58. See PETER F. DRUCKER, INNOVATION AND ENTREPRENEURSHIP 231 (1985) (setting forth various entrepreneurial strategies in Part III).

59. *Id.* at 233.

60. *Id.* at 231.

for “knocking the socks off the competition”<sup>61</sup>—not cultivating more competition.

It is true that some business management theories encourage companies to promote competition in certain contexts—for instance, to incentivize employee performance, and to pressure-test their products in order to spur improvement and innovation.<sup>62</sup> However, managers and management scholars are circumspect even about this type of performance-enhancing competition, recognizing that it can undermine organizational focus, demoralize employees, fuel destructive turf wars, and generate wasteful duplication of effort.<sup>63</sup> “A rational market strategy, therefore, is an attempt at escaping competition rather than searching for it.”<sup>64</sup>

In addition, regulatory managerialism presumes a naïve understanding of competition as a pre-existing natural state into which government can, and should, simply assimilate itself. But research has shown that competition is socially constructed, and the construction of competition “may require considerable organizational effort and time.”<sup>65</sup> For instance, studies of the introduction of competition among railway service providers demonstrate the substantial effort organizers expended to create actors capable of competing, establish their legitimacy as competitors, cultivate competitive relationships among these actors, and develop legal support for these relationships.<sup>66</sup>

In a bizarre inversion of management theory, regulatory managerialism tells regulators to undertake costly efforts to create competition for themselves while ignoring the potentially ruinous implications of this course of action. Regulatory managerialism does not provide regulators with strategies to dominate their competition—or even to survive it, for that matter. By contrast, the private firms recruited into such competitions are armed with the tools and orientations to win them. This is gaslighting. And it is part of the reason why the active cultivation of competition has devastated some domains of government service. For instance,

61. THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST-RUN COMPANIES 30 (1982).

62. Tom Peters, *Get Innovative or Get Dead (Part I)*, 33 CAL. MGMT. REV. 9, 12 (1990) (advising that companies should “[i]nsist that every element of the firm—even staff—demonstrate ‘fitness to compete’ by selling a substantial share of their products or services on the outside market”).

63. Internal competition is viewed with ambivalence by managers and management scholars. *See, e.g.*, Julian Birkinshaw, *Strategies for Managing Internal Competition*, 44 CAL. MGMT. REV. 21, 21 (2001). She notes:

Internal competition evokes mixed feelings among most senior executives. When asked whether it is allowed within their firm, the gut reaction from executives is usually negative. It conjures up images of turf wars among departments. It is seen as indicative of an inability to define a clear strategic direction. Furthermore, it is often thought to result in massive duplication of effort and an insipid financial performance. . . . [I]n the words of one former manager [internal competition] meant that “we duplicated development and then we cut each other’s throats in front of the customer.”

*Id.*

64. Arora-Johnson et al., *supra* note 55, at 8.

65. Stefon Arora-Jonsson et al., *The Origins of Competition: Institution and Organization*, in *COMPETITION: WHAT IT IS AND WHY IT HAPPENS* 61, 67 (Stefon Arora-Jonsson et al. eds., 2021).

66. *See generally, e.g.*, Daniel Castillo, *Creating A Market Bureaucracy: The Case of a Railway Market*, in *ORGANIZING AND REORGANIZING MARKETS* (Nils Brunsson & Mats Jutterström, eds., 2018); FRANK DOBBIN, *FORGING INDUSTRIAL POLICY: THE UNITED STATES, BRITAIN, AND FRANCE IN THE RAILWAY AGE* (1994).

school choice policies headlined government reinvention projects in the 1990s and early 2000s, but research has found that they failed to improve academic outcomes or close racial achievement gaps while they undermined core democratic values of public education and entrenched racial subordination.<sup>67</sup>

## 2. Outsourcing

Outsourcing is the linchpin of regulatory managerialism's contemporary iterations. For privatization advocates, the outsourcing of government functions to the private sector is an end in itself and is said to be “*the key to effective government.*”<sup>68</sup> For the reinvention school, outsourcing government functions to private entities is the central means by which regulators can inject competition and improve government performance.<sup>69</sup> The new governance literature takes as given a significant level of outsourcing and theorizes how regulators should manage the networks of public and private actors that proliferate in its wake.<sup>70</sup>

Outsourcing is not just theory; it is the dominant reality of contemporary government. In fiscal year (FY) 2022, the U.S. government spent \$435 billion on service contracts and \$259 billion to procure products.<sup>71</sup> One study estimates that federal contractors outnumber federal government agency employees by three to one.<sup>72</sup> Moreover, contractors do not merely perform ministerial tasks. They are responsible for core governmental functions such as analyzing comments submitted in rulemakings, producing studies to support regulatory policy decisions, facilitating public hearings, producing agency guidance documents, and drafting regulatory text that sometimes becomes binding law.<sup>73</sup> And private contractors play high-level roles in developing agency programs and processes, some of which govern the business practices of their private clients. It has been reported, for instance, that management consultant McKinsey & Company regularly advised the Food and Drug Administration (FDA) on important projects including drug-approval processes and opioid safety protocols even as it helped its pharmaceutical industry clients lobby to water down the FDA's proposals.<sup>74</sup>

---

67. Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1085–86 (2014).

68. E.S. SAVAS, *PRIVATIZATION: THE KEY TO EFFECTIVE GOVERNMENT* (1987) (emphasis added).

69. OSBORNE & GAEBLER, *supra* note 13, at 19–20.

70. LESTER M. SALAMON, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 12 (2002). *See, e.g.*, Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) (assuming the importance of outsourcing); Margot Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529 (2019) (same).

71. U.S. GOV'T ACCOUNTABILITY OFF., *A SNAPSHOT OF GOVERNMENT-WIDE CONTRACTING: A 2022 UPDATE* (2023), [https://gaoinnovations.gov/Federal\\_Government\\_Contracting/](https://gaoinnovations.gov/Federal_Government_Contracting/) [<https://perma.cc/S9Z2-5Q9U>].

72. PAUL C. LIGHT, *THE GOVERNMENT-INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984-2018*, at 36–38 (2019).

73. *See* MICHAELS, *supra* note 34, at 111–12; Bridget C.E. Dooling & Rachel Augustine Potter, *Contractors in Rulemaking: Report to the Administrative Conference of the United States (ACUS)* 1, 25–27 (2022), <https://www.acus.gov/sites/default/files/documents/Contractors%20in%20Rulemaking%20Final%20Report.pdf> [<https://perma.cc/329K-2WBU>].

74. *See, e.g.*, Ian MacDougall, *McKinsey Never Told the FDA It Was Working for Opioid Makers While Also*

Outsourcing likewise is integral to management theory and business strategy, but management theories of outsourcing contain important nuance that has gone largely unrecognized in regulatory managerialism's push to privatize government functions and institutionalize these arrangements. At the crux of outsourcing theory lies what is known as the "make-or-buy" decision.<sup>75</sup> The make-or-buy decision is the strategic choice whether to manufacture products and perform services in-house or to purchase them from third parties. The relative net costs of each approach drive the make-or-buy decision. The management literature on outsourcing draws on transaction cost economics to highlight that the costs of making or buying things include not only *production costs*, but also *governance costs*.<sup>76</sup> Outsourced production tends to entail higher governance costs because the contracting firm must take measures such as contractual risk mitigation and performance monitoring to ensure quality and prevent opportunistic behavior by external suppliers. These governance structures impose transaction costs which may, in some cases, overwhelm the production cost efficiencies that managers can obtain through outsourcing. Governance costs are especially high in situations where there is uncertainty about a supplier's performance,<sup>77</sup> where the quality of the output is difficult to evaluate,<sup>78</sup> and where the supplier's poor performance poses greater risks to the buyer's reputation than to the supplier's.<sup>79</sup>

These conditions—performance uncertainty, evaluation challenges, and asymmetrical reputation risk—pervade the outsourced production of government functions, especially services. It is notoriously difficult to monitor and assess the quality of outsourced services, because it is hard to observe outputs.<sup>80</sup> Moreover, when private suppliers perform government functions poorly, the reputational repercussions tend to fall more heavily on the government than on the private supplier. For instance, the Obama administration suffered serious political damage from the shoddy roll-out of HealthCare.gov, the insurance exchange website that facilitates the sale of private health insurance plans under the Affordable Care Act.<sup>81</sup> No one pointed the finger at,

---

*Working for the Agency*, PRO PUBLICA (Oct. 4, 2021), <https://www.propublica.org/article/mckinsey-never-told-the-fda-it-was-working-for-opioid-makers-while-also-working-for-the-agency> [<https://perma.cc/USQ9-WG5C>].

75. OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); Jeffrey T. Macher & Barak D. Richman, *Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences*, 10 *BUS. & POL.* 1, 13 (2008).

76. OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996).

77. Ann Parmigiani, *Why Do Firms Both Make and Buy? An Investigation of Concurrent Sourcing*, 28 *STRATEGIC MGMT. J.* 285, 289–90 (2007).

78. *Id.* at 290.

79. Kyle J. Mayer, *Spillovers and Governance: An Analysis of Knowledge and Reputational Spillovers in Information Technology*, 49 *ACAD. MGMT. J.* 69, 69 (2006); Jack A. Nickerson & B.S. Silverman, *Why Aren't All Truck Drivers Owner-Operators? Asset Ownership and the Employment Relation in Interstate For-Hire Trucking*, 12 *J. ECON. & MGMT. STRATEGY* 91, 96 (2003).

80. See Nan Jia, *The "Make And/Or Buy" Decisions of Corporate Political Lobbying: Integrating the Economic Efficiency and Legitimacy Perspectives*, 43 *ACAD. MGMT. REV.* 307, 310 (2018) (acknowledging the difficulty of monitoring quality in the context of lobbying services).

