SYMPOSIUM: REGULATORY MANAGERIALISM AND PUBLIC GOVERNANCE

INTRODUCTION: FRAMING REGULATORY MANAGERIALISM AS AN OBJECT OF STUDY AND STRATEGIC DISPLACEMENT

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The regulatory state's entanglement with managerial governance is undertheorized and poorly understood, with consequences that are increasingly dire. A quarter century ago, scholars of administrative law and regulatory theory identified a new approach to regulation that they called the "new governance." Drawing from a parallel vein of recent scholarship in public administration, these scholars identified as key characteristics of the new governance its preference for relatively informal modes of policymaking and enforcement—for example, guidances rather than rulemakings and negotiation rather than litigation—and its emphasis on devolution of regulatory authority to private-sector partners and delegates.[1] Some celebrated the new governance, characterizing it as flexible, nimble, responsive to stakeholder priorities, and well suited to a fast-changing, complex economy.[2] Others, more skeptical, characterized the turn to informality

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1. On the "new public management," see, e.g., DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992); MICHAEL BARZELAY, BREAKING THROUGH BUREAUCRACY: A NEW VISION FOR MANAGING IN GOVERNMENT (1992); Christopher Hood, *A Public Management for All Seasons?*, 69 PUB. ADMIN. 3 (1991); Linda Kaboolian, *The New Public Management: Challenging the Boundaries of the Management vs. Administration Debate*, 58 PUB. ADMIN. REV. 189, 189–93 (1998). On the "new governance," see, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Carol Harlow, *Accountability, New Public Management, and the Problems of the Child Support Agency*, 26 J.L. SOC'Y 150, 163 (1999).

2. *E.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); *see also* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992). For more recent examples of work in the new governance vein, see, e.g., Dennis

and privatization as an abdication of public responsibility.[3]

Neither adherents nor critics of the new governance, however, have focused on regulatory managerialism as a distinct mode of governance in its own right. Key characteristics of regulatory managerialism include not only its preferences for procedural informality and privatization but also its distinctive techniques and their underlying logics. The result has been an incomplete account of the managerial turn—an account that overlooks many of managerialism's signature practical and ideological components and that, consequently, understates the shift in governmentality that managerialism represents.

The entrenchment of regulatory managerialism, moreover, has coincided with an era in which information and information technologies have become both principal inputs to and outputs of economic production and principal mechanisms for control and oversight of economic production.[4] This is no accident; informational modes of production and control and managerial modes of governance have strong affinities.[5] But the ascendancy of informational modes of production and control also raises the stakes. Legal and regulatory tools developed to address the harms of an industrial society—the very same tools that regulatory managerialism supplants—are ill equipped to address the harms of an informational society. Therefore, simply unwinding the changes and reverting to legacy regulatory models is not a realistic option.[6] Regulators shackled by the assumptions of managerial regulatory models have been unable to develop new models, and legacy models' evident inadequacies have reinforced the seeming inevitability of the managerial turn.

The list of harms resulting from the convergence of informational capitalism and regulatory managerialism is long and growing. Environmental degradation continues apace, and financialization, financial speculation, data extraction, and data-driven predation and discrimination have gathered speed, routing nimbly around the occasional regulatory speed bump. Many of the most harmful practices seem beyond the reach of regulators starting their work from a crouched position, constrained by methodological restrictions that force them to

D. Hirsch, *Going Dutch? Collaborative Dutch Privacy Regulation and the Lessons it Holds for U.S. Privacy Law*, 2013 MICH. ST. L. REV. 83 (2013); Dave Owen, *Consultants, the Environmental and the Law*, 61 ARIZ. L. REV. 823 (2019); Emily S. Bremer, *Private Complements to Public Governance*, 81 MO. L. REV. 1115, 1116–24 (2016); W. Nicholson Price II, *Regulating Black-Box Medicine*, 116 MICH. L. REV. 421 (2017); Margot Kaminski, *Binary Governance: Lessons From the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529 (2019).

3. *E.g.*, Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 458–65.

4. JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019); *see also* MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE, VOL 1: THE RISE OF THE NETWORK SOCIETY 14–18 (1996); DAN SCHILLER, HOW TO THINK ABOUT INFORMATION 3–35 (2007).

5. *See generally* JAMES R. BENIGER, THE CONTROL REVOLUTION (1989).

6. *See* COHEN, *supra* note 4, at 237, 270–71; Julie E. Cohen, *From Lex Informatica to the Control Revolution*, 36 BERKELEY TECH. L.J. 1017, 1027 (2022).

justify every intervention in quantified terms and jurisdictional limits that render them powerless to address systemic threats. A combustible mix of anger and nihilism pervades public perception of government, and especially of regulators' willingness to stand up for the have-nots.[7]

It is, therefore, imperative to develop a more complete account of managerialism and to devise new ways of holding extractive industries publicly accountable that begin to move beyond the managerial frame. In an era in which many of the primary targets of regulatory oversight are data, algorithms, platforms, networks, and associated business practices, it is insufficient simply to call for a return to all of the traditional administrative mechanisms that have found themselves outmaneuvered. As others have ably argued, older traditions of public governance have important lessons to teach us about the formulation of public regulatory missions and the justifications for constraining private extractive power.[8] Charting a just and sustainable path forward, however, requires both recovering lost traditions of public governance and developing a new paradigm for meaningful public oversight of information-intensive economic sectors and activities.

The goals of this symposium issue, accordingly, are twofold. First, we develop the foundation for a thicker description of regulatory managerialism, including its practices, its underlying logics, and the specific mechanisms by which it displaces or co-opts preexisting legal-institutional frameworks. Second, we introduce a series of proposals designed to break the feedback loops of the managerial turn.

Part I of this Introduction lays essential groundwork for understanding regulatory managerialism. Effective change requires understanding the ways that regulatory managerialism entrenches and reinscribes itself, but it also requires thinking beyond description and critique. One might envision various responses to the dysfunctions of managerialism. Like the social democrats of the last century who sought to mitigate industrial capitalism's excesses, one might accept the general contours of the managerial turn in governance while seeking to soften its impact on the least fortunate.[9] We aim to be more ambitious. Alternatively, one might imagine a fully formed ideological framework that could replace regulatory managerialism. We are sympathetic to that project but hope to be

7. Cristie Ford, *Regulation as Respect*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 133.

8. *See, e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2022); Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231 (2021); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 BROOKLYN L. REV. 1621 (2018).

