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Regulating into Uncertainty: Regulation as a Discovery Process

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Should Internet Platform Companies Be Regulated – And If So, How?

Introduction

A fundamental puzzle underlies the entire edifice of the administrative state: why do we need it? Agencies' power derives from Congressionally enacted statutes. But if Congress knows enough to enact these statutes, why not just rely on Congress to write the rules that, instead, we (and Congress) currently rely on agencies to write? In other words, what is the role of agencies in writing rules if they are supposed to write only the rules that Congress tells them to write?

This question has been a central issue in the theory of administrative law over the past century, evolving from "transmission belt" theory to "expertise," to "interest group," and most recently to "presidential administration" models. Each of these provides a different answer to the question of the role of the agency in giving meaning to Congressionally defined authority.

This article suggests a different role for agencies: to develop regulation as a discovery process. Congress doesn't rely on agencies merely because it lacks the information needed to define the static details of regulation (although that is certainly often the case). Uncertainty is endemic to the regulatory enterprise, and although an expert agency surely is aware of more of the relevant, existing information and knowledge than the generalist Congress, the much more significant problem remains that the information available at the time of regulation is rarely, if ever, sufficient for optimizing regulation.¹ Thus, we argue that an important function of regulation lies in agencies' superior ability to identify the limits of knowledge and to implement regulation in order that it both reflects those limits and can adapt to future information. A central part of the regulatory process is, therefore, to figure out what it is that Congress (or the regulator itself) didn't know that it needed to know to figure out how to regulate. What we suggest here is that a central part of the regulatory process should *also* be to ensure that the regulatory process (including both the background rules (e.g., the APA) and judicial review) not only recognizes the limitations of information, but also incorporates mechanisms to reduce regulatory uncertainty (i.e., to produce necessary but lacking information) and to ensure that regulation adapts in light of the new information it produces.

This shines a light on an important tension in the administrative state—a tension that the evolution of models from transmission belt through presidential administration has been chasing: the tension between the recognized need to sometimes to regulate and the uncertainty over how actually to regulate. The congressional demand often embodied in regulation is for agencies to limit, reduce, overcome uncertainty. The idea of regulation as a discovery process runs orthogonal to this impulse, arguing that uncertainty should instead be embraced and incorporated into the regulatory edifice.

This paper proceeds in four parts. The first part situates the discussion of the role of information in regulation by considering the role of information in markets. Economists have long discussed

¹ "The future is not simply 'unknown,' but is 'nonexistent' or 'indeterminate' at the point of decision." JACK WISEMAN, *COST, CHOICE, AND POLITICAL ECONOMY* 230 (1989).

the ability to produce and make productive use of information as a defining feature of markets and one of their primary advantages compared to regulation. It is this understanding, that markets serve as a discovery process, that frames our interest in the question whether regulation can serve a similar role. Part II then looks at the role of information in regulation, considering both how shifting understandings of the role of information (especially in the form of expertise) affected understandings of the purpose and structure of the administrative state over the 20th century. Part III considers several categories of regulation as a discovery process, looking at examples of how we may approach regulation in the face of uncertainty and the use of regulation to produce information. The basic idea of regulating in the face of substantial uncertainty raises a range of legal questions and concerns. Part IV considers these concerns. For instance, courts may consider rules that are expressly based on uncertain information to be arbitrary or capricious; regulations that may dynamically change in response to uncertain future events could face due process concerns; empowering agencies to regulate into uncertainty almost necessarily requires delegating even more substantial authority to them that already is. These and other concerns are considered.

I. Information in Economics: The Market as a Discovery Process

This section provides the background for understanding the role of information in regulation by briefly explaining its importance in the market process. There is, of course, no strong market process that guides government regulation. But because markets are the best devices for encouraging the creation of information and its incorporation into decision-making processes,² it stands as something of an ideal.³ Our hope is that by understanding the dynamics of information in market settings we can discern guideposts that may be implementable in the regulatory context to understand and improve the role of information in regulatory settings.

The assumption of perfect information in static neoclassical modeling does *not* represent the real world. A more dynamic understanding of the market process, informed by insights from the Austrian school of economics, helps illustrate the necessity of change and adaptation in response to new information.