81. *Obama Addresses Healthcare Website Glitches*, BBC (Oct. 22, 2013), <https://www.bbc.com/news/world-us-canada-24613022> [<https://perma.cc/ML25-EZ9S>].

and few even knew about the existence of, the CGI Group—an obscure, private Canadian information technology company to which the Centers for Medicare and Medicaid had outsourced the building of the website. In the face of such extreme asymmetries in reputational risk, research has shown that businesses will perform sensitive functions in-house, rather than outsource them, to enable more robust quality control.<sup>82</sup>

While regulatory managerialism has fully absorbed the insight that outsourcing can lower production costs,<sup>83</sup> it has largely ignored the substantial and potentially catastrophic costs of contractual governance and reputational risk that outsourcing can impose on government. It pushes agencies toward outsourcing maximalism without regard to these costs and risks, and it gaslights government by letting it take the fall for the failings of private sector contractors. This compounds the costs of increased competition discussed above.

### 3. Customer Focus

Customer-driven government is a touchstone of managerial regulation. As Osborne and Gaebler put it:

Democratic governments exist to serve their citizens. Businesses exist to make profits. And yet it is business that searches obsessively for new ways to please the American people. Most American governments are customer-blind, while [successful American corporations] are customer-driven. This may be the ultimate indictment of bureaucratic government.<sup>84</sup>

They explain that business and government have a different orientation toward customers because they have different funding streams. Businesses get their funds directly from customers, thus there is a clear connection between pleasing customers and increasing revenue. By contrast, government agencies get their funds from legislative bodies, which are driven by interest group constituencies, so agencies strive to please interest groups and politicians rather than the individuals they serve.<sup>85</sup> Because of the powerful incentives businesses face to please customers, “[a]ll the management experts . . . dwell on the importance of listening to one’s customers.”<sup>86</sup> So, too, should government say the regulatory managerialists. Specifically, government should listen to its customers, meet their needs, offer them choices, and make them feel “valued.”<sup>87</sup>

Management theory and practice similarly advise business managers to be hyper-attentive to customers. However, customer focus in the business management context has a different valence than customer focus in the regulatory management context. Specifically, the business management literature is quite transparent that focusing on customers entails not only listening to, learning from, and catering to them—it includes manipulating customers by

---

82. Nickerson & Silverman, *supra* note 79, at 91.

83. *See, e.g.*, STUART BUTLER, *PRIVATIZING FEDERAL SPENDING: A STRATEGY TO ELIMINATE THE DEFICIT* (1985).

84. OSBORNE & GAEBLER, *supra* note 13, at 166–67.

85. *Id.* at 167.

86. *Id.* at 169.

87. *Id.* at 166.

grabbing and holding their attention and actively shaping their preferences, sometimes against their express will. For instance, in a classic management text by Tom Peters and Rob Waterman, referenced throughout *Reinventing Government*, the authors hold up one business manager as a paragon of “closeness to the customer.”<sup>88</sup> He cultivates this closeness by sending his customers a barrage of unsolicited greeting cards:

Joe’s customers won’t forget him once they buy a car from him; he won’t let them! Every month throughout the year they get a letter from him. It arrives in a plain envelope, always a different size or color. “It doesn’t look like that junk mail which is thrown out before it is even opened,” Joe confides. And they open in up and the front of it reads, ‘I LIKE YOU.’ Inside it says ‘Happy New Year from Joe Girard.’ He sends a card in February wishing the customers a ‘Happy George Washington’s Birthday.’ In March it’s ‘Happy St. Patrick’s Day.’<sup>89</sup>

Peters and Waterman similarly tout IBM for its customer focus in an anecdote about a Bank of America executive who had hoped to wean his bank off “total dependency on IBM” by cultivating relationships with other suppliers.<sup>90</sup> Anticipating this plan, his IBM account executive thwarted it by sending him a comprehensive proposal for upgrading the bank’s system requirements. The manager reported, “I didn’t want it. I called him up and asked, ‘Why the hell are you doing this to me?’ He was very direct and to the point. He said, ‘That’s the way we control the customer!’”<sup>91</sup>

While business managers are schooled in customer solicitation and control, regulators are drilled solely in customer solicitude and submission. This might comfort those who would worry about government manipulation of citizens, but there can be no doubt that this limitation hampers government’s ability to operate and perform like a business. Moreover, regulatory managerialism discourse obscures the identity of the customer in the regulatory context. Although regulatory managerialism tends nominally to identify “citizens” or “the people” as the ultimate regulatory customers,<sup>92</sup> it lacks a conceptualization of “the public” to guide regulators as to which people it should be serving. At the same time, regulatory managerialist paeans to competition, outsourcing, and cooperation with private enterprise can be read to suggest that regulators are obligated to serve regulated businesses. This lack of clarity in conceptualizing the construct of the public blurs the line between customers and competitors and distracts regulators from the core constituencies they exist to serve.

#### 4. Quantified Decision Making

No single idea in the regulatory managerialist pantheon has gained more traction than quantified decision making. It features prominently in managerialist discourses of reinventing government, experimentalism, and new governance.<sup>93</sup>

---

88. PETERS & WATERMAN, JR., *supra* note 61, at 157.

89. *Id.* at 158.

90. *Id.* at 160.

91. *Id.*

92. OSBORNE & GAEBLER, *supra* note 13, at 166–67.

93. See, e.g., Donald F. Kettl, *Managing Indirect Government*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 502 (Lester M. Salmon ed., 2002) (advocating the use of strategic performance plans

But nothing reveals the predominance of quantitative analysis more clearly than the way regulatory managerialism has been operationalized in practice, particularly in federal administration, through risk assessment and cost-benefit analysis (CBA). In this volume, William Boyd describes how quantitative risk assessment slipped into “mainstream of regulatory thought” despite its controversial assumptions and inefficacy.<sup>94</sup> Others have described how “[n]et-benefit maximizing became a cornerstone of regulatory reform efforts”,<sup>95</sup> resulting in what has been characterized as the “cost-benefit State.”<sup>96</sup> CBA has become so deeply entrenched in federal administrative policymaking that Cass Sunstein, former Administrator of the Office of Information and Regulatory Affairs (OIRA), has argued that an agency rule might be presumptively arbitrary and capricious if it is not justified by an analysis of its quantified benefits and costs.<sup>97</sup>

While regulatory managerialism leans into quantified decision-making models, management theory and practice long have recognized the limitations of these tools. According to Peters and Waterman, “[t]he best companies on our list combine a tablespoon of sound analysis with a pint of love for the [product]; both are indispensable. . . . The trouble arose when [quantitative analysis] techniques became the pint and love of product became the tablespoon.”<sup>98</sup> This is because, according to leading management scholars, overly complex and quantified analysis can impede action, creativity, and innovation. Peters and Waterman, for instance, caution against “the all-too-frequently observed ‘paralysis through analysis’ syndrome,” arguing that it stifles creativity by placing would-be innovators in the impossible situation of quantifying why new ideas might work.<sup>99</sup> Over-reliance on quantified analysis for decision-making “stamps all verve, life, and initiative out of the company.”<sup>100</sup>

Skepticism about over-quantification in management theory and practice has only intensified in the wake of the global financial crisis. A consensus has emerged among management scholars that financial institutions “relied too heavily on mathematical risk models and not enough on good judgment.”<sup>101</sup>

---

that measure outputs and outcomes of government programs); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COL. L. REV. 267, 347 (arguing that agencies should adopt benchmarking based on common systems of composite measurement that will allow for comparison across programs and jurisdictions).

94. William Boyd, *With Regard for Persons*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 101, 116.

95. Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L. J. 1617, 1622 (1985).

96. Cass Sunstein, *The Cost-Benefit State*, COASE-SANDOR WORKING PAPER IN L. & ECON. 1, 1 (1996).

97. Cass Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV. L. REV. 1, 9 (2017). U.S. Supreme Court case law lends support to this position. See Susan Dudley, *Putting a Cap on Regulation*, 42 ADMIN. & REG. L. NEWS 4, 5 (2017) (“Indeed, recent Supreme Court decisions have indicated that it would be unreasonable for agencies not to consider benefits and costs in making regulatory decisions. See e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).”).

98. PETERS & WATERMAN, JR., *supra* note 61, at 32–33.

99. *Id.* at 31.

100. *Id.*

101. SRIKANT DATAR ET AL., *RETHINKING THE MBA: BUSINESS EDUCATION AT A CROSSROADS* 102 (2010).

Beyond the risk management implications of quantification, both management educators and corporate executives continue to express concern that quantification undermines creativity and innovation: “There is too much belief in models and data-based thinking. [MBA s]tudents are not able to think originally[.]”<sup>102</sup>

Although an extensive literature presents trenchant critiques of regulatory quantification,<sup>103</sup> CBA remains a fixture of regulatory managerialist discourse and regulatory policymaking in many domains. Rather than rethink quantification in the face of its failings, there has been a trend toward retrenchment on both ends of the political spectrum: pro-regulatory scholars insist on more rigorous and sophisticated CBA to support robust regulation,<sup>104</sup> anti-regulatory commentators push quantification for quantification’s sake with regimes such as “2-for-1” requirements that have no rational connection to regulatory outcomes.<sup>105</sup> And quantified risk analysis continues to spread to ever-more-uncertain, complex, and potentially unknowable domains such as cyber regulation.<sup>106</sup> As a practical matter, agencies remain subject to demanding review of their quantitative analyses by OIRA and, in many cases, courts on judicial review. This lack of trust in regulators to unmoor themselves from calculation and to think creatively and exercise good judgment, as their business counterparts are encouraged and empowered to do, is a form of gaslighting.

## B. Missing Managerial Tools

The managerial tools described above—competition, outsourcing, consumer focus, and quantified regulatory analysis—are central to management theory as well as business strategy and operations. But in the real world of management and business, managers treat them with more circumspection and nuance. And, importantly, they are embedded in a more comprehensive set of tools and strategies that regulatory managerialism does not offer to government. I highlight

---

102. *Id.* at 96.