9. Paradigmatic, although not identical, examples of this approach are the high-tax socialist economies and centralized care systems of the Nordic countries and, to a lesser extent, the social programs associated with the New Deal and the Great Society in the United States. *See generally* Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 (Steve Fraser & Gary Gerstle eds., 1989) (analyzing similarities and differences between progressive social reform approaches).

more practical in the pages that follow. In between these two options sits another approach based on what one might call "non-reformist reforms:" incremental but meaningful changes to practices of public governance, designed to empower both regulators and publics to interrupt, and ultimately redirect, today's seemingly inexorable trajectories of development and extraction.[10]

Therefore, the second goal of this symposium is to begin developing proposals for regulatory change that might begin to interrupt and displace managerialist practices, patterns, and reflexes. The proposals fall into two categories. One group of articles, discussed in Part II, considers strategies for reorienting and broadening regulatory managerialism's approach to knowledge production and value-setting, particularly with regard to systemic threats and harms. The other, discussed in Part III, explores mechanisms for improving inclusion of and accountability to the publics whose interests regulators are supposed to serve.

I

WHAT MANAGERIALISM IS AND ISN'T

As used throughout this symposium issue, *managerialism* refers to a set of practices for organizing and overseeing private sector, capitalist economic production and to the logics and underlying ideologies in which those practices are rooted, and *regulatory managerialism* refers to the decades-long tradition of importing those practices and logics into regulatory domains.[11] Regulatory managerialism is an approach to regulation and government that is both descriptive and normative: it (purports to be) informed by best practices in private-sector management, and it also involves beliefs about why those practices are worth privileging. At the same time, it is not reducible either to best practices or comparative assessments of the superiority of those practices. It is a mode of governmentality—an immersive ideological framework that facilitates and legitimates particular patterns of social and economic activity.[12]

Regulatory managerialism's practices vary contextually but also share some consistent attributes. First, as the new governance scholarship recognizes, managerialist practices are procedurally informal relative to traditional modes of prescription and enforcement within administrative law. Over the past half-century, regulators have leaned ever more heavily on guidances and best-practices statements rather than rulemakings, on compliance certifications rather

10. ANDRE GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 112–17 (2020).

11. On the rise of managerialism in the private sector generally, see ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

12. *See generally* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE 1977-78, 108–10 (Graham Burchell trans., 2007); Nikolas Rose, Pat O'Malley, & Mariana Valverde, *Governmentality*, 2 ANN. REV. L. & SOC. SCI. 83, 6 (2006).

than inspections, and on negotiations rather than enforcement litigation.[13] Regulated industries are deeply embedded within processes for generating best practices, compliance standards, and consent decree templates.[14] Relatedly, and in keeping with preferences for delegation and outsourcing common in the private sector generally, regulatory managerialism relies heavily on arrangements for industry self-oversight and sometimes also on wholly privatized production of services formerly supplied by government.[15]

For all their procedural informality, managerialist regulatory practices are nonetheless optimized for participation by members of an exclusive club. Unlike legacy models of administrative governance, which sought to mobilize domain-specific expertise in pursuit of broader social welfare goals, managerial practices rely heavily on cadres of compliance professionals and professionalized audit and certification intermediaries to perform opaque, technocratic operations that require mastery of specialized and often technical vernaculars.[16] They replace public modes of accountability with internal governance metrics such as impact assessments and audits, few of which the public will ever see. Internal, expert-driven oversight and accountability practices, in turn, rely on sets of technical and process standards that require separate, time-intensive processes to develop.[17] This opaque technocracy achieves two important deregulatory goals: It conceals predatory corporate behavior beneath a veneer of procedural legitimacy and creates a feedback loop in which the organizational structures, processes, and vernaculars of managerialism silence and marginalize anti-managerial voices and traditions. So, for example, in our home field of information privacy law, companies that collect and use personal information have developed sets of

13. *See generally* Daniel A. Farber & Anne Joseph O'Connell, "*The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003). On guidances and best-practices statements, see, e.g., Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165 (2019); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000). On compliance certification, see David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563, 580 (2016); Christian Langpap, *Self-Reporting and Private Enforcement in Environmental Regulation*, 40 ENVT'L & RESOURCE MGMT. 489 (2008); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005). On enforcement, see, e.g., William McGeveran, *Friending the Privacy Regulators*, 68 ARIZ. L. REV. 959 (2016); Neal Perlman, *Section 21(A) Reports: Formalizing a Functional Release Valve at the Securities Exchange Commission*, 69 N.Y.U. ANN. SURV. AM. L. 877 (2015). *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1995).

14. *See generally, e.g.*, Freeman, *Private Role*, *supra* note 2; David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006).

15. JODY FREEMAN & MARTHA MINOW, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 93–152 (2009); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 385–92 (2006).

16. Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010) [hereinafter Bamberger, *Technologies of Compliance*]; William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. no. 1, 2015, at 61.

17. TIM BUTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2017); COHEN, *supra* note 4, at 190–93.

compliance structures—privacy officers, reporting protocols, impact assessments, and audits, among others—that resemble business school exercises calling for repeated iteration of managerial frameworks rather than crisp application of rules and regulations. Many of these structures are outsourced to vendors even further afield from public accountability.[18] Narrow privacy discourses work together with check-box compliance cultures to create the illusion of corporate accountability despite no change in underlying data-extractive practices, and as check-box compliance sensibilities have permeated privacy discourses, other perspectives on what privacy might mean and how regulators might protect it have been banished to the fringes of policy dialogues.[19]

For all of these reasons, regulatory managerialism invites—and often welcomes—co-optation. In a vicious cycle, regulated industries determine the nature and scope of their own compliance practices, and those practices endogenously redefine the meaning of the applicable standards.[20] The outputs of managerial frameworks are largely unreviewable by courts, and underresourced regulators have been largely unable—and, often, unmotivated—to peer under the hood of managerial governance models. Digital information technologies did not cause these problems, but their increasing centrality, as both drivers of economic development and tools for the control of economic production, makes processes of regulatory co-optation and managerialist reorientation more seamless and opaque.[21] Banks operating under financial stability mandates develop and implement convoluted algorithmic methods for assessing capital adequacy.[22] Firms in legacy chemical and transportation industries use black-boxed, algorithmic systems for monitoring production and testing compliance with environmental mandates.[23] Consumer protection, financial, and environmental regulators, along with many others, rely heavily on the work of third-party compliance intermediaries, and those intermediaries often operate

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18. Ari Ezra Waldman, *Outsourcing Privacy*, 96 NOTRE DAME L. REV. REFLECTION 194, 195 (2021).