For instance, dynamic markets are characterized by technological change, business model and product innovation, and, inevitably, creative destruction. The strategy-oriented dynamic markets literature is broadly concerned with competition over time in the face of uncertainty and changing markets. As Jorde & Teece have written:

As Schumpeter (1942) suggested . . . , the kind of competition embedded in standard microeconomic analysis may not be the kind of competition that really matters if

² See generally ISRAEL M. KIRZNER, *THE MEANING OF MARKET PROCESS* (1992).

³ “[T]he single most widely accepted rule for the governance of the regulated industries is regulate them in such a way as to produce the same results as would be produced by effective competition, if it were feasible.” ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS*, VOL. I 17 (1970).

enhancing economic welfare is the goal of antitrust. Rather, it is dynamic competition propelled by the introduction of new products and new processes that really counts.⁴

Their work is rooted significantly in the Austrian tradition, which eschews static equilibrium analysis: “competition is by its nature a dynamic process whose essential characteristics are assumed away by the assumptions underlying static analysis.”⁵

But at its root the problem of dynamic markets, and especially of their regulation, is a problem of information. For example,

[t]he implication that Hayek recognized is that one cannot regard the wishes and desires of consumers as information given to producers; instead, one must view the task of identifying consumers’ preferences as a problem that the process of competition can solve.⁶

The problem with the application of static analysis to dynamic markets is not only that it misunderstands the nature of the competitive process, but also that, by doing so, it makes assumptions about unknowable future conditions that are, by their nature, even *less* knowable by regulators. The problem of accounting for dynamic markets is especially acute for regulators because they face not only the fundamental uncertainty regarding future consumer preferences, exogenous technological change, and the like, but also uncertainty regarding the welfare implications of business’ current responses to their *own* anticipation of these conditions.

Also crucial—particularly to the extent that process and business model innovations are a key source of market dynamism—the extent of unknown (or unknowable) information includes not only the blunt effects on investments in product innovation, but also the effects on incentives to adopt efficient and innovative organizational structures and business models.

Managers of firms themselves almost certainly don’t know in most cases whether their decisions are optimal. Particularly in the context of novel products, technologies, and business models, the longevity (let alone prior success) of existing exemplars may be nonexistent or of little

⁴ ANTITRUST, INNOVATION, AND COMPETITIVENESS 5 (Thomas M. Jorde & David J. Teece eds., 1992).

⁵ Friedrich A. Hayek, *The Meaning of Competition*, in FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 94 (1948). See also Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (1942) (concluding that: “Thus it is not sufficient to argue that because perfect competition is impossible under modern industrial condition or because it always has been impossible the large-scale establishment or unit of control must be accepted as a necessary evil inseparable from the economic progress which it is prevented from sabotaging by the forces inherent in its productive apparatus. What we have got to accept is that it has come to be the most powerful engine of that progress and in particular of the long-run expansion of total output not only in spite of, but to a considerable extent through, this strategy which looks so restrictive when viewed in the individual case and from the individual point of time. In this respect, perfect competition is not only impossible but inferior, and has no title to being set up as a model of ideal efficiency. It is hence a mistake to base the theory of government regulation of industry on the principle that big business should be made to work as the respective industry would work in perfect competition.”).

⁶ Sidak & Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 604 (2009).

value.⁷ It might seem attractive to look to indicia like profits, prices, and output levels to assess optimality, but with what degree of reliability can we tell if a firm is operating “optimally” when the prevailing price is zero, where inputs and outputs are exceedingly heterogeneous, or where (as Harold Demsetz has often stressed), past profits under one set of conditions are no indication of future profits under an entirely different set of conditions?⁸

All economic activity is fundamentally governed by a set of judgments regarding potential trade-offs. Thus, the roles of regulators need to be evaluated against a backdrop where technology enables businesses of the modern economy to experiment with new forms of organization, distribution, and customer satisfaction—which is to say, a freedom to further diversify and tailor the sets of potential tradeoffs that consumers have available. The point is to make sure that we leave room for innovation in business models in order to allow individuals to discover when those trade-offs make sense. But many regulations significantly interfere with this process.⁹

The work of Mises, Hayek, and many of their followers distinctly appreciates these twin information problems, and describes the market as an entrepreneurial “discovery procedure”¹⁰ by which the price system assesses the risk created by uncertainty, as well as new information as it arises, permitting them to be incorporated into decision making. As Israel Kirzner puts it:

the price system promotes alertness to and the discovery of as yet unknown information (both in regard to existing opportunities for potential gains from trade with existing techniques and in regard to possibilities for innovative processes of production).¹¹

As noted, crucial to the Austrian conception is the fundamental problem of imperfect information, the appreciation for which leads to particular insights into market processes.