103. See Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REGULATION 33, 33-34 (1981) (critiquing the philosophical underpinnings of cost-benefit analysis); ACKERMAN & HEINZERLING, *supra* note 49, at 176 (critiquing the subversion of values in cost-benefit analysis); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEG. STUD. 419, 419 (2018) (arguing that cost-benefit analysis is subject to the systems fallacy: “the mistaken belief that systems-analytic decision-making techniques . . . are neutral and objective, when in fact they normatively shape political outcomes.”); COHEN, *supra* note 49, at 182–84 (critiquing overreliance on quantified risk analysis in an information economy facing systemic threats); DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 96–97 (2010) (criticizing the use of quantified risk assessment and cost benefit analysis in environmental law); William Boyd, *Genealogies of Risk*, 39 ECOLOGY L. Q. 895, 986 (2012) (expressing deep ambivalence about the rise of formal approaches to quantified risk analysis and their displacement of precautionary approaches).

104. See generally MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH (2020).

105. Jodi L. Short, *The Trouble with Counting: Cutting through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93, 97 (2018).

106. See COHEN, *supra* note 49, at 182–84 (critiquing the quantification of cybersecurity risk management through “threat modeling protocols that explicitly incorporate both risk and uncertainty”).

five of these below: leadership development, marketing and communications, purpose, stakeholder engagement, and embrace of failure. I do so, first, to highlight the extent of gaslighting that occurs in a regulatory managerialist paradigm that sends regulatory entrepreneurs onto the battlefield of the market without the equipment other combatants enjoy. In addition, scrutinizing the gap between business managerialism and regulatory managerialism generates possibilities for a new regulatory paradigm that will be considered in Part V.

### 1. Leadership Development

Leadership development is at the core of the MBA curriculum<sup>107</sup> and drives a multi-billion-dollar management consulting industry.<sup>108</sup> “Virtually all of the top business schools aspire to ‘develop leaders.’”<sup>109</sup> And companies spend lavishly on executive education designed to develop the leadership skills of their workforces.<sup>110</sup> Business managers increasingly see the need to develop leadership skills of employees throughout the company, not just at the upper echelons of management.<sup>111</sup> Cutting-edge leadership skills training focuses on the development of “interpersonal skills essential to thriving in today’s flat, networked, and increasingly collaborative organizations.”<sup>112</sup> These skills include: self-awareness of how others perceive your actions;<sup>113</sup> psychological and interpersonal understandings of what moves others;<sup>114</sup> and ethical frameworks that provide “a clear sense of right and wrong, and how to think through difficult situations.”<sup>115</sup> As one business executive summarized to a group of prominent management educators rethinking the fundamentals of MBA training: “Any opportunity that allows the business leaders of the future to be more introspective is a plus.”<sup>116</sup>

Regulatory managerialism neglects this key component of successful strategy development and implementation, and it does so despite the transformational demands it makes on regulators. Management researchers have found that strong and effective leadership is particularly crucial to the success of organizational transformations.<sup>117</sup> While significant resources are available to support business

---

107. DATAR ET AL., *supra* note 101, at 86.

108. See, e.g., Mihnea Moldoveanu & Das Narayandas, *The Future of Leadership Development*, HARV. BUS. REV., Mar.–Apr. 2019, at 43 (available at <https://hbr.org/2019/03/the-future-of-leadership-development> [<https://perma.cc/62EX-VD3T>]) (noting large management consulting companies are joining the leadership development industry); IBIS WORLD, BUSINESS COACHING IN THE US (2022), <https://www.ibisworld.com/industry-statistics/market-size/business-coaching-united-states/> [<https://perma.cc/7A8L-3XH9>] (noting business coaching was a \$14.2 billion industry in 2022).

109. DATAR ET AL., *supra* note 1071, at 86.

110. Moldoveanu & Narayandas, *supra* note 108, at 43.

111. *Id.*

112. *Id.* at 42.

113. DATAR ET AL., *supra* note 1071, at 86.

114. *Id.* at 87.

115. *Id.* at 88.

116. *Id.* at 87.

117. Michael Beer et al., *Why Leadership Training Fails—and What to Do About It*, HARV. BUS. REV., Oct.

managers in leading change, such scaffolding is neither theorized nor routinely provided to regulatory managers.<sup>118</sup>

## 2. Marketing and Communications

U.S. companies spend between 6.4% and 9.5% of their revenue on marketing.<sup>119</sup> In FY 2022, the total budget for the Occupational Health and Safety Administration (OSHA) was \$612 million.<sup>120</sup> During roughly the same period, Walmart, the largest U.S. employer, and a company that is regulated by OSHA, spent more than six times that much—\$3.9 billion—on advertising alone.<sup>121</sup> Business managers do not take markets as given; they use marketing and communications strategy to shape markets and construct consumer demands, desires, cognition, and identities. According to Peter Drucker, “the purpose of business is to create a customer.”<sup>122</sup> Marketing and communications are part of the core MBA curriculum,<sup>123</sup> and there is a vast literature in management scholarship on marketing theory and practice. I highlight four themes in the literature on strategic marketing that are particularly revealing of the managerial gaps in regulatory managerialism.

First, the assumption underlying the enterprise of strategic marketing is that products and services do not sell themselves. “So it’s a cliché: don’t sell the steak, sell the sizzle. It’s also a principle that every corporate brand understands implicitly. . . . [N]o matter how tasty you’ve made that [steak] . . . , you still have to market the bejesus out of your brand.”<sup>124</sup> This approach is out of reach for many government regulators, who operate under significant legal, political, and resource constraints on their ability to communicate with the public.<sup>125</sup> Accordingly, recent scholarship has observed the dearth of marketing by

---

2016, at 54 (available at <https://hbr.org/2016/10/why-leadership-training-fails-and-what-to-do-about-it> [<https://perma.cc/G3P8-L9L3>]).

118. Cf. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. 137, 142 (2023) (noting environmental regulators in government agencies are rarely trained in negotiation). The author documents a similar lack of training in an area heavily promoted by regulatory managerialists: negotiation. *Id.* He argues that training in negotiation skills is essential to effective negotiation and documents that government employees who are tasked to negotiate with regulated entities receive little to no formal training in negotiation skills. *Id.*

119. Jordan Turner, *What Marketing Budgets Look Like in 2022*, GARTNER (June 6, 2022), <https://www.gartner.com/en/articles/what-marketing-budgets-look-like-in-2022> [<https://perma.cc/WZ34-UPDV>].

120. *OSHA budget increase for FY 2022 Much Smaller Than Biden Administration’s Request*, SAFETY+HEALTH (Mar. 16, 2022), <https://www.safetyandhealthmagazine.com/articles/22363-osha-budget-increase-for-fy-22-much-smaller-than-biden-administrations-request> [<https://perma.cc/G43U-DERF>].

121. *Wal-Mart Stores, Inc Advertising Costs Worldwide in the Fiscal Years 2014 to 2022*, STATISTA (Mar. 2022) <https://www.statista.com/statistics/622029/walmart-ad-spend/> [<https://perma.cc/G7HU-Y5RU>].

122. PETER F. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 61 (1973).

123. DATAR ET AL., *supra* note 1071, at 46.

124. Tom Peters, *The Brand Called You*, FAST CO. (Aug. 31, 1997), <https://www.fastcompany.com/28905/brand-called-you> [<https://perma.cc/7D5T-MZZY>].

125. Gabriel Scheffler & Daniel E. Walters, *The Submerged Administrative State*, 2024 WISC. L. REV. \_\_\_\_ (forthcoming 2024) (describing these constraints and suggesting strategies for regulators to better communicate their accomplishments to the public).

government officials—even those who provide highly popular services such as prosecuting corporate criminals.<sup>126</sup>

Second, strategic marketing theory holds that companies choose their customers, rather than the other way around, and the choice of customer drives the product mix. Harvard Business School’s core marketing curriculum refers to this as the “aspiration decision”: a company identifies which market segment of customers to target and determines what it wants these customers to think about its product relative to other options.<sup>127</sup> Many choices flow from the aspiration decision—including what product or service the company should offer to best meet the needs of the selected target customers. Regulators face a very different choice set because statutes significantly constrain the universe of customers they may, or must, serve and the products they may, or must, offer. Unlike businesses, regulators typically are not at liberty cleave off hard-to-serve populations from their business plans to focus on more “profitable”—less resource draining—populations.

Third, an integrated communications plan—including the use of various media, face-to-face sales efforts, and non-personal sales efforts such as advertising, promotion, and public relations—is key to an effective marketing strategy.<sup>128</sup> Advertising ranges from mass communication to highly customized communications that address the specific needs of individual customers. Importantly, communications come not just from companies, but from consumers themselves. Customers tell stories about the products they consume and the companies they patronize. “Current and potential customers are exposed to these communications as part of their daily lives, absorbing them, interacting with them, and, if the messaging is effective, responding to them by making a purchase and perhaps recommending the product to friends.”<sup>129</sup> Thus, companies must be attuned not only to the messages they send to consumers, but to the messages consumers convey to one another. As discussed above, regulatory managerialism discourse tends to amplify government customers’ “horror stories about particular regulatory encounters”<sup>130</sup> rather than equipping regulators with the tools and strategies to tell and amplify their own positive stories.

Fourth, marketing aims to shape the cognition of the company’s target customers. The ultimate goal of marketing communications is to “optimize *consumer engagement*—that is, the cognitive, emotional, and/or behavioral investment consumers make in positively interacting with a brand.”<sup>131</sup> Companies

---

126. W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 2 STETSON BUS. L. REV. 1, 20 (2022) (arguing that the Department of Justice should better publicize corporate criminal prosecutions).

127. Robert J. Dolan, *Framework for Marketing Strategy Formation*, in CORE CURRICULUM: MARKETING 1, 4–5 (Sunil Gupta ed., 2014).

128. *Id.* at 24–25.

129. Jill Avery & Thales S. Teixeira, *Marketing Communications*, in CORE CURRICULUM: MARKETING 1, 3 (Sunil Gupta ed., 2016).