19. *See* ARI EZRA WALDMAN, INDUSTRY UNBOUND: THE INSIDE STORY OF PRIVACY, DATA, AND CORPORATE POWER 45–98 (2021) (explaining how this dynamic describes current privacy practice); *see also* Lauren Edelman & Mark Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIO. 479, 480–83 (1997) (describing how actors inside organizations strategize to perpetuate or change existing discourses but are at the same time immersed in discourses in ways they may not understand or recognize).

20. Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CAL. L. REV. 1221, 1223–28 (2022); *see also* LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND CIVIL RIGHTS 12–16 (2016) (coining the term legal endogeneity to describe how the cycle of cooptation shapes judicial interpretation of civil rights statutes).

21. *See* Cohen, *supra* note 6, at 1021–27 (explaining how the "control revolution" that reshaped economic production, and organizations engaging in economic production, has also reshaped legal organizations).

22. *See generally* Mehrsa Baradaran, *Regulation by Hypothetical,* 67 VAND. L. REV. 1247 (2014).

23. *See generally* Cary Coglianese & Jennifer Nash, *The Law of the Test: Performance-Based Regulation and Diesel Emissions Control*, 34 YALE J. REG. 33 (2017).

opaque, data-driven systems of their own.[24]

Regulatory managerialism also has a powerful ideological dimension, which is linked to the neoliberal turn in political theory and political economy. Scholars in a number of fields—political theory, political economy, and law, to name a few—have begun to map the connections between neoliberal political ideology and the structure and operation of economic, social, and legal institutions.[25] They have observed an intimate connection between managerial forms of governance and a social order of deepening inequality, environmental degradation, and regulatory paralysis. At the same time, scholars have also realized that neoliberalism's stance toward government is paradoxical. Although neoliberal political theory privileges market outputs and logics and trumpets the virtues of individual self-sufficiency, it does not seem to contemplate less government. Rather, it seeks to reconfigure government in ways that echo and mimic market processes. It refigures regulatory oversight as expert stewardship designed to maximize welfare—defined largely in terms of economic growth and industrial profit—by bringing competition and efficiency into government.[26] That project often seems to entail bureaucratic growth rather than bureaucratic shrinkage.

Managerialism supplies a key missing piece to the puzzle of neoliberalism's progressively deeper entrenchment within government. Where the two dominant political and economic theories of the last century—liberalism and socialism—centered the individual and the collective, respectively, managerialism centers organizations and those that run them.[27] That project is normative through and through. An organizational sociologist wanting to understand the connections between organizations and governance might counsel attention to the range of institutional functions that organizations enact and to the ways organizations can become sites for interpreting and contesting social values and priorities.[28]

24. *See generally, e.g.*, Bamberger, *Technologies of Compliance*, *supra* note 16; Kenneth W. Abbott, Davidi Levi-Faur & Duncan Snidal, *Theorizing Regulatory Intermediaries: The RIT Model*, 670 ANN. AMER. ACAD. POL. & SOC. SCI. 14 (2017); Dave Owen, *Private Facilitators of Public Regulation: A Study of the Environmental Consulting Industry*, 15 REG. & GOV. 226 (2019); Shauhin A. Talesh, *Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements*, 37 L. & POL'Y 1, 24–25 (2015).

25. *E.g.*, Jedediah Britton-Purdy, David Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. no. 4, 2015, at 71; QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018).

26. Nicholas Gane, *The Governmentalities of Neoliberalism: Panopticism, Post-Panopticism and Beyond*, 60 SOCIO. REV. 611, 625–29 (2012); Gerard Hanlon, *The First Neo-Liberal Science: Management and Neo-Liberalism*, 52 SOCIO. 298, 298–315 (2018).

27. WILLARD ENTEMAN, MANAGERIALISM: THE EMERGENCE OF A NEW IDEOLOGY 154–59 (1993); *see also* CHANDLER, *supra* note 11, at 381–454.

28. *E.g.*, DIANE VAUGHAN, THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA (1996) (describing conflicts of functions, pressures, and culture within public organizations); Diane Vaughan, *Bourdieu and Organizations: The Empirical Challenge*, 37 THEORY & SOC'Y 65 (2008) (studying organizations as Bourdieusian "fields" to elaborate on organizations as sites of contestation about power); *see also* MICHAEL LIPSKY, STREET-LEVEL

Managerialism's concerns are ostensibly narrower and relate to appropriate structures for decision-making about interests and actions: Organizations serve as the means for aggregating the interests of the presumptively self-sufficient individuals who join them, and governance is the province of managers. Managerialism also centers particular, highly informationalized organizational controls and the expertise required to develop and operate them.[29] It therefore both necessitates mid-level administrative growth and positions the discourses of technocratic organizational optimization as virtuous.

These ideological foundations help to explain the mystery of regulatory managerialism's resilient and self-reinforcing qualities. Legal scholars have observed that organizational structures optimized for opaque, professionalized management skillfully incorporate—and then weaponize—exogenous demands for change with minimal impact on organizational priorities and actions. For example, the sociolegal scholar Lauren Edelman has demonstrated how managerial organizations transformed substantive nondiscrimination requirements into procedural check boxes—a policy here, a training there, a Title VII officer who discourages anyone from bringing discrimination complaints.[30] One of us (Waldman) has identified similar dynamics in emergent structures for privacy governance.[31] As described by tech companies and leading organizations representing privacy professionals, those structures ostensibly constrain the collection and processing of personal information, keeping privacy-related values front of mind as employees do their work. However, they have done little either to slow the development and deployment of data-extractive products or to prevent a steady stream of scandals.

From a managerialist perspective, these outcomes make sense. As an ideology, managerialism erases publics, holding that what we understand as society is neither broadly social nor narrowly individualistic but rather the product of decisions by and negotiations among managers of organizations, both public and private.[32] Normatively, then, it positions the dominance of organizational interests and priorities as wholly appropriate. As a form of governmentality, it privileges the knowledge practices developed by and for organizational managers and erases others that might compete with or supplement them.

These ideological foundations also help to explain regulatory managerialism's insistent focus on sheltering private-sector growth and innovation. In the private sector, managerialism's commitments to marketized metrics of success have long emphasized economic growth and capital accumulation at the expense of social

BUREAUCRACY (2d ed. 2010) (describing the ways front line workers in public organizations transform agencies into sites of contestation about missions, values, and work).

29. *See* BENIGER, *supra* note 5, at 390–425; CHANDLER, *supra* note 11, at 11; Hanlon, *supra* note 26, at 299–301. *See generally* SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY (rev. ed. 2004).

30. EDELMAN, *supra* note 20.

31. *See generally* Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773 (2020).