The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate “given” resources—if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data”. It is rather a problem of how to

⁷ See generally Geoffrey A. Manne & Todd J. Zywicki, *Uncertainty, Evolution, and Behavioral Economic Theory*, 10 J. L. ECON. & POL’Y 555 (2014).

⁸ See, e.g., Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973). See also YALE BROZEN, *CONCENTRATION, MERGERS, AND PUBLIC POLICY* (1982).

⁹ For example, prohibitions on collection and use of data absent demanding notice and consent obligations curtails innovative uses of data and experimentation in business models and even corporate organization. This is especially true where such rules place the greatest limitations on sharing of data outside a traditional firm structure—meaning they tend to ossify hierarchical firms even as the very technology at issue is undermining the relative benefits of traditional firm structure.

¹⁰ Hayek, *supra* note 5.

¹¹ ISRAEL M. KIRZNER, *THE MEANING OF MARKET PROCESS* 104 (1992).

secure the best use of resources known to any of the members of society, for ends whose relative importance only those individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in totality.¹²

Most notably, the evolving improvement of the market and its participants derives from the very striving to overcome uncertainty and ignorance:

What Mises and Hayek preserved was a vision of the market which firmly recognizes its systematic (rather than chaotic or haphazard) character while never losing sight of the ‘open-endedness’ of the decision making environment—an open-endedness generated by the imminent passage of time, by the imperfect knowability of the future and by the consequent omnipresence of radical uncertainty. This feat they accomplished by pointing the way to an understanding of market processes as systematic “discovery procedures”—i.e. spontaneous mutual learning procedures continually being set in motion by entrepreneurial human agents. The drive, the alertness and the incentives which spur human action tend to guide these unmodellable entrepreneurial discoveries in the direction of enhanced mutual knowledge, of enhanced interpersonal coordination.¹³

Discovery by entrepreneurs in the marketplace is not just about finding previously unknown answers to known questions. The open-endedness of the market process means the questions themselves change. In other words, it’s not just about figuring out the most cost-effective way to serve consumer preferences that can be taken as a given. Consumer preferences are also in flux. This is best illustrated by the written testimony of Amazon CEO Jeff Bezos for his appearance before the House Judiciary Committee in a recent antitrust hearing:

In my view, obsessive customer focus is by far the best way to achieve and maintain Day One vitality. Why? Because customers are always beautifully, wonderfully dissatisfied, even when they report being happy and business is great. *Even when they don’t yet know it, customers want something better, and a constant desire to delight customers drives us to constantly invent on their behalf. As a result, by focusing obsessively on customers, we are internally driven to improve our services, add benefits and features, invent new products, lower prices, and speed up shipping times—before we have to. No customer ever asked Amazon to create the Prime membership program, but it sure turns out they wanted it.* And I could give you many such examples. Not every business takes this customer-first approach, but we do, and it’s our greatest strength. Customer trust is hard to win and easy to lose. When you let customers make your business what it is, then they will be loyal to you—right up to the second that someone else offers them better service. We know that customers are perceptive and smart. We take as an article of faith that customers will notice when we work hard to do the right thing, and that by doing so again and again, we will earn

¹² Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

¹³ KIRZNER, *supra* note 11, at 135.

trust. You earn trust slowly, over time, by doing hard things well— delivering on time; offering everyday low prices; making promises and keeping them; making principled decisions, even when they're unpopular; and giving customers more time to spend with their families by inventing more convenient ways of shopping, reading, and automating their homes.¹⁴

For market participants, prices serve as an important source of information to help them economize. For consumers, prices help them determine the quantities and qualities of the products they desire on the margin. For entrepreneurs, the prices of capital goods allow for rational calculation,¹⁵ and profit-and-loss signals whether or not they successfully brought value to society.¹⁶ The feedback effect from prices allows markets participants to adjust their behavior amidst constant change without having to know the cause of those changes.