130. BARDACH & KAGAN, *supra* note 11, at 7.

131. Avery & Teixeira, *supra* note 129, at 3.

deploy communications “to encourage consumers to think, feel, or do something”<sup>132</sup> so that they can “prompt the movement of consumers along a series of steps in a purchase-decision journey.”<sup>133</sup> Branding is a common vehicle companies use to facilitate this journey. According to management scholars, the mechanism by which branding achieves its aims is by occupying cognitive real estate in the minds of consumers. According to branding consultants Al Ries and Jack Trout, “positioning is not what you do to a product. Positioning is what you do to the mind of a prospect.”<sup>134</sup>

Manipulative marketing techniques have been turbocharged by information or surveillance capitalism, which seeks not merely to colonize the cognition of individual consumers but to efface individual consumers entirely, subsuming them into aggregated, data-derived populations from which companies can predictably extract value.<sup>135</sup> This system of data harvesting, appropriation, cultivation, and processing transforms individuals from consumers to “commodity inputs, valuable only insofar as their choices and behaviors can be monetized.”<sup>136</sup> It is a finely honed means of behavior modification “designed and controlled by companies to meet their own revenue and growth objectives.”<sup>137</sup> As Ryan Calo summarized:

Today’s companies fastidiously study consumers and, increasingly, personalize every aspect of the consumer experience. Furthermore, rather than waiting for the consumer to approach the marketplace, companies can reach consumers anytime and anywhere. The result of these and related trends is that firms can not only take advantage of a general understanding of cognitive limitations, but can uncover, and even trigger, consumer frailty at an individual level.<sup>138</sup>

Regulatory managerialism does not offer regulators the techniques of cognitive and social control that are central to business marketing and information capitalism. Regulatory managerialism insists on the fiction of autonomous customer choice and does not invite the possibility that regulators could or should be preference shapers or behavior modifiers. Indeed, regulatory managerialists have raised alarm about the dangers of importing sophisticated marketing tools into the government context: “one cannot but feel a deep suspicion about the role that marketing and persuasion should play in public sector management. To talk of such things recalls deep anxieties about the power of government propaganda.”<sup>139</sup> While such concerns are serious, it is important to recognize that cognitive manipulation entails risks to individuals whether it is practiced by government or by business, and these risks must be fairly acknowledged and addressed in both contexts. But the larger point for purposes

---

132. *Id.* at 7.

133. *Id.*

134. AL RIES & JACK TROUT, POSITIONING: THE BATTLE FOR YOUR MIND: HOW TO BE SEEN AND HEARD IN THE OVERCROWDED MARKETPLACE 2 (2001).

135. COHEN, *supra* note 49, at 75–76.

136. *Id.* at 71.

137. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 294 (2019).

138. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 995 (2014).

139. MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT 186 (1995).

of the present argument is only this: if we conclude for whatever reason that regulators may not use the highly manipulative marketing tools that businesses deploy to achieve their “bottom line” results, it is fair to ask whether we can hold regulators to similar “bottom line” demands.

### 3. Purpose

In the mid-1990s, around the same time that key texts on reinventing government and new governance were appearing, two prominent business school professors sought to launch a very different revolution in management theory. They argued that in order to successfully navigate the changing economic, social, and business environment of the late twentieth century, “[s]enior managers of today’s large enterprises must move beyond strategy, structure, and systems to a framework built on purpose, process, and people.”<sup>140</sup> In their view, the primary role of top management should be “to instill a common sense of purpose”<sup>141</sup> that will unite and motivate employees. Their focus on corporate purpose was a response to hyper-financialized conceptions of the corporation, which the authors believed alienated, frustrated, and demotivated employees. “Neither the valueless quantitative terms of most planning and control processes nor the mechanical formulas of leveraged incentive systems nurture employees’ commitment or motivation.”<sup>142</sup> Corporate purpose was theorized as a vehicle for cultivating the necessary commitment and motivation for the business to succeed.

Corporate purpose as management strategy has resurfaced with a vengeance in recent years, embraced with much fanfare by Blackrock CEO Larry Fink in his 2018 “Letter to CEOs,” which called on companies to center themselves around a clear, guiding purpose: “Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.”<sup>143</sup> Fink’s 2022 “Letter to CEOs” continued to promote corporate purpose as ever-more-essential in the wake of social and economic disruptions caused by the COVID-19 pandemic: “It’s never been more essential for CEOs to have a consistent voice, a clear purpose, a coherent strategy, and a long-term view. Your company’s purpose is its north star in this tumultuous environment.”<sup>144</sup> Other prominent corporate voices have followed Blackrock’s lead. The Business Roundtable issued a “Statement on the Purpose

---

140. Christopher A. Bartlett & Sumantra Ghoshal, *Changing the Role of Top Management: Beyond Strategy to Purpose*, 72 HARV. BUS. REV. 79, 79 (1994).

141. Claudine M. Gartenberg et al., *Corporate Purpose and Financial Performance*, 30 ORG. SCI. 1, 1 (2019).

142. Bartlett & Ghoshal, *supra* note 140, at 81.

143. Edward B. Rock, *For Whom is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363, 364 (2021).

144. Larry Fink, *Larry Fink’s 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, [https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter?cid=ppc:blk:ll:na:ol:goog:na:v2:bhv:tl&gclid=CjwKCAjwsfuYBhAZEiwA5a6CDJHsGhaHr-M4MrBBnUPDu-J9LdOcPME2FU9GnzoSGxy4nFOA2bHWxBoC4yAQAvD\\_BwE&gclidsrc=aw.ds](https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter?cid=ppc:blk:ll:na:ol:goog:na:v2:bhv:tl&gclid=CjwKCAjwsfuYBhAZEiwA5a6CDJHsGhaHr-M4MrBBnUPDu-J9LdOcPME2FU9GnzoSGxy4nFOA2bHWxBoC4yAQAvD_BwE&gclidsrc=aw.ds) [https://perma.cc/BN77-DULY].

of a Corporation,” signed by 181 of its CEO members,<sup>145</sup> and the 2020 Davos Manifesto—“The Universal Purpose of a Company in the Fourth Industrial Revolution”—endorsed corporate purpose on the global stage.<sup>146</sup>

Scholars variously define corporate purpose as a company’s “reason for being”;<sup>147</sup> “a concrete goal or objective for the firm that reaches beyond profit maximization”;<sup>148</sup> “a meaning-rich articulation of the main business of the firm”;<sup>149</sup> and “the statement of a company’s moral response to its broadly defined responsibilities, not an amoral plan for exploiting commercial opportunity.”<sup>150</sup> Many have dismissed corporate purpose as “platitudes” and “clichés”<sup>151</sup> with little practical impact. Others have noted its failure to advance stated social goals “because shareholder capitalism is inherently corrupting of purpose.”<sup>152</sup> Putting aside questions about whether a clearly articulated corporate purpose can help advance public values beyond shareholder value, there is broader consensus that it can serve important instrumental functions—such as coordination, motivation, and legitimation—that promote business success. “In short, purpose is an internal tool rather than an external constraint like regulation.”<sup>153</sup>

Corporate purpose satisfies “an operational need for an articulated purpose around which corporate participants can coordinate their activity.”<sup>154</sup> Management scholars have theorized that corporate purpose can positively impact corporate performance and value creation<sup>155</sup> through a variety of mechanisms, including: increased employee productivity because of higher employee fulfillment and commitment;<sup>156</sup> greater customer satisfaction and

145. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/RVX9-5HH2].

146. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/> [https://perma.cc/FLQ7-V4PF].

147. Gartenberg et al., *supra* note 141, at 3.

148. Rebecca Henderson & Eric Van den Steen, *Why Do Firms Have “Purpose”? The Firm’s Role as a Carrier of Identity and Reputation*, 105 AM. ECON. REV. 326, 327 (2015).

149. Gartenberg et al., *supra* note 141, at 3.

150. Bartlett & Ghoshal, *supra* note 140, at 88.

151. Lance Leuthesser & Chiranjeev Kohli, *Corporate Identity: The Role of Mission Statements*, 40 BUS. HORIZONS 59, 61, 65 (1997).

152. Gerald F. Davis, *Corporate Purpose Needs Democracy*, 58 J. MGMT. STUD. 902, 907 (2020). *See also* Jill E. Fisch & Steven D. Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1312 (2021) (concluding that aspirational corporate charters do not impose enforceable legal obligations on corporate managers); Saule Omarova, *The “Franchise” View of the Corporation*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 201, 209 (2021) (arguing that the model of the corporation as a creature of private contract undermines its ability to achieve public purposes).

153. Fisch & Solomon, *supra* note 152, at 1340.

154. Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1445 (2021).

155. *See, e.g.*, GEORGE SERAFEIM, PURPOSE + PROFIT: HOW BUSINESS CAN LIFT UP THE WORLD (2022).

156. *See* Gartenberg et al., *supra* note 141, at 4 (noting corporate purpose “might increase employee effort and productivity by increasing the meaning of work at the employee level”).

loyalty when customers identify with the firm's purpose;<sup>157</sup> and reduced short-term pressures on management that allow for greater flexibility and creativity.<sup>158</sup> A recent study finds that companies with a strong sense of corporate purpose clearly articulated by management have superior financial performance.<sup>159</sup>

Regulatory managerialism has little to say about how regulators might leverage purpose as an internal tool to support effective regulation. This omission is particularly odd because administrative agencies are inherently mission-driven organizations. A meaningful focus on mission could serve the same important functions in agencies that it can for businesses. It can motivate agency employee performance and retention, as management scholars argue. It can be used to direct and "manage [] expectancy interests"<sup>160</sup> of the agency's constituents, as corporate governance scholars argue. Such functions are unexplored in regulatory managerialism, which eclipses the *purpose* of regulation with a focus on the *process* of regulating and the *quantitative value* generated by regulation. This misses the key insight of the corporate purpose movement: purpose is inextricable from process and value.

#### 4. Stakeholder Engagement

Thought leaders in business increasingly embrace the idea that engagement with a broad array of stakeholders is essential for business success. As Larry Fink put it in his 2022 *Letter to CEOs*: "In today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders."<sup>161</sup> He goes on to explain, "[s]takeholder capitalism is not about politics. It is not a social or ideological agenda. It is not 'woke.' *It is capitalism*, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to *prosper*. This is the power of capitalism."<sup>162</sup> Other major corporate players have sounded similar themes. The Business Roundtable's "Statement on the Purpose of a Corporation" reads: "While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders."<sup>163</sup> It explicitly articulates the commitments companies have to their customers, employees, suppliers, communities, and shareholders, and it concludes: "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country."<sup>164</sup> The 2020 Davos Manifesto similarly states: "The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a

---

157. *Id.*

158. *Id.* at 15.