32. ENTEMAN, *supra* note 27, at 154.

and political accountability.[33] In recent decades, that orientation has become especially pronounced in the finance and technology sectors.[34] Tech start-ups want to grow, and grow fast; rapid growth is also essential to the logics of venture capital investment, which depend on explosive growth to justify a portfolio full of risky bets.

Regulatory managerialism internalizes those commitments, which then fuel deeply one-sided narratives about the relationship between protective regulation and social welfare and inform proposals for flabby, cautious oversight. In the aftermath of the 2008 financial crisis, when policymakers began to propose new rules to regulate complex financial derivatives and rein in risky speculation by financial institutions, financial industry leaders—and some regulators—were quick to counsel restraint lest regulatory overreaction harm "financial innovation."[35] The FTC, which has emerged as the de facto regulator for Silicon Valley, has historically preferred a light regulatory touch, in part because a key piece of its statutory mandate is both uniquely vague and uniquely constrained, but in part because it has internalized the oft-repeated but historically unfounded canard that regulation stifles innovation.[36] Similarly, leading information industry players proclaim their support for new federal privacy legislation in the United States, but only for the "right regulation" that "still allow[s] companies to innovate and develop."[37] The occasional proposals for more aggressive

33. For useful histories, see generally GIOVANNI ARRIGHI, THE LONG TWENTIETH CENTURY: MONEY, POWER, AND THE ORIGINS OF OUR TIMES (1994); ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM (1994). *See also* Richard Marens, *Destroying the Village to Save It: Corporate Social Responsibility, Labour Relations, and the Rise and Fall of American Hegemony*, 17 ORG. 743 (2010) (reviewing the evolution of theories about and approaches to corporate accountability through the prism of labor relations).

34. *See generally, e.g.*, DONALD MACKENZIE, TRADING AT THE SPEED OF LIGHT: HOW ULTRAFAST ALGORITHMS ARE TRANSFORMING FINANCIAL MARKETS (2021); DANIEL SCOTT SOULELES, SONGS OF PROFIT, SONGS OF LOSS: PRIVATE EQUITY, WEALTH, AND INEQUALITY (2019); Natascha Van der Zwan, *Making Sense of Financialization*, 12 SOCIO-ECON. REV. 99 (2014); Josh Lerner & Ramana Nanda, *Venture Capital's Role in Financing Innovation: What We Know and How Much We Still Need to Learn*, 34 J. ECON. PERSP. 237 (2020); *see also* COHEN, *supra* note 4, at 41, 55.

35. *See generally* Josh Lerner & Peter Tufano, *The Consequences of Financial Innovation: A Counterfactual Research Agenda*, 3 ANN. REV. FIN. ECON. 41 (2011).

36. *See* 15 U.S.C. §§ 45(n), 57(a); FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 7–9, 25–26, 36–39 (2012) (describing adjustments to earlier, stricter proposed principles in response to concerns raised by business commenters about deterring innovation); CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 55–56, 333–35 (2016). On whether some of the difficulties surrounding use the FTC's unfairness mandate have been self-imposed, see Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431 (2021) (challenging the historical and legal narrative). On the relationship between regulation and innovation, see MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (2013); Mariana Mazzucato, *The Green Entrepreneurial State*, in THE POLITICS OF GREEN TRANSFORMATIONS 134–52 (Ian Scoones, Melissa Leach, & Peter Newell, eds. 2015).

37. Alfred Ng, *U.S. Privacy Law is on the Horizon. Here's How Tech Companies Want to Shape It*, CNET (Sept. 26, 2018), https://www.cnet.com/news/politics/us-privacy-law-is-on-the-horizon-heres-how-tech-companies-want-to-shape-it/ [https://perma.cc/F7Z8-FFH8]. *See also* Jodi Short et al., *The Dog that Didn't Bark: Looking for Techno-Libertarian Ideology in a Decade of Public Discourse About Big Tech Regulation*, 19 OHIO ST. TECH. L.J. 1, 14–18 (2022).

regulatory action provoke aggrieved howls of protest about threats to the innovation imperative. The antiregulatory feedback loop is so strong that industry no longer feels the need to cite evidence when arguing that law stifles innovation.[38]

Relatedly and not coincidentally, both managerialism and regulatory managerialism advance their priorities by mobilizing discourses about efficiency-maximization, data-driven growth, and technological wizardry that reflect background transformations in political economy and that have become normalized and deeply ingrained as ways of public sensemaking. In particular, the contributions in the symposium focus on two kinds of discourses, one financialized and the other technological and focused on mobilization of data to achieve efficiency goals. Over the final decades of the twentieth century, the language of regulatory oversight became narrowly focused on values like efficiency as framed and measured through the lenses of cost-benefit analysis and quantitative risk modeling.[39] That development tracked both the increasing financialization of economic activity and the increasingly computational approaches to financial modeling that digital processing power and digital networks enabled.[40] More recently, the regulatory managerialist toolkit has expanded to include digital control systems and sophisticated data analytics, which are heralded as efficient solutions to the problems entailed in performing a wide variety of government functions at scale.[41] That development, in turn, tracks both the growing power of the technology industry and the emergence of a particular technological imaginary that posits automated, data-driven tools as answering all manner of personal and social needs.[42] And in government, as in industry, the toxic combination of financialization and technological solutionism

38. COHEN, *supra* note 4, at 90–93; WALDMAN, *supra* note 19, at 74.

39. CASS R. SUNSTEIN, THE COST-BENEFIT STATE ix (2002); DOUGLAS KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 15 (2010); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY xvi (1991); William Boyd, *Genealogies of Risk: Searching for Safety, 1930s-1970s*, 39 ECOL. L.Q. 895 (2012); THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 148–89 (1995).

40. *See generally* Van der Zwan*, supra* note 34.

41. For a useful review of the literature on "agile government," see Ines Mergel, Yiwei Gong & John Bertot, *Agile Government: Systematic Literature Review and Future Research*, 35 GOV. INF. Q. 291 (2018). On implications for values of due process and administrative accountability, see Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1259–60 (2008); Deirdre Mulligan & Kenneth Bamberger, *Procurement as Policy*, 34 BERKELEY TECH. L.J. 781, 779 (2019). On larger ideological implications, see Kean Birch, *Automated Neoliberalism? The Digital Organisation of Markets in Technoscientific Capitalism*, 100 NEW FORMATIONS 10 (2020); Mariana Valverde & Michael Mopas, *Insecurity and the Dream of Targeted Governance*, *in* GLOBAL GOVERNMENTALITY: GOVERNING INTERNATIONAL SPACES 239 (Wendy Larner & William Walters eds. 2004).