Coordinating such a system entails providing immediate feedback that provides information regarding the “rules of the road” (and their violations). But this alone is insufficient to achieve optimality. While the provision of certainty (i.e., the “rule of law”) is important, it is insufficient to ensure that the system improves—or even, given the inevitable uncertainty and political influence under which it is devised, that it is optimal in a static sense.

Kirzner offers an apt example. Consider a well-designed system of traffic management. “In the absence of [] a central omniscient mind, a well-designed (and fully enforced) system of traffic signals can achieve co-ordination by providing each driver of a vehicle with confident assurance as to what the other driver will decide to do. . . . By timing the light changes appropriately, smoothly co-ordinated traffic conditions can be achieved.”¹⁷

But avoiding collisions is not the only dimension on which we would judge the quality of such a regulatory system. “A successful traffic signaling system will not only succeed in avoiding collisions, it will avoid requiring cars to wait needlessly (such as at times when traffic along the other direction is extremely light). Superior co-ordination would permit the timing of light changes to reflect the relative intensities of traffic along the two intersecting streets.”¹⁸ And while collision avoidance can be achieved under any of a wide range of specific rules (so long as they are known and enforced), optimizing travel time requires a far more complex system for which not only will there be an extremely small number of appropriate rules, but even those rules will have to change throughout the day and over time in both predictable and unpredictable ways.

¹⁴ Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law (statement of Jeff Bezos, CEO, Amazon), available at <https://assets.documentcloud.org/documents/7009139/jeff-bezos-written-testimony.pdf> (emphasis added).

¹⁵ See generally LUDWIG VON MISES, *ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH* (1920).

¹⁶ See generally LUDWIG VON MISES, *BUREAUCRACY* (1944).

¹⁷ KIRZNER, *supra* note 11, at 141.

¹⁸ *Id.*

In order to “achieve coordination” in *this* sense, the regulatory system itself must be dynamic, and it must incorporate some mechanism by which it learns. Thus, as Kirzner posits:

But imagine now that the signal system is programmed in a manner that, at the beginning of each day, alters the system’s timing to reflect yesterday’s actual time-profile of traffic experience. . . . Then the very experience that results today from the as yet-imperfectly co-ordinated system plays its part in bringing about a revision in the system’s timing, in a way that substitutes a better co-ordinated system in place of the less co-ordinated one. This kind of signal system (including its property of improving itself by “learning” from the unfortunate results of its earlier imperfections) may also be described as one that “achieves co-ordination”. However, here the phrase refers to the property of the system that permits it to identify and begin to correct its earlier weaknesses.¹⁹

Even though such a system necessarily makes errors at the outset, as long as it is learning and improving, it, too, may be said to provide information and achieve coordination:

[T]he system, from the very outset, has possessed the property of ‘achieving co-ordination’ in the sense of incorporating a feedback mechanism that deploys the results of its own inadequacies towards their systematic elimination. Here too the co-ordinating property of the system arises from the way that it provides information – but in a sense quite different from that relevant to the system that is already perfectly timed. In this second, initially faulty, system, the co-ordinating properties arise from its ability to communicate information concerning its own faulty information communication properties.²⁰

There is a risk that efforts to improve our systems of regulation focus too much on providing “perfectly timed” static coordination from the outset, and not enough on ensuring that the system itself can properly evolve (and, of course, allow those it regulates to adapt, and so on)—even if doing so means the system engenders short-term, sub-optimal results at the outset. While the effort to improve regulation from the outset to incorporate and convey information sufficient to enable coordination by market actors is beneficial, it is beneficial only relative to an even worse outcome that doesn’t even try to do that. It is not, however, beneficial if, in exchange, it fails to adapt and to permit adaptation.²¹

Regulation that cannot keep up with changes in the market, locks in particular technologies or business models, or prevents entrepreneurs from trying new ways to satisfy consumers will cause significant losses to society. The challenge is to think about how to design

¹⁹ *Id.* at 142.

²⁰ *Id.*

²¹ See Frank H. Easterbrook, *Ignorance and Antitrust*, in *ANTITRUST, INNOVATION, AND COMPETITIVENESS* 119, 122-23 (Thomas M. Jorde & David J. Teece eds., 1992) (“An antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the cost of production would be a calamity.”).

regulation to deal with real world harms associated with dynamic markets while avoiding societal harms associated with curtailing the very dynamism inherent in the marketplace.