159. *Id.* at 2.

160. Fisch & Solomon, *supra* note 152, at 1339.

161. Fink, *supra* note 144.

162. *Id.*

163. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, *supra* note 145.

164. *Id.*

company serves not only its shareholders, but all its stakeholders—employees, customers, suppliers, local communities and society at large.”<sup>165</sup>

Driven by such convictions, leading corporate lawyers advise their management-side clients to engage with stakeholders so that they can “arm themselves with the knowledge necessary to understand the relevant risks and to develop strategies to support sustainable growth.”<sup>166</sup> Management consultants equip companies with tools to develop robust and meaningful stakeholder engagement processes.<sup>167</sup> Management scholarship theorizes the relationship between stakeholder engagement and business performance.<sup>168</sup> And leading MBA faculty express the imperative of teaching students to understand the role, responsibilities, and purposes of businesses relative to a broad array of stakeholders.<sup>169</sup>

To be clear, there is scant evidence that such engagement advances the interests or values of stakeholders—particularly when those interests or values are in tension with shareholder profit maximization. Rather, stakeholder engagement is a legitimation strategy that corporate elites wield to preserve or expand their social license to operate,<sup>170</sup> to burnish their brand with socially conscious investors and consumers, and to protect their reputation capital from attack by activists. In short, it is an essential tool for managing a successful business in socially and politically fraught environments.

In contrast to the managerial tools already discussed, regulatory managerialism has a lot to say about stakeholders. Particularly in new governance and experimentalist theories, stakeholder participation occupies a central role. “The new governance model . . . broadens the decision-making playing field by involving more actors in the various stages of the legal process.”<sup>171</sup> Dorf and Sabel’s theory of experimentalism calls for greater localization of government

165. Schwab, *supra* note 146.

166. Martin Lipton, *ESG, Stakeholder Governance, and the Duty of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 18, 2022), <https://corpgov.law.harvard.edu/2022/09/18/esg-stakeholder-governance-and-the-duty-of-the-corporation/> [<https://perma.cc/2526-UTXH>].

167. See *Stakeholder Engagement* 2, DELOITTE (2014), [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_StakeholderEngagement\\_04042014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_StakeholderEngagement_04042014.pdf) [<https://perma.cc/EQ86-CU5E>] (last visited Sep. 3 2023) (advising companies how to productively engage with stakeholders); Neil Jeffery, *Stakeholder Engagement: A Road Map to Meaningful Engagement*, CRANFIELD SCH. MANAGEMENT 14, (July 2009) <https://files.core.ac.uk/pdf/23/139119.pdf> [<https://perma.cc/TT3F-TE7K>] (arguing that companies should use stakeholder engagement for their benefit).

168. E.g., Robert G. Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2836 (2014); Gabriele Santoro et al., *Exploring the Relationship Between Entrepreneurial Resilience and Success: The Moderating Role of Stakeholders’ Engagement*, 119 J. BUS. RSCH. 142, 142 (2020); María Consuelo Pucheta-Martínez et al., *Does Stakeholder Engagement Encourage Environmental Reporting? The Mediating Role of Firm Performance*, 8 BUS. STRATEGY & ENVIRONMENT 3025, 3025 (2020).

169. Srikant M. Datar et al., *Rethinking the MBA: Business Education at a Crossroads*, 30 J. MGMT. DEVELOPMENT 451, 451 (2011).

170. Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L. & SOC. INQUIRY 307, 307 (2004).

171. Lobel, *supra* note 52, at 373.

services to enable providers to “collaborate closely with citizen users in the specification of services and the detection of errors in their provision, as well as with other parties who may suffer damages as a side effect of the service activity.”<sup>172</sup>

Where regulatory managerialist theories depart from management theory and practice is that they see stakeholder engagement as a means of operationalizing—perhaps even perfecting—democracy. Lobel writes that “the overall goal of participation is broader than simply ensuring the achievement of policy goals; it enhances the ability of citizens to participate in political and civic life.”<sup>173</sup> Dorf and Sabel style their theory as *democratic* experimentalism and argue that it can revitalize defining features of the American constitutional system—such as separation of powers, federalism, and government constraint—as “organizing principles of our democracy.”<sup>174</sup>

These are no doubt worthy aspirations, but they saddle agencies with responsibilities and expectations that impede their ability to deliver on regulatory managerialism’s bottom-line demands. Business managers are not encumbered by the expectation that their engagement with stakeholders will yield a more perfect union. Instead, they are instructed how to manage stakeholder relations and mitigate stakeholder-related risk so that they can maintain sufficient legitimacy to continue to exist and maximize profits. Indeed, the adoption of stakeholder engagement as a key component of corporate governance strategy is itself a form of gaslighting in that it allows companies to cloak themselves in the democratic patina of broad-based citizen participation—indeed to co-opt this traditional government function—even as they exploit the public in pursuit of profits for shareholders.

## 5. Embrace of Failure

Management theory and practice portray failure both as normal and as an essential catalyst of innovation and entrepreneurship. Business executives report that they want “to see ‘more of an adventurous attitude,’ a willingness ‘to come in and say, ‘Let’s give it a try,’ to take risks and fail, to learn from experiments and iterate.”<sup>175</sup> This Part highlights five positive understandings of failure that suffuse the management literature but are scarcely to be found in regulatory managerialism.

First, failure is inevitable. As one prominent management theorist puts it, “innovation, in the end and no matter how well thought out, is a numbers game. Lots of tries, lots of lead users, lots of tiny markets—and maybe a hit or two from time to time.”<sup>176</sup> Another seeks to prepare entrepreneurs for the “multiple

---

172. Dorf & Sabel, *supra* note 93, at 317.

173. Lobel, *supra* note 52, at 374.

174. Dorf & Sabel, *supra* note 93, at 270.

175. DATAR ET AL., *supra* note 101, at 98.

176. Peters, *supra* note 62, at 17.

failures” they will inevitably experience.<sup>177</sup> The management literature normalizes failure rather than pathologizing it, as literature on regulation often does.

Second, failure is a learning opportunity.<sup>178</sup> “Just as you don’t learn anything in science without experimenting, you don’t learn anything in business without trying, failing, and trying again.”<sup>179</sup> Research has shown that failure-inspired learning can prompt entrepreneurs to improve their competence,<sup>180</sup> and this can catalyze innovation<sup>181</sup> and lead to better future business outcomes.<sup>182</sup>

Third, failure itself is a skill that can be learned. Management scholars are interested not only in how business enterprises fail, but especially in how they can “fail better.” Failing better means minimizing the negative impacts and maximizing the potential positive upside of failure.<sup>183</sup> For instance, management scholars have developed frameworks to help entrepreneurs decide when it’s time to call it quits<sup>184</sup> and outlined best practices for winding down a failed enterprise in a way that minimizes impacts on various constituencies and on the founder’s reputation and finances.<sup>185</sup>

Fourth, management scholars see failure as an occasion for personal self-reflection and emotional nurturing. Management scholarship is highly attuned to the emotional devastation that many founders experience when their business ventures fail and includes guidance about how to manage the emotional fallout of failure. As one prominent scholar of entrepreneurship recognizes, “[w]hen we have lost something that is important to us, it is natural to feel bad.”<sup>186</sup> Management theorists have adapted psychological frameworks on the phases of

177. DEAN A. SHEPHERD, FROM LEMONS TO LEMONADE: SQUEEZE EVERY LAST DROP OF SUCCESS OUT OF YOUR MISTAKES 151 (2009).

178. *See generally*, Tom Eisenmann, WHY STARTUPS FAIL: A NEW ROADMAP FOR ENTREPRENEURIAL SUCCESS 5 (2021) (“[E]xperts agree that we can learn a lot from failure.”); Wolfgang Lattacher & Malgorzata A. Wdowiak, *Entrepreneurial Learning from Failure: A Systematic Review*, 25 INT’L J. ENTREPRENEURIAL BEHAV. & RSCH. 1093, 1093 (2020) (“[K]nowledge acquired through failure can, under certain conditions, facilitate successful entrepreneurial re-emergence.”); George S. Walsh & James A. Cunningham, *Regenerative Failure and Attribution: Examining the Underlying Processes Affecting Entrepreneurial Learning*, 23 INT’L J. ENTREPRENEURIAL BEHAV. & RSCH. 688, 702 (2017) (confirming that entrepreneurs learn from their failure in executing businesses); Andrew C. Corbett et al., *How Corporate Entrepreneurs Learn from Fledgling Innovation Initiatives: Cognition and the Development of a Termination Script*, 31 ENTREPRENEURSHIP: THEORY & PRAC. 829, 848 (2007) (finding that entrepreneurs can learn to develop business strategies by failing).

179. PETERS & WATERMAN, JR., *supra* note 61, at 218.

180. Jorge Espinoza-Benavides & David Díaz, *The Entrepreneurial Profile After Failure*, 25 INT’L J. ENTREPRENEURIAL BEHAV. & RSCH. 1634, 1634 (2019).

181. *See* PETER F. DRUCKER, INNOVATION AND ENTREPRENEURSHIP 9 (1985) (describing the different circumstances that prompt innovation).

182. Rita Gunther McGrath, *Falling Forward: Real Options Reasoning and Entrepreneurial Failure*, 24 ACAD. MGMT. REV. 13, 13 (1999).