42. *See* Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL'Y REV. 309, 311 (2016). *See generally* EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM (2013). For a powerful and generative of an alternative path for technological development, see Rediet Abebe, Solon Barocas, Jon Kleinberg, Karen Levy, Manish Raghavan, & David G. Robinson, *Roles for Computing in Social Change*, in FAT* '20: PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 252–60 (2020).

has tended to ratify background distributions of resources and power, producing harms that fall most heavily on marginalized populations.

Lastly, managerialism's capacity to co-opt, redirect, or soften potential disruptions also manifests in its ability continually to reinforce itself while rhetorically insisting on government's comparative disabilities and deficits. While manipulating the public into seeing its corrosive effects as flexible and progressive—using words like agile and nimble to describe its machinery—regulatory managerialism denies government the very resources and tools industry uses to attain agility and nimbleness. In this issue, Jodi Short uses a now-familiar word to describe this strategy: gaslighting.[43] As Short deftly describes, the discourse of regulatory managerialism is replete with language that attacks and undermines not only the public mission of government but also the identity and mission of those who serve as government regulators. It projects blame for society's ills onto government even when business rather than government is the principal driver of spiraling economic precarity, rampant and deeply embedded inequality, and looming environmental catastrophe. These habits of thought and argument have become deeply engrained within law and governance scholarship, and they have bled into adjacent literatures. Consider, for example, the so-called pacing problem, or the theory that the law cannot effectively regulate technology because it is forever relegated to playing catch up.[44] Within the intellectual climate created by widespread internalization of regulatory managerialism, it becomes easy to conclude that, because law sometimes must react to change, government is inherently a second-best solution to problems of social ordering. That is no accident; just like any other form of governmentality, managerialism mobilizes discourse as a tool of power.

In sum, regulatory managerialism is a governance toolkit but also a deeply internalized governance orientation—a way of conceptualizing and internalizing a particular relationship between government and economic and social ordering. That relationship privileges private enterprise over public values, elevates opaque, technocratic knowledge practices that suit the needs of elites and management, and excludes everything else as noise. Displacing it requires a paradigm for oversight of managerial processes of industry that centers publics, not managers. As Parts II and III will describe, the articles in this Symposium suggest a number of different starting points for that project.

II

BRINGING PUBLIC VALUES INTO GOVERNANCE: BEYOND COST ACCOUNTING, RISK MANAGEMENT, AND MARKET FUNDAMENTALISM

Effective governance after the managerial turn requires new thinking about

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43. Jodi Short, *Gaslighting Government*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 1.

44. Gary E. Marchant, *The Growing Gap Between Emerging Technologies and the Law*, *in* THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM 19, 19 (Gary Marchant, Braden Allenby & Joseph Herkert eds., 2011).

mechanisms for injecting and iteratively reinforcing public values within regulatory processes. Although private actors may have important roles to play in coordinating and generating information about regulated activities, effective public oversight is indispensable for channeling such activities in pro-social, sustainable, and democratically accountable ways. Current forms of public oversight are captured by managerialist epistemologies and practices. Four of the articles in this Symposium offer proposals for interrupting managerial feedback loops in policy setting and monitoring.

Recall that neoliberalism envisions regulatory oversight through the prism of marketization, and regulatory managerialism provides the intellectual and practical scaffolding on which that vision rests. The resulting regulatory toolkit is both descriptively blinkered and normatively impoverished. Three articles explain how regulatory managerialism's logics and knowledge practices disable regulators from addressing systemic threats and harms. A fourth explores whether regulatory managerialism's baseline assumptions about the normalcy and stability of market modes of ordering make sense at all in the context of the automated, data-driven operations that play increasingly dominant roles in contemporary information societies.

Law and technology scholar Frank Pasquale considers what cost-benefit analysis (CBA), as used in the executive branch, has to teach about the epistemology of regulatory managerialism.[45] Many scholars have written about the harms of CBA, connecting those harms to CBA's methods and assumptions.[46] As one of us (Cohen) has put it, the kinds of accounting methodologies used in CBA "rest on sets of assumptions about how to describe, measure, and account for program costs and benefits. Those assumptions are neither transparent nor inherently neutral, and merit careful scrutiny based on both the values that they enshrine and those that they elide or omit."[47] Pasquale singles out CBA's resolute certainty—its insistence that all components of the cost-benefit calculus are capable of reduction to determinate form—as a particular epistemic weakness. As he explains, the insistent prioritization of certainty raises an obvious question: Even if we could agree on the questions to ask and the ideals to consider, can we ever assign a determinate value to the things we care about? Pasquale challenges us to consider whether there is a set monetary value for a pollution-free environment or the extinction of the human race or the ability to breathe without contracting asthma. Such questions, he argues, point to an overlooked consequence of a system of regulatory decision-making that excludes *un*certainty. Such a system does not simply minimize diffuse, yet-to-be-realized harms and benefits. More profoundly, shoehorning an uncertain reality into a falsely

45. Frank Pasquale, *Power and Knowledge in Policy Evaluation: From Managing Budgets to Analyzing Scenarios*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 39.

46. *See generally, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY (2010); Matthew D. Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. *PENN. L. REV.* 1371 (1998).

47. COHEN, *supra* note 4, at 194.

determinate frame erases complexity, path dependency, and snowball effects from regulatory landscapes, leaving regulators wholly unequipped to confront the most difficult problems.

A pair of articles on financial and environmental regulation illustrates and deepens these themes, bringing concerns about the managerialist fetish for cost accounting and risk management to bear on two patterns of systemic threat that loom large in our complex, interconnected world. Hilary Allen, a scholar of financial regulation, explains how the managerialization of financial regulation has undermined the law's ability to guarantee financial stability for the public.[48] Minimum equity requirements for banks are supposed to provide a buffer against solvency crises. Whether and how to adjust those requirements in response to climate threats are the subjects of much current controversy and the focus of Allen's intervention. One might require banks to maintain a defined, high level of equity to help absorb losses from severe climate events. Currently, however, minimum equity requirements are determined using complex mathematical models based on the risk management techniques used by the banks themselves. As Allen explains, this has two principal effects. First, quantitative models tend to spotlight the minimum thresholds necessary in light of known risks; this, in turn, incentivizes banks to leverage themselves to the greatest extent possible in pursuit of the largest financial returns. At the same time, the perceived need to reduce financial risks to numbers excludes from financial regulators' field of vision the systemic harms that sit outside the frame of the prevailing approach to risk modeling. For example, a regulator might want to consider the possibility of catastrophic operational problems resulting from storm damage to data centers supporting financial institutions and cashless payment systems and located near a coastline threatened by storms made more severe because of climate change, but that kind of uncertain event doesn't fit easily within the parameters of the current models used for capital regulation.