II. Information in Regulation

The institutional comparison between market processes and government processes can be viewed through the lens of how well each produces and makes use of information. In particular, participants in each process have very different feedback effects under the current regulatory approach.

This section will explain how information is produced and used in regulation. Part II.A will explain how regulatory agencies are generally structured by Congress to answer predetermined questions by giving them autonomy over how they discover and apply information. Part II.B will situate this information approach within the current theories of the administrative state. Part II.C will then consider the limits on the use of information in regulation.

A. Regulation takes a different information approach.

The current regulatory approach in the United States is largely reliant upon federal regulatory agencies. Technically part of the executive branch, legislation delegates responsibilities for rulemaking to these “administrative” agencies. The Supreme Court have allowed this as long as Congress gives agencies an “intelligible principle” to base their regulation on.²²

The Supreme Court has stated the reason for this is because of the perceived complexity of regulating society:

Applying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it "constitutionally sufficient" if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.²³

Through statute, Congress essentially sets the agenda for regulatory agencies, from the subject matter to what they must consider. As will be discussed in more detail below, the main procedural limitation on regulatory agencies comes from the Administrative Procedure Act (APA) and courts through arbitrary and capricious review.

²² See *Hampton Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

²³ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Sometimes, statutes also set out limitations on the information the agency may consider. In *Whitman v. American Trucking*,²⁴ for example, the Supreme Court found the EPA may *not* consider implementation costs when promulgating national ambient air quality standards under Section 109 of the Clean Air Act.

For the most part, however, agencies are given wide latitude to consider any information, including that gathered through notice-and-comment rulemaking, to create rules. This information is of a fundamentally different kind than that imparted through the market process, however.

In markets, as described above, there is a lot of unarticulated information built into prices that are the product of human action, but not of human design. Much of this information is the type of tacit knowledge which is known without being articulated. For instance, the cost of hiring a master plumber is not due to his ability to explain how to fix your sink or toilet in propositions, but in his actual ability to do so. In an attempt for the master plumber to explain how you could fix it yourself, much information would be lost. The fragmented information known to the many members of society is aggregated in market transactions, including changes in what is known, by prices and the resulting trade-offs made by participants in the market process each and every day in transactions.

But in regulatory bodies, the type of information gathered by regulatory agencies is only that which is articulable. As explained by Thomas Sowell:

Another way of looking at the vicissitudes of articulation is that one cannot articulate what does not exist—namely an objective set of characteristics which determine an objective scale of economic priorities. All values are ultimately subjective and incrementally variable. No single social group, or scale of priorities can define the varying importance of multifaceted characteristics, either to disparate consumers or to equally disparate producers. The millions of users of millions of products can judge incremental trade-offs when confronted with them, but no third party can capture these changing trade-offs in a fixed definition articulated to producers in advance. When user monitoring, conveyed through prices and sales, is replaced by third-party articulation, in words or numbers, vast amounts of knowledge are lost in the process. In the absence of user monitoring of producer output through a market, there must be third-party specification of what the output shall consist of, and this runs into the inherent limits of articulation.²⁵

The limits of articulation by Congress or even regulatory bodies often becomes the source of future need for clarification by regulators and courts in time-consuming review processes. For example, what is a sandwich? The dictionary definition of “two or more slices of bread or a split roll having a filling in between”²⁶ would necessarily include things not really thought of as sandwiches, like

²⁴ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001).

²⁵ THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 216-17 (2nd Ed. 1996).

²⁶ See, e.g., *Sandwich*, Merriam-Webster (2020), <https://www.merriam-webster.com/dictionary/sandwich>.

hot dogs and burritos. Regulatory and tax authorities have had to grapple with this question and have come up with different answers and arbitrary exceptions to the definitions they create.²⁷

In the area of technology regulation, this is no less common. For instance, the definition of “personal information” under the Children’s Online Privacy Protection Act (COPPA) is defined by statute to be:

individually identifiable information about an individual collected online, including—

- (A) a first and last name;
- (B) a home or other physical address including street name and name of a city or town;
- (C) an e-mail address;
- (D) a telephone number;
- (E) a Social Security number;
- (F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual; or
- (G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.²⁸

In 2012, the FTC set to update the COPPA rule by amending the definition of personal information to include persistent identifiers that by themselves do not permit the physical or online contacting of a specific individual, nor share individually identifiable information. The FTC stated it “continues to believe that persistent identifiers permit the online contacting of a specific individual,” arguing that because behavioral advertising is premised on trying to provide individually-desired ads, that it is clear that these persistent identifiers lead to targeting.²⁹ The technical issues for how that is possible on a shared devices is elided over, and the harm of behavioral advertising to children assumed.