183. Eisenmann, *supra* note 178, at 265.

184. SHEPHERD, *supra* note 177, at 13.

185. Eisenmann, *supra* note 178, at 265.

186. SHEPHERD, *supra* note 177, at 83.

grief<sup>187</sup> and the process of mourning<sup>188</sup> to “offer advice for entrepreneurs on how to heal, learn, and ultimately rebound from a [business] failure.”<sup>189</sup> Failed business founders offer self-care advice. Jason Goldberg, founder of the failed startup Fab, recommends that “[e]very founder should go through a soul-searching exercise after failure.”<sup>190</sup> Adi Hillel, founder of failed startup Hubitus, counsels: “Let go. Allow yourself to fail without judging. Do nothing. Go to the cinema, you probably haven’t seen a decent movie in six months. Meet some friends. . . . Be gentle with yourself. Remember that everything is temporary, and that you are temporarily depressed.”<sup>191</sup>

Finally, failure can be a source of positive societal spillovers. Tom Eisenman, a leading scholar of entrepreneurship at Harvard Business School, suggests that before declaring a new business venture to be a failure, we should consider potential payoffs to society at large.<sup>192</sup> Positive spillovers could include forging paths for future entrepreneurs trying to solve the same problem or by building human capital in the form of skills and insights acquired by team members that they can then apply in their future endeavors with other companies.

This discourse of entrepreneurial failure stands in stark contrast to the portrayal of regulatory failure. Whereas regulatory scholar Peter Schuck puzzles over why government fails so often,<sup>193</sup> management scholar Tom Peters understands that the law of averages in a world where success and failure are determined by a convoluted and unpredictable web of variables make “the odds of succeeding on any given ‘at bat’ . . . frightfully low.”<sup>194</sup> Regulators are not taught how to fail better when failures predictably occur—much less counseled to go see a movie and cut themselves some slack. Rather than a learning opportunity or an innovation catalyst, critics see government failure as something shameful, to be avoided if at all possible,<sup>195</sup> and potentially disqualifying of the entire government enterprise.<sup>196</sup>

Such perceptions of government failure are anathema to the aspirations of regulatory managerialism. Studies by management scholars show that negative attitudes toward failure inhibit entrepreneurship in societies where they are prevalent.<sup>197</sup> Legal scholars argue that fear of failure and mid-course correction

---

187. Eisenmann, *supra* note 178, at 275.

188. SHEPHERD, *supra* note 177, at 13.

189. Eisenmann, *supra* note 178, at 275.

190. *Id.* at 280.

191. *Id.* at 278.

192. *Id.* at 27.

193. See SCHUCK, *supra* note 10 (investigating possible sources for government failure).

194. Peters, *supra* note 62, at 17.

195. See SCHUCK, *supra* note 10, at 371–72 (identifying cross-cutting reforms designed to minimize the dysfunctionality of policy systems).

196. See, e.g., Wolf Jr., *supra* note 50 (identifying systematic reasons for government failure and suggesting that this delegitimizes government regulation as a response to market failures).

197. Andreas Kuckertz et al., *Misperception of Entrepreneurship and Its Consequences for the Perception of Entrepreneurial Failure—the German Case*, 26 INT’L J. ENTREPRENEURIAL BEHAV. & RSCH. 1865, 1866 (2020).

thwart experimentalist approaches to regulation such as adaptive management.<sup>198</sup> Moreover, the double-standard that condemns government failure while valorizing business failure operates despite the fact that “in many of the cases that the State ‘failed’, it was trying to do something much more difficult than what many private businesses do.”<sup>199</sup> This extreme asymmetry in the treatment of business versus government failure is a form of gaslighting.

## V

### EXTINGUISHING THE GASLIGHT

A glimpse into the defects of the managerial toolkit that regulatory managerialism offers to regulators suggests strategies for combatting government gaslighting and imagining alternative models of good public management. These strategies entail not only giving regulators meaningful access to a broader range of tools but reclaiming those tools as core elements of state governance rather than a stunted form of management and reasserting the distinctly public character of regulation. I sketch briefly below what this might look like.

My outline is inspired by the *Blacksburg Manifesto*, issued in 1987 by a group of political scientists at Virginia Polytechnic Institute (Virginia Tech) in response to what they saw as “the denigration of bureaucracy in the 1980s.”<sup>200</sup> The *Manifesto* called for “a new and refocused dialogue about American public administration”<sup>201</sup> focused on the restoration of the “distinctive character of public administration.”<sup>202</sup> That project was largely lost in the avalanche of regulatory managerialist discourse that followed in the 1990s. I begin to exhume it here.

#### A. Reassert the Public Identity of Regulators and Agencies

A decades-long effort to make government more like a business has obscured government’s role in identifying, nurturing, and advancing society’s collective goals. We must recover thinking and narratives about the distinctively public character of government, regulation, and public administration, or we risk ceding the State’s sovereign, democratic mission to the logic of the market.<sup>203</sup> As one

---

198. Robin Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 24 (2014); Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 WASHBURN L. J. 50 (2001); Dave Owen, *Probabilities, Planning Failures, and Environmental Law*, 84 TUL. L. REV. 265, 331 (2009).

199. MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* 25 (2013).

200. Wamsley et al., *supra* note 38, at 293.

201. *Id.*

202. *Id.* at 294.

203. MICHAELS, *supra* note 34, at 12 (“Pragmatically, we will have hollowed out the government sector to such an extent that we may well lack the capacity, infrastructure, and know-how to reclaim that which has increasingly been outsourced or marketized. . . . And, psychologically, we will have done such a good job disassociating the public services we like from the government itself—and will have been doing that job for so long—that we’ll risk altogether forgetting the State’s sovereign, democratic

prominent public administration scholar put it, “business and public administration are alike in all unimportant respects.”<sup>204</sup> A renewed dialogue about the publicness of regulation must highlight the *important respects* in which government differs from business. The *Blacksburg Manifesto* provides a useful model for such a project. The *Manifesto* highlights three distinctive features of public administration that are useful for thinking about moving beyond regulatory managerialism.

First, the *Manifesto* argues that public administration is distinctive in that it is the chief instrument of state governance and occurs in a highly political context that generates intense passions. Its authors are refreshingly frank in acknowledging what makes public administration “highly political”: public administrators distribute and redistribute resources.

Because governance involves the state’s power to reward and deprive in the name of society as a whole, and because politics is the art of gaining acceptance for those allocations, administration is an inextricable part of both governance and politics. Because of its key role in rewarding, depriving, and distributing, as well as regulating and redistributing, and because it is the only set of institutions that can lawfully coerce to achieve society’s ends, the state’s administrative machinery is seldom viewed dispassionately.<sup>205</sup>

No amount of pabulum about reinvention, experimentation, optimization, and cooperation can change this hard reality of state governance. As Jon Michaels puts it, “[s]overeign power, unlike most (but of course not all) expressions of corporate power, is intentionally and necessarily morally inflected and coercive.”<sup>206</sup> Effective and invigorated agencies must be prepared to embrace and defend the moral bases for their decisions about distribution and redistribution rather than hide behind welfare maximization criteria and the political obfuscation that calculative managerial techniques enable.<sup>207</sup>

Second, the *Manifesto* observes that public administration is carried out with an “agency perspective,” understood as a constellation of expertise, competence, experience, and the oft-overlooked resource of institutional knowledge.

[M]any agencies are repositories, and their staffs are trustees, of specialized knowledge, historical experience, time-tested wisdom, and a degree of consensus about the public interest as it relates to a particular function of society. Persons staffing agencies have often been charged with executing the popular will in ways that sustain and nurture the public interest. They have generally done so through years of struggle within the larger political system and in careful negotiations in the more limited processes of governance in order to achieve and enact some kind of consensus about the specific requirements of public policy. Surely this unique experience is worth far more than Americans have been willing to acknowledge to date.<sup>208</sup>

---

mission.”).

204. Wamsley et al., *supra* note 38, at 300.

205. *Id.*

206. MICHAELS, *supra* note 34, at 6.

207. See K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1697 (2018) (arguing that regulators must engage controversies about values “directly and explicitly through democratic debate and contestation over the substantive moral and political goals of public policy”).

208. Wamsley et al., *supra* note 38, at 301.

The agency perspective “provides public administrators with a center of gravity or a gyroscope to guide them as they perform their duties.”<sup>209</sup> And it lays the foundation for regulation that attends to broad public principles and values. It also provides the basis for reclaiming *authority* as an important component of public administration. The *Manifesto* argues, provocatively, for a “fuller appreciation of the positive role of authority in administration.”<sup>210</sup> Against the grain of prevailing practical and scholarly wisdom—both then and now—it posits that participatory processes cannot fully replace authority. It maintains that understanding the nature and necessity of authority is key to improving “the vitality of the agency perspective, the health of public administration, and the improved self-concept of the public administrator.”<sup>211</sup>

Third, the *Manifesto* argues that the success of public administration depends on regulators establishing a public function and identity distinct from their role in promoting capitalism. A central challenge of public administration is the set of contradictory demands placed on regulators in the modern state to advance freedom and justice, on the one hand, as well as capitalism, on the other. “The commitment to freedom and justice creates pressures for equity, but the doctrine of state capitalism creates a counterpressure for economic and social differentiation.”<sup>212</sup> The *Manifesto* acknowledges a role for regulation in supporting capitalism, but it cautions that this role cannot overwhelm the state’s responsibility to protect freedom, justice, and social well-being. It suggests one way that public administration can balance these demands: by serving “as a cooling, containing, and directing foil to the capitalist economic system”<sup>213</sup> that guides the economy toward the public interest.

Embracing such a role foregrounds some comparative advantages government enjoys over business. Indeed, regulatory managerialist discourse denigrating government and regulators supplies potentially useful tropes that public administrators can mine and re-appropriate by inverting their negative valence. For instance, Osborne and Gaebler lament what they characterize as the “distinct ethos” of government: “slow, inefficient, impersonal.”<sup>214</sup> They mean this as an insult. But some might consider this “distinct ethos” a welcome antidote or counterweight to an information economy that is highspeed, optimized, and dangerously personalized.<sup>215</sup>

---

209. *Id.*

210. *Id.* at 303.

211. *Id.*

212. *Id.* at 295.

213. *Id.* at 309.