Financial regulation is not the only area where regulatory managerialism's emphasis on data-driven cost accounting provides cover for regulatory inaction that suits industry and that exacerbates systemic threats to human wellbeing. William Boyd, a scholar of environmental law, tells the story of *Industrial Union Department v. American Petroleum Institute*,[49] commonly known as the *Benzene* decision.[50] In 1977, the Occupational Health and Safety Administration (OSHA) released a policy statement announcing a harm-based trigger for regulating carcinogenic chemicals. If there was evidence that a chemical caused cancer in animals or humans, OSHA planned to issue emergency standards limiting workplace exposure to the lowest possible level. The chemical industry challenged OSHA's harm-based approach and persuaded a conservative

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

49. 448 U.S. 607 (1980).

50. William Boyd, *With Regard for Persons: Rethinking Risk Assessment in U.S. Health, Safety, and Environmental Law*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 101, 103.

Supreme Court to rule that protective regulation must be preceded by a threshold determination of significant risk. More data was needed, the Court said, before any regulation could be issued. Following *Benzene*, the prestigious National Research Council took up the call for more data and more modeling, issuing an influential report on the optimal design of institutional architectures for risk assessment that became the lodestar for a broad reorientation of the regulatory state toward quantitative risk modeling. As Boyd explains, *Benzene* and its aftermath buried federal agencies in iterative and endless processes of quantification, while industry learned that risk modeling could serve a weapon *against* regulation rather than a means to achieve it.

As Pasquale, Allen, and Boyd remind us, regulatory managerialism does not simply rank-order priorities and announce its intention to put industry first. Regulatory managerialism's priorities inhere in its knowledge production methods, which it enshrines as the highest and best ways of reasoning about the very purpose of regulatory oversight. Within the broader context of regulatory managerialism as a mode of governmentality, the moves to heavily quantified cost accounting and risk modeling made good common sense. Both appeared to be gold-standard methods of marshaling expertise in the service of fact-based oversight. But that characterization camouflaged some decidedly non-neutral assumptions, and the assumptions both erased systemic threats and baked in the underlying burden allocation that generally accompanies cost accounting and risk modeling mandates: no regulation without data-driven confirmation of determinate harms outweighing the economic burdens to industry.

It is insufficient, therefore, simply to oppose regulatory managerialism by pointing out places here and there where regulators have failed to account for the public's interests, instances where the models have not (yet?) expanded to encompass new kinds of harm, or occasions when the fetish for quantification has produced endemic "analysis paralysis." Rather, it is essential to introduce—or, in some cases, reintroduce—knowledge production methods that might compete with and ultimately dislodge managerialist epistemologies.

In their respective articles, the three scholars propose different but complementary methods for re-integrating public values into regulatory decision-making from the ground up. All are focused to some extent on the idea of precautionary regulation, which Allen has elsewhere defined as an approach that would "block activities that are, on balance, likely to be dangerous, notwithstanding that doing so will create some inadvertent harm by preventing the beneficial aspects of the activity."[51] Additionally, all would work to eliminate the shelter that complex, quantitative modeling now affords to industry abuse and regulatory inaction. So, for example, Boyd recommends that, rather than waiting decades for data that might enable more precise risk modeling, regulators adopt a policy stance inspired by the one that OSHA originally attempted to implement: If evidence suggests that a substance causes harm, regulate

51. Hilary J. Allen, *A New Philosophy for Financial Stability Regulation*, 45 LOY. U. CHI. L.J. 173, 204 (2013).

temporarily first, subject to additional review. Allen endorses a similar approach to bank equity regulation, based on a simple leverage ratio designed to hedge against the risk of spiraling defaults created by unforeseen, systemic events.

But Pasquale, Allen, and Boyd also seek to introduce new kinds of knowledge production and sensemaking practices that would enable regulators to bring new lenses to bear on the most difficult systemic problems. Pasquale introduces scenario analysis, a structured method of inquiry through which participants envision a range of likely, possible, and worst-case outcomes and iterate the consequences of each. As he illustrates, sensitizing regulators to the range of possibilities—and, critically, to worst-case harms resulting from snowball effects and other unforeseen synergies—would create new opportunities for them to define choice sets and consider what values should guide those choices. Allen would add less formal processes of narrative to the regulatory toolkit; in particular, she argues that authorizing regulators to develop narrative-based methods of communicating with the public could foster better understanding of both possible harms and the benefits of regulatory action. Boyd, meanwhile, reminds us that the government might deploy its considerable power to coordinate knowledge production to very different ends than it currently does, mobilizing the epidemiological and scientific skills of environmental research communities and the experiences of communities affected by environmental harms to develop broader visions for change.

The fourth article in this group, by law and technology scholar Salomé Viljoen, interrogates regulatory managerialism's baseline presumption about markets as ordering mechanisms for economic activity.[52] As Viljoen explains, the very large, data-driven processes that now permeate our economy and command an increasing share of public and regulatory attention in fact do not behave like markets at all. Platform-based, data-driven mechanisms for allocating goods and services operate in ways very different from those presumed by efficiency- and liberty-based arguments about the superiority of markets as allocation methods. Rather, they are designed, instructed, and continually tuned to behave in particular ways in the service of particular interests. Platforms are not markets but rather "market machines," and in that context, the regulatory managerialist's core reflex to restore and steward the "normal" operation of markets makes no sense.

As regulators increasingly move both to extend existing models of managerialist oversight to platforms and to adopt new suites of data-driven managerial tools procured from the private sector, this insight is enormously important. First and most basically, because platformized processes do not and cannot work the way regulators assume they do, light-touch oversight intended to restore and reinforce marketization—for example, by mandating additional disclosures to consumers or giving consumers new choice sets relating to data harvesting or imposing limits on self-preferencing by dominant gatekeepers—

52. Salomé Viljoen, *Market Machines, Social Data, and Informationalism Beyond Managerialism*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 257.

threatens to produce even more than the usual level of regulatory managerialist dysfunction.[53] Second, however, and more optimistically, Viljoen raises the possibility that data-driven tools for regulatory oversight might be designed, instructed, and continually tuned to pursue public interests in public-spirited ways. Within the regulatory managerialist frame, more data translates to more accurate and efficient governance, and the fact that data maximalist tools are trained on private data with a view to identifying managerial efficiencies is a good thing. But that is not the only way to incorporate data and data-driven tools as governance methods. Governing complex societies at scale requires data, so it is the tools themselves that need to change. Viljoen suggests strategies for reorienting datasets, standard-setting processes, and markets toward the production of identified public goods.