214. OSBORNE & GAEBLER, *supra* note 13, at 14.

215. See, e.g., MICHAELS, *supra* note 34, at 126 (arguing that the structural design of government “is not accidentally clunky but purposely (and necessarily) so” and cautioning that “[c]leaning up that clunkiness is not a little botox under the eyes. It is, for better or worse, a full-blown lobotomy”). For examples of what it might look like to intentionally design “clunky” governmental programs, consider Paul Ohm and Jonathan Frankle’s case for building “desirable inefficiency” into certain technical and regulatory systems in Paul Ohm & Jonathan Frankle, *Desirable Inefficiency*, 70 FLA. L. REV. 777 (2018).

## B. Recognize the Role of Regulation in Creating and Sustaining Markets

Although regulatory managerialism presents a blinkered view of competition, the construct of competition contains generative possibilities for reinvigorating the regulatory state. Rather than accepting regulatory managerialism's naïve understanding of competition as a pre-existing natural state into which government must insinuate itself, we should equip regulators with a more sophisticated understanding of competition and the role that regulation plays in constructing and maintaining it. A vast body of social science research documents the essential role that states play in constructing markets.<sup>216</sup> "In practice, government regulation defines and enables markets" by creating not only the "minimal rules of the game" but by crafting "a broader range of laws, practice, and norms" in which markets are embedded.<sup>217</sup> As Karl Polanyi remarked, "[l]aissez-faire was planned."<sup>218</sup> But this extensively documented empirical reality has been no match for a neoliberal ideology that portrays government as an interloper in self-regulating markets.<sup>219</sup>

Regulatory managerialism's demand that government inject competition into the domains in which it operates subtly subverts this ideology. The insistence that government manufacture competition expressly acknowledges government's role in making markets. And once we see government as a competition instigator or facilitator, it is but a small step to see it as a market maker. A dose of realism about government's role in crafting markets opens a world of policy possibilities

---

216. See, e.g., KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944) (documenting how markets and states grew symbiotically following the industrial revolution); Harrison C. White, *Where Do Markets Come From?*, *AM. J. SOCIOLOGY* 517 (1981) (empirically documenting how markets are socially constructed and contingent on collective action); PETER HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* (1986) (explaining economic development in Britain and France as a product of political processes); PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* (1995) (investigating how variations in the organizational structure of states predict the success of states' industrial policy in developing industry); STEVEN K. VOGEL, *FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES* (1996) (revealing the extensive network of regulation necessary to support supposedly "free" markets, resulting in the simultaneous rise of increasingly free global markets and increasingly extensive regulation in the late twentieth century); NEIL FLIGSTEIN, *THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES* (2001) (providing a sociological framework to understand the state's role in creating stable markets); Daniel Carpenter, *Confidence Games: How Does Regulation Constitute Markets?*, in *GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION* (Edward J. Balleisen & David A. Moss eds., 2010) (exploring the ways in which state mechanisms of "entry regulation" and "approval regulation" help to maintain a structure of beliefs that make markets possible); GRETTA R. KRIPPNER, *CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE* (2011) (exploring the historical evolution and consequences of the rise of finance and the deregulation of financial markets in the 1970s and 1980s); STEVEN K. VOGEL, *MARKETCRAFT: HOW GOVERNMENTS MAKE MARKETS WORK* (2018) [hereinafter VOGEL, *MARKETCRAFT*] (arguing that the state's power to both regulate and design markets comprises a central function of government); MILAN BABIĆ, *THE RISE OF STATE CAPITAL: TRANSFORMING MARKETS AND INTERNATIONAL POLITICS* (2023) (exploring the historical development and consequences of state-led transnational investment in the global economy).

217. VOGEL, *MARKETCRAFT*, *supra* note 216, at 6.

218. POLANYI, *supra* note 216, at 147.

219. FRED BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM: KARL POLANYI'S CRITIQUE* 34 (2014) (describing the seductive appeal of utopian ideas about free markets that are autonomous from states).

by shifting perspectives on regulation from removing constraints to building institutions.<sup>220</sup> Such a perspective shift is essential to tackling existential problems such as climate change and extreme economic inequality.

### C. Develop Alternative Narratives about Regulation

The *Blacksburg Manifesto* observes that regulators “have accomplished administrative wonders[.]”<sup>221</sup> But one would never know by listening to the pointedly negative political and academic discourse about regulatory failures. Perhaps even more detrimentally, many take agencies’ most enduring successes for granted—with these successes ultimately fading into the background, literally unseen. “Despite their importance, regulatory successes, and especially those that are old news by virtue of longevity, are rarely reported, generally lack drama, and are therefore easily overlooked and forgotten.”<sup>222</sup> An extensive sociological literature describes how privatization and other social and political forces render state regulation invisible, depriving the state of credit for (or even basic acknowledgement of) the policy successes it achieves.<sup>223</sup> To counteract these structural impediments to recognition, agencies should take the advice of a leading management scholar and “market the bejesus out of [their] brand.”<sup>224</sup> This requires more routine and robust public communication about agencies’ achievements.<sup>225</sup>

In addition to touting their own successes, agencies should devise strategies to enlist third parties as messengers. Such a strategy would be particularly valuable given legal constraints on agencies’ communications activities.<sup>226</sup> Some agencies already rely on researchers and public interest groups to disseminate

220. VOGEL, *MARKETCRAFT*, *supra* note 216, at 2.

221. Wamsley et al., *supra* note 38, at 294.

222. Carol A. Heimer & Elsinore Kuo, *Subterranean Successes: Durable Regulation and Regulatory Endowments*, 15 *REGUL. & GOVERNANCE* S63, S64 (2021).

223. See, e.g., SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011); Damon Mayrl & Sarah Quinn, *Beyond the Hidden American State: Classification Struggles and the Politics of Recognition*, in *THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL* (Kimberly J. Morgan & Ann Shola Orloff eds., 2017).

224. Peters, *supra* note 124.

225. See, e.g., Scheffler & Walters, *supra* note 125 (arguing that regulators need to better communicate their accomplishments to the public); Thomas & Diamantis, *supra* note 126 (arguing that prosecutors should publicize white collar criminal prosecutions).

226. Agencies must contend with legal restrictions on their communications activities that do not apply to business marketing and communications. 5 U.S.C. 3107 prohibits the use of appropriated funds to hire publicity experts. 5 U.S.C. § 3107. Floor debate on this 1913 statute indicates that members of Congress “defined the publicity expert . . . [as] a man whose business is to extol and exploit the virtues of [an] agency.” Kevin R. Kosar, *The Law: The Executive Branch and Propaganda: The Limits of Legal Restrictions*, 35 *PRESIDENTIAL STUD. Q.* 784, 786 (2005). Annual appropriations riders contain additional restrictions on agency communications. “Since 1952, appropriations acts have carried straightforward language like this: ‘No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofor [sic] authorized by Congress.’” *Id.* The Information Quality Act and accompanying guidance issued by the OMB require that agencies observe strict procedures for reviewing information before it is disseminated to ensure “quality, objectivity, utility, and integrity.” Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 *Fed. Reg.* 8452, 8452 (Feb. 22, 2002). See Scheffler & Walters, *supra* note 125, for a detailed discussion of these constraints.

information that agencies collect in a form that is digestible and actionable for the public. EPA has long relied on environmental groups to parse the raw data submitted to the Toxic Releases Inventory under the Toxic Substances Control Act and publicize their findings about polluting firms.<sup>227</sup> Such public reports helped to mobilize collective action to pressure firms to reduce emissions.<sup>228</sup> Some have suggested that agencies should publicize their activities and achievements by posting metrics on their websites charting progress toward regulatory goals.<sup>229</sup> Interest groups that support the agency's mission could amplify this information by monitoring the agency's progress and summarizing the agency's metrics for their constituencies.

Regulators should also find ways to amplify individual stories about citizens' positive experiences with government. Business managers recognize that consumers receive messages not only from them but from each other, and regulators must recognize this too. As scholars have noted, “[m]ost clients of bureaucracy are not dissatisfied. The vast majority of them are very pleased with the services and treatment they receive.”<sup>230</sup> Some have gone further, celebrating the “joys” of bureaucracy that can be found in the mastery of rule-bound games<sup>231</sup> or the “bliss” that can be achieved in the state of heightened attentiveness required to focus on mundane and repetitive bureaucratic tasks.<sup>232</sup> Bureaucratic encounters also have been favorably described as a locus of solidarity, “a way our lives are brought under a common structure”;<sup>233</sup> a source of support in navigating complex modern society;<sup>234</sup> and an occasion for social leveling—one of the few sites “in which we interact with others from different class, racial, geographic, and cultural backgrounds.”<sup>235</sup> It would be fascinating and potentially transformative to surface and circulate such counternarratives about agencies in the lived experiences of citizens.

Importantly, these kinds of communications can be more than just agency brand boosting. Recent scholarship advocating that prosecutors market their corporate criminal prosecutions argues that such publicity serves important public functions such as articulating the agency's values commitments, naming and validating the harms suffered by victims of law breakers, and promoting general deterrence.<sup>236</sup> From this perspective, failing to communicate enforcement

---

227. Marc Shapiro, *Equity and Information: Information Regulation, Environmental Justice, and Risks from Toxic Chemicals*, 24 J. POL'Y. ANALYSIS & MGMT. 373, 373 (2005).

228. *Id.*

229. STEINZOR & SHAPIRO, *supra* note 32, at 185.

230. Wamsley et al., *supra* note 38, at 297.

231. DAVID GRAEBER, *THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY* 106–17 (2015).

232. DAVID FOSTER WALLACE, *THE PALE KING* 546 (2011).

233. Shalini Satkunanandan, *Bureaucratic Passions*, 15 LAW, CULTURE & HUM. 14, 25 (2015).

234. *Id.* at 17–18.

235. *Id.* at 27–28.

236. Thomas & Diamantis, *supra* note 126, at 12–22.

actions risks “undermin[ing] the most basic moral and preventive aspirations of corporate criminal law.”<sup>237</sup>

#### D. Clearly and Frankly Articulate Agencies’ Purposes

Unlike corporations, which can be organized in most states for any lawful purpose, statutes supply and constrain agency purposes. But statutory purposes are typically broad-textured and multivalent, leaving agencies room to clarify, adapt, and focus their missions. Regulators should take a page from the management playbook and articulate “a common sense of purpose”<sup>238</sup> that encapsulates regulation’s positive contribution to society and how it benefits a wide range of stakeholders.<sup>239</sup> To be sure, staff and external constituencies already consider many agencies to be mission- or purpose-driven organizations. But just as management theory sees advantage in the exercise of crafting and publicizing an explicit statement of corporate purpose, such an exercise might serve important functions for administrative agencies as well.