These interventions have three common threads. First, they do not counsel wholesale abandonment of facts and data but rather advocate for a more open-minded and context-sensitive approach to exploring what relevant facts and data might mean. Second and relatedly, they do not recommend that experts in, for example, epidemiology or complex systems modeling abdicate their role in policymaking; in complex economies, some amount of expert analysis and oversight is indispensable. They do remind us that the value of expertise is instrumental, and it must still be disciplined in ways that serve public ends. Finally, and most importantly, they underscore that the mechanisms for regulatory oversight require animating principles, and those principles may—and should—be chosen in ways that center human and social wellbeing, however difficult-to-quantify those may be.

III

BRINGING PUBLICS INTO GOVERNANCE: BEYOND PERFORMATIVE INCLUSION AND MANAGED TRANSPARENCY

Effective governance after the managerial turn also requires new thinking about listening to public voices, responding to public concerns, and informing publics about the activities of both government and industry actors. Words like inclusion, accountability, and transparency reappear often in regulatory managerialist discourse, but the mechanisms touted as effectuating those values

53. For example, in the United States, several proposals for comprehensive data privacy regulation introduced in the U.S. Congress roughly continue an individual rights of control and procedural compliance model. For the bills proposed in the U.S. Congress, see American Data Protection and Privacy Act, H.R. 8152, 117th Cong. (2022); Consumer Data Privacy and Security Act of 2021, S. 1494, 117th Cong.; Data Care Act of 2021, S. 919, 117th Cong. (2021); Information Transparency & Personal Data Control Act, H.R. 1816, 117th Cong. (2021); Data Accountability and Transparency Act of 2020, 116th Cong. (2020) (distributed as discussion draft); Setting an American Framework to Ensure Data Access, Transparency, and Accountability Act, S. 4626, 116th Cong. (2020); American Data Dissemination Act of 2019, S. 142, 116th Cong. (2019); Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019); Data Care Act of 2019, S. 2961, 116th Cong. (2019); Mind Your Own Business Act of 2019, S. 2637, 116th Cong. (2019); Online Privacy Act of 2019, H.R. 4978, 116th Cong. (2019); Privacy Bill of Rights Act, S. 1214, 116th Cong. (2019).

are often more performative than real. Consider, for example, the ongoing debates about whether and how to craft more effective information privacy regulation. For some years now, the FTC has done outreach to elicit the public's views, but its statements about the kinds of regulation that are needed have not changed much and remain narrowly oriented toward extensions of the traditional notice-and-choice model. Or consider the transparency reports that large technology companies like Google and Meta now use to inform both regulators and the public about the nature and scale of their content moderation actions. The numbers are impressive, to be sure, but they function primarily to distract the public and regulators from what has not been done. Neither company has disclosed meaningful information about the operation of its content moderation activities or about the factors structuring operation of its data-driven, algorithmic recommender and advertising systems. Regulators, for their part, lack tools to seek the kinds of disclosure that would enable meaningful oversight of those activities and systems.

None of this is accidental. Recall that regulatory managerialism privileges organizational voices and interests over public voices and interests. The marginalization of public voice and the hollowing out of mechanisms purporting to provide public accountability are *features, not bugs*, of regulatory managerialism. In response, several scholars in this symposium seek to reimagine mechanisms for reintegrating public participation and oversight into regulatory decision-making. The approaches operate at the macro, meso, and micro levels.

At the macro level, the securities and financial regulation scholar Cristie Ford highlights the disconnect between regulatory decision-making and democratic will.[54] She identifies one of the central failings of regulatory managerialism—namely, that it measures success using industry-developed compliance metrics rather than improved outcomes for ordinary people. The resulting public alienation expresses both anger and ennui. Affected publics learn, over and over again, that regulators aren't there to protect them but rather serve only the privileged. Many proposals for improving public participation in regulatory processes rely too heavily on the hope that the simple introduction of new participatory fora—for example, town halls and other listening sessions—will somehow manage to dislodge managerial logics in favor of different regulatory agendas. Turning seats at the table into meaningful participation in regulatory processes requires a more profound transformation. This is doubly true for members of minoritized groups that so often find themselves marginalized within political and social processes. Disability scholars and advocates use the phrase "nothing about us without us" to emphasize the importance of including those harmed by structures of power in policy discussions about those structures of power.[55] The managerial state has proved particularly effective at sidelining or

54. Cristie Ford, *Regulation as Respect*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 133.

55. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3–4 (1998).

co-opting contributions from marginalized voices.[56]

In place of incremental reforms that leave in place power structures benefiting elite actors, Ford asks us to think of regulation as respect. Drawing from the restorative justice literature, she identifies popular anger and disenchantment as drivers of the kinds of change on which regulators should focus. Instead of centering managers, organizations, and industry-driven growth, regulation as respect consciously recenters publics and, along with them, methods of listening and learning that are human-centered, iterative, and cooperative. To begin, regulators might involve sociologists, anthropologists, and other experts on social life in processes of regulatory design, but simply adding new layers of expertise will not be enough. In particular, Ford advocates learning from the literature on participatory design to craft mechanisms for bringing traditionally excluded voices into regulatory processes at all stages.

In some contexts, however, the introduction of some traditional regulatory processes may promise significant improvements. As we noted in Part I, third-party compliance intermediaries play pivotal roles in the oversight of many activities in our complex and highly informationalized economy. Their involvement creates additional layers of privatized, professionalized opacity that complicate the project of democratic accountability. In the energy sector, for example, the day-to-day operations of electrical power grids are run not by highly regulated public utilities, but by far more opaque private regulatory intermediaries.[57] The Financial Industry Regulatory Authority, an intermediary created to oversee certain financial industry functions, does so with only minimal public oversight, guided chiefly by its mission to promote "vibrant capital markets" that benefit the financial firms it is supposedly monitoring.[58] Situations like these, which are repeated in hundreds of places across the executive branch, might be thought to present classic principal-agent problems, but according to the distinctive governmentality of regulatory managerialism, there is no problem at all. Private intermediaries are not necessary evils but rather virtuous links in a managerial chain crafted to reorient governance toward marketization; they are supposed to envision governance though the lens of the interests they are charged with overseeing.