First, the exercise of drafting a purpose statement can help agencies focus and galvanize members of the organization toward the achievement of shared goals. Having a well-articulated purpose that agency staff value can help attract, retain, and motivate employees. This might alleviate the challenges faced by agencies with demoralized workforces. Of course, political leadership of an agency might articulate a purpose that does not align with the commitments of agency staff. Making such conflicts more visible can promote broader political dialogue about public understandings of the agency’s purpose.

Second, a clear purpose statement can help clarify who agencies believe that they serve. As discussed above, regulatory managerialism muddies the waters around the identity of the “customers” to which agencies should attend. Agencies should clear up any confusion by clearly and explicitly identifying the publics they serve.

Third, a clearly articulated purpose can help agencies manage stakeholder expectations, and it provides a mechanism for stakeholders to hold agencies to account when they fail to live up to their missions. As in the corporate context,<sup>240</sup> accountability can be promoted through activism by stakeholders who believe the agency is not acting consistent with its mission. In the agency context, purpose could reinforce this function by providing support for APA challenges to agency action. A strong purpose statement also could help regulators manage relationships with private contractors to reap the benefits of outsourcing while protecting their reputations. A sharp statement of purpose can set clear

---

237. *Id.* at 22.

238. Gartenberg et al., *supra* note 141, at 2.

239. Larry Fink, *Larry Fink’s Annual Letter to CEOs: A Sense of Purpose* (2018), BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [https://perma.cc/4VW4-JQUL].

240. *See* Fisch & Solomon, *supra* note 152, at 1344 (discussing the importance of a “corporate purpose,” and how to make one effective).

parameters for contractors, and actions contrary to that purpose could trigger contractual remedies.

Finally, plainly expressed and long-standing agency purpose statements might help agencies respond to legal challenges based on the so-called major questions doctrine. Recent cases striking down agency actions under the major questions doctrine have highlighted ways in which the challenged action fell outside the agency's core mission.<sup>241</sup> Thinking carefully through the relationship between policy and mission could help agencies defend against such challenges.

#### E. Legitimacy Beyond Stakeholders

As discussed above, regulatory managerialist discourse rhapsodizes about the democratizing effects of meaningful engagement with stakeholders. However, the reality is that procedures designed to promote stakeholder participation in the regulatory process have largely entrenched hierarchies and aggrandized the power of wealthy, well-organized stakeholder groups.<sup>242</sup> I leave to others to theorize and experiment with new ways of constructing agencies as a locus for democratic citizen engagement, but I tend to agree with Cristie Ford's article in this volume that says "[i]f there were easy solutions to the problem of public accountability in the era of regulatory managerialism, we likely would have landed on them by now. We have not."<sup>243</sup>

As Ford recognizes, despite its lofty democracy rhetoric, stakeholders serve much the same function in regulatory managerialism that they do in business management: legitimation. This disrespects stakeholders, as Ford discusses in her article for this Symposium. And it calls for a rethinking of the bases for agency legitimacy. The *Blacksburg Manifesto* posits the "agency perspective," described more fully above, as the basis for agency legitimacy. It provides a rich description of the institutional knowledge sedimented in agencies, including dimensions of experience, expertise, and a knowledge of how political understandings have developed and settled over time in relation to particular issues.<sup>244</sup> It argues that:

Ideally, the agency perspective provides public administrators with a center of gravity or a gyroscope to guide them as they perform their duties. On such a foundation is built a concern for broader public principles and values; in other words, a concern for the more inclusive principles we commonly call the public interest.<sup>245</sup>

More recently, Nick Bagley has argued that the legitimacy of regulation should be measured "by how well it advances our collective goals."<sup>246</sup> But he

---

241. *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. \_\_\_, 5–7 (2021) (arguing that the regulation of the landlord-tenant relationship is too far removed from the CDC's core mission of disease prevention and control to be permissible under its statutory authority); *West Virginia v. EPA*, 597 U.S. \_\_\_, 5 (2022) (noting that EPA had never previously ordered regulated entities to shift their mix of power sources).

242. Cristie Ford, *Regulation as Respect*, 86 LAW & CONTEMP. PROBS. no. 3, 2023, at 133, 141–42.

243. *Id.*

244. Wamsley et al., *supra* note 38, at 301.

245. *Id.*

246. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350 (2019).

worries that onerous participation processes imposed in the name of legitimacy hobble agencies in achieving these goals. Bagley demands that

“[w]e should—indeed, we must—revive a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations: to enable a fairer distribution of wealth and political power; to protect us from the predations of private corporations; and to minimize risks to our health, financial security, and livelihoods.”<sup>247</sup>

#### F. Reduce Reliance on Quantitative Analysis and Foreground Values in Decision-Making

To meaningfully pursue many of the foregoing strategies, we must free agencies from overly restrictive quantitative analysis requirements. As management scholars suggest to businesses, regulators should pursue policy implementation with a “pint of love”,<sup>248</sup> seasoned by only a tablespoon of quantitative analysis, guided by their values rather than their “dexterity with numbers.”<sup>249</sup> Or, as the authors of the *Blacksburg Manifesto* put it:

One of the characteristics of the agency perspective and of effective public administration is the development of a prudent and reasoned attention to agency performance that gives consideration to both the short- and long-run consequences of policies. Another is the habit of mind that searches for ways of measuring outputs that are qualitative as well as quantitative. A third is an outlook that rejects ‘the bottom line’ as a slogan sometimes antithetical to good public administration.<sup>250</sup>

There are many thoughtful approaches to less quantified, more values-forward agency decision-making—far too many to rehearse here.<sup>251</sup> For purposes of this article, I would highlight scholarship that centers humans and their needs as the touchstone of regulatory decision-making: William Boyd’s “regard for persons”;<sup>252</sup> Blake Emerson’s ethic of “public care”;<sup>253</sup> K. Sabeel Rahman’s “anti-domination principle”;<sup>254</sup> Cristie Ford’s “regulation as respect”;<sup>255</sup> Hilary Allen’s suggestion to make the human consequences of regulation readable by placing them in narrative form.<sup>256</sup> This body of scholarship points the way towards policymaking that is responsive and accountable in ways that quantification can never achieve.

247. *Id.* at 400–01.

248. PETERS & WATERMAN, JR., *supra* note 61, at 32.

249. *Id.* at 51.

250. Wamsley et al., *supra* note 38, at 302.

251. *See generally*, Kelman, *supra* note 103; ACKERMAN & HEINZERLING, *supra* note 49; Lisa Heinzerling, *What is Regulation?*, 19 GEO. J. L. & PUB. POL’Y 667 (2021); COHEN, *supra* note 49, at 182–84; KYSAR, *supra* note 103; Boyd, *supra* note 103.

252. Boyd, *supra* note 94.

253. Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL’Y. REV. 101 (2022).

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

255. Ford, *supra* note 242.

256. Hilary J. Allen, *Regulatory Managerialism and Inaction: A Case Study of Bank Regulation and Climate Change*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 71.

### G. Anticipate and Allow for Failure

Finally, we need to build in a permission structure that encourages regulators to take “more of an adventurous attitude, a willingness to come in and say, ‘Let’s give it a try,’ to take risks and fail.”<sup>257</sup> And we need to respond with empathy and compassion when they miss the mark, as they inevitably will. This attitude implicitly undergirds pragmatist and experimentalist approaches to regulation—a policy would not be an experiment if it did not carry the possibility of failure. But government failures still carry an outsized stigma. New research offers a fresh perspective on permission to fail in the policymaking context with a framework for thinking about which types of government failures are more excusable and which types of government failures are more concerning.<sup>258</sup> Such an approach can open spaces for regulatory success as well as failure.

## VI

### CONCLUSION

Armed with such tools and strategies, regulators just might be empowered to go out and “knock[] the socks off the competition.”<sup>259</sup> Which is precisely why dogged anti-regulatory advocates who have sought for decades to dismantle the administrative state would deny agencies the tools they need to succeed. While “paralysis through analysis”<sup>260</sup> might be problematic for business managers, it is a primary goal of anti-regulation advocates. For this constituency, regulatory managerialism is attractive because it asks regulators to do the impossible, and their failure to achieve the impossible delegitimizes them. It is a gaslighting *coup de grâce* to persuade the target that they are not good enough, to convince them that they should be someone else, and then to demonstrate that they have failed at that too. It is the ultimate debasement of the target. More importantly, delegitimized government creates openings for business leaders to appropriate greater authority and legitimacy for themselves. Larry Fink notes hopefully near the end of a recent letter to CEOs that, in an environment of intense political polarization, “facts themselves are frequently in dispute, but businesses have an opportunity to lead. Employees are increasingly looking to their employer as the most trusted, competent, and ethical source of information—more so than government, the media, and NGOs.”<sup>261</sup>

In the end, the grand inversion worked by regulatory managerialism is to co-opt core governmental functions as managerial tools for the purpose of aggrandizing corporate power. There is nothing inherently managerial about

---

257. DATAR ET AL., *supra* note 101, at 98. For an attempt to theorize the excusable spectrum of regulatory failure, see Hilary J. Allen, *Regulatory Innovation and Permission to Fail: The Case of Suptech*, 19 J. L. & BUS. 237 (2023).

258. Allen, *supra* note 257.

259. PETERS & WATERMAN, JR., *supra* note 61, at 30.

260. *Id.* at 31.

261. Fink, *supra* note 144.

strong leadership, purpose- and values-driven administration, informing the public, and meaningful engagement with all stakeholders. Indeed, these are hallmarks of good government. It is time to stop talking about government as a business and, instead, to reclaim these public functions and situate them within a vocabulary that better captures what it means to govern.