Daniel Walters, a scholar of environmental regulation and administrative law, uses the example of regional energy intermediaries to argue that traditional principles of administrative design, including procedural formality and contestatory policymaking, could make on-the-ground operation of the energy sector more accountable to the public.[59] Currently, although most such

56. *See generally* WALDMAN, *supra* note 19 (describing the discursive and organizational tools technology companies use to co-opt or sideline pro-privacy voices).

57. Daniel Walters, *Reclaiming Regulatory Intermediation for the Public*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 157, 171.

58. ABOUT FINRA, https://www.finra.org/about [https://perma.cc/S634-HJWE] (last visited July 14, 2023).

59. Walters, *supra* note 57.

intermediaries are private entities, a few are quasi-public in terms of their structure, their mission, and the kinds of process they are required to utilize when setting operational policy. Those process obligations have enabled the inclusion of public voices—asserting, for example, the importance of distributive justice and climate considerations—alongside those of the industry incumbents, which are the only voices heard when Regional Transmission Organizations make policy in the dark. Process alone, of course, will not solve the larger, system-wide problem of misdirected energy priorities. But a strong public voice and a public mission are essential to managing the resources that the background system of energy production makes available. As Walters explains, a Private Administrative Procedure Act governing the activities of third-party regulatory intermediaries could help to produce that reorientation.

As Ford and Walters recognize, new mechanisms for integrating publics and their concerns within structures for regulatory oversight are just the beginning; real accountability requires two-way flows of information about both government processes and regulated industries. Transparency has long been a watchword for industry and managerialized regulators alike, but it has rarely, if ever, meant the kind of openness necessary for real accountability. The final two contributions focus on strategies for empowering both publics and regulators to insist on accountability outside the managerial frame.

Margaret Kwoka, a scholar of government information practices, takes a systems approach to the problems of government transparency and transparency mandates for regulated industries.[60] Kwoka begins by situating transparency laws like the federal Freedom of Information Act (FOIA) within a more widespread mid-twentieth century practice of crafting rights-based approaches to government accountability. FOIA, however, has become emblematic of the problems with such approaches. FOIA processes are no longer robust contestatory mechanisms that work in the public's interest. Rather, like other agency processes after the managerial turn, FOIA processes have become procedurally informal, technocratic, and opaque. Prescribed time frames are honored in the breach, third-party vendors mediate compliance, and entanglements with regulated industries are endemic, especially when technologies procured for government use are involved.

Although amendments to the existing FOIA statute might address some of these problems, Kwoka thinks a regime of transparency for the information era should be more ambitious. Following a pattern adopted by other countries in the decades since FOIA was enacted, she proposes the creation of a transsubstantive information commission that would prioritize the public interest for all information and public record requests and that would also craft a broader set of government information policies oriented toward more sweeping public empowerment. Among other things, its mandate would include ensuring systematic production of the kinds of information that both the public and

60. Margaret B. Kwoka, *Scoping an Information Commission*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 197.

regulators require—including information not only from and about government but also from and about industry. In short, Kwoka seeks nothing less than a radical reenvisioning of the public domain of regulatory information, with an independent, empowered regulator leading the way.

Law and technology scholar Hannah Bloch-Wehba dives deeply into the public accountability problems resulting from private domination of the state's technological infrastructures.[61] The state uses privately provisioned digital tools and services to perform a wide and growing range of public governance functions, from doling out benefits and collecting revenues, to analyzing comments submitted in public rulemakings, to policing borders and border crossings. Many scholars have written about the harms that result from the largely unaccountable design choices encoded in such systems. As Bloch-Wehba recounts, obstacles to accountability extend well beyond the dysfunctional FOIA regime that Kwoka describes. FOIA's trade secrecy exception shelters many aspects of these systems from disclosure, but government information officers also habitually defer to industry preferences for secrecy that extend beyond the scope of that exception. Nondisclosure agreements (NDAs) covering the design, training, and operation of privately provisioned technologies are endemic at all levels of government, and the widespread reliance on NDAs within industry also affects the public's ability to understand how technology firms and their products operate. As a practical matter, regulators and the public now rely heavily on unsanctioned leaks to provide information that should have been available to them all along.

Here again, amendments to the existing FOIA statute might address some obvious problems, but Bloch-Wehba has a more ambitious response in mind. As to FOIA, she suggests that private vendors should have to cede trade secrecy protections for the privilege—and considerable value—of working with the state. But she also proposes, more broadly, that the federal government should begin to invest in building systems for its own use and should undertake such projects in open and publicly accountable ways. As envisioned by Bloch-Wehba, a technological public option would integrate public values and interests into government operations at the infrastructural level—insisting, for example, that getting benefits to recipients is an urgent public priority and that determinations about benefit eligibility should be structured from the ground up to avoid disparate impacts.

These proposals are not utopian. We have concrete examples of experiments putting them into practice, stretching from Canada, where, as Ford notes, new laws require regulators to consult with and accommodate Indigenous peoples; to California, which, as Walters highlights, has designed a publicly accountable oversight structure for its energy grid; to the U.S. Census Bureau, where, as Kwoka describes, officials pay careful attention to the potential privacy harms that government databases could enable. They are bold yet also practical, aimed at wresting regulatory control away from those whom regulation is supposed to

61. Hannah Bloch-Wehba, *A Public Technology Option*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 223.

constrain and restoring it to those whom it is supposed to serve. They represent important first steps in a longer process of regulatory reorientation and reinvigoration in the public interest.

IV
CONCLUSION

The goal of this Introduction was to frame regulatory managerialism as an object of study. The goal of this Symposium is to imagine strategies for displacing regulatory managerialism and reimagining public governance adequate to the informational era in which we now live. Together, the contributions tackle urgent questions about the kinds of intellectual and practical resources required to regulate highly informationalized industries in the public interest.

There is much more work to do. The pieces in this symposium have taken an internal perspective; we have not dealt with questions about judicial review or about the place of public regulatory institutions within a system of democratic governance more generally. In the current moment, debates about such questions revolve primarily around legal barriers put in place by courts ideologically committed to deregulation, small government, states' rights, and other discourses that seek to entrench current and historical structures of power. Governance after the managerial turn, however, also requires scholarly attention to some new topics, such as questions about how to interpolate rule-of-law constraints within data driven, algorithmic processes that resist detailed self-accountings.[62]

In short, this Symposium seeks to begin a conversation, not to end one. That said, it offers some ambitious and provocative responses to a question we get asked often: If not managerialism, then what?

62. *See* MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW: NOVEL ENTANGLEMENTS OF LAW AND TECHNOLOGY 174–83 (2015); *see also generally* LAURENCE E. DIVER, DIGISPRUDENCE: CODE AS LAW REBOOTED (2022).