The cost of getting “verifiable parental consent” is high enough that online children’s content forgoes it. Due to a lack of behavioral advertising, there is less value in creating online children’s content. With less content available, there are less transactions that exist—which means there are less children enjoying online children’s content than otherwise.

²⁷ See, e.g., Michele Debszak, *5 Ways to Define a Sandwich, According to the Law*, MENTAL FLOSS (Mar. 22, 2018), <https://www.mentalfloss.com/article/501011/5-ways-define-sandwich-according-law>.

²⁸ 15 U.S.C. § 6501(8).

²⁹ Children’s Online Privacy Protection Rule, 78 Fed Reg. 3972, 3981 (Jan. 17, 2013), *available at* https://www.ftc.gov/system/files/documents/federal_register_notices/2013/01/2012-31341.pdf.

As a result, the incremental judgment of whether parents allow their children to use devices to access online content is largely removed from them by a statute that is premised on increasing parental involvement. This is an example of how an agency can effectively rewrite statutes based upon the inherent limits of articulation, in a way that takes choices about tradeoffs away from consumers, in the name of a problem (behavioral advertising to children) which didn't exist at the time the statute was drafted.

A. Theories of the administrative state, and the role of information in each

There are different theories which attempt to understand the administrative state within the American constitutional framework where Congress is supposed to be the legislature. While much has been written about each theory, this section wants to explore the informational issues present in each.

1. Transmission Belt

The transmission belt theory is that agencies basically serve to fulfill the mandates of Congress, in other words, they serve more or less as a transmission belt in faithfully creating rules Congress desired.³⁰

Many have noted the basic problem with this theory is that it doesn't square with the discretion administrative agencies have when Congressional mandates are broad, ill-defined, ambiguous, or when circumstances change from what was originally conceived of by Congress.³¹

But there is a further problem with the transmission belt theory in that if Congress had sufficient information to know what the best rule should be, then delegating the power to an agency to determine the rule is unnecessary. Congress could create the best rule and then amend as necessary.

2. Expertise

The expertise model justifies delegation on the grounds that agencies are staffed with experts "committed to an ethic of professionalism and rationality", arguing they are better positioned to produce sound regulation and good government than elected officials."³²

³⁰ Lisa Schultz, Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 53 (2006) ("Agencies are merely implementing statutory instructions... agency officials assumed the virtues of their authors; agency officials were viewed as faction-proof, and efficacious as was Congress.").

³¹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-77 (1975).

³² Lisa Schultz, Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47, 53 (2006).

Many find this theory attractive on the ground that it seemingly justifies administrative law's general deference to agency discretion.³³ But agency practice makes clear that the decisions regulators must make are not simply about facts, but about value choices. Critics have noted that in many cases this deference frees agencies to engage in political judgment free from political supervision.³⁴

3. *Interest Group*

The interest group theory is based upon the idea that since interest groups are more likely to be the constituencies for agencies, then agencies should be "open to all affected interests" and be "even more accessible and responsive to the public than [] elected officials."³⁵

Aside from the obvious criticism that this view further empowers organized interests at the expense of diffused interests, leading to almost complete capture in things like negotiated rulemaking, there are informational deficiencies as well. The response of agencies to create methods to make sure all affected interests were heard were both time-intensive and costly.³⁶ As a result, agencies were reluctant to engage in rule changes at all, including the type of changes which would be necessary in response to changed information.

4. *Presidential Administration*

The Presidential Administration theory is that since agencies are "subject to oversight and management of the chief executive... officials stood in the shoes of their boss" and they are "as accountable, faction-resistant, and efficacious as the president."³⁷ And since presidents are chosen by the nation as a whole, they are "more responsive to and representative of the people than Congress" as well as "more resistant to factional influence."³⁸ Supporters of this theory have argued that since presidents are held accountable for results by the public, they have the interest, as well as the ability as the chief executive, to coordinate among agencies and ensure they are acting in a cost-effective manner.³⁹

This theory is also inconsistent with governmental practice in that the President does not oversee agency action in the way imagined. Critics have pointed to

³³ See Timothy H. Jones, *Administrative Law, Regulation, and Legitimacy*, 16 J. L. AND SOCIETY 410, 421 (1989) ("The attraction of the expertise model is that it promises to provide a solution to the problem of granting discretionary powers to administrators.").

³⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2262-64 (2001).

³⁵ Lisa Schultz, Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006).

³⁶ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2266-67 (2001).

³⁷ Lisa Schultz, Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006).

³⁸ *Id.* at 54.

³⁹ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339-46 (2001).

Informational problems help explain this. Even within the government, gathering information about what each agency is doing is costly. No one person can possibly oversee this process in a way that assures every rule is cost-effective. OIRA is set up to do cost-benefit analyses of rules, but even there, they can't possibly review everything and there seems to be strategic intervention in when and how agency action is reviewed.

B. Limits on the use of information in regulation

As noted above, regulatory agencies are given pretty wide latitude in what information they consider and how they use it in the creation of rules. The internal constraints on agency action above were found to be wanting in assuring agencies gather and use information effectively. This section details external limitations imposed on regulatory agencies from administrative law.

Chevron deference gives agencies considerable discretion in interpreting ambiguous Congressional mandates which courts will not second-guess.⁴⁰ Similarly, *Auer* deference gives agencies discretion in interpreting ambiguous agency rules.⁴¹

The limitations in how agencies use information comes primarily from the Administrative Procedure Act (APA). The APA provides that courts may hold unlawful and set aside agency actions under a number of circumstances.⁴² Specifically, Section 706 of the APA states:

The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.⁴³

Arbitrary and capricious review was borne out of judicial attempts to figure out how and what should inform the regulatory process under the APA. The Supreme Court in *State Farm*, in particular, grappled with the proper standard for judicial review:⁴⁴

⁴⁰ See *Chevron U.S.A. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984).

⁴¹ See *Auer v. Robbins*, 519 U.S. 452 (1997). See also *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

⁴² See 5 U.S.C. §§ 701-706.

⁴³ *Id.* at §706(2).

⁴⁴ See *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute ... The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise ... We may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.⁴⁵

In other words, it was an attempt to figure out how to incorporate a recognition of uncertainty into the process.

Another limitation on agency discretion to update rules under current administrative law is the major questions doctrine. Originally introduced in *Brown & Williamson*⁴⁶ but most recently delineated *UARG*⁴⁷ and *Burwell*,⁴⁸ the Supreme Court has noted

[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," ... we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."⁴⁹

Practically, the reason agencies are relied upon to update rules is because it is even more difficult to update statutes through legislation. Agencies are thus the main locus of rulemaking in response to societal change.

However, the speed of change by even regulatory agencies pales in comparison to the changes in a dynamic marketplace.⁵⁰ Lacking the same profit-and-loss feedback mechanism that

⁴⁵ *Id.* at 42-43 (internal quotations and citations omitted).

⁴⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁴⁷ *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302 (2014).

⁴⁸ *King v. Burwell*, 576 U.S. 988 (2015)

⁴⁹ *UARG*, 573 U.S. at

⁵⁰ See, e.g., Mark Fenwick, Wulf A. Kaal, & Erik P.M. Vermeulen, *Regulation Tomorrow: What Happens When Technology is Faster than the Law?*, 6 AM. U. BUS. L. REV. 561 (2017).

entrepreneurs have in the marketplace, agency decisionmakers must rely on other criteria to judge rules.⁵¹

Since an uncertain Congress delegates rulemaking to expert agencies, and courts must review the agencies, but generalist courts aren't experts, courts are left in a position where they must create standards of how to determine whether expert agencies did what they were supposed to under the enabling statute and the APA. Decisions like *Chevron* and *Auer/Kisor* to *UARG/Burwell* to *State Farm* are attempts by non-expert courts to create heuristics to review what agencies are doing. The benefit of these requirements is to give courts a better way to review agency action.

There are also constitutional limitations on agency action under the Due Process clause.

For regulations that do not impinge upon a protected class or "fundamental" right, courts review it under the rational basis test.⁵² This is a relatively low level of review, even compared to the APA's arbitrary and capricious test. The courts give agencies a lot of deference under the rational basis test, and require a litigant show a regulation is *not* rationally related to a legitimate government interest. Even if the actual reason the agency did something is not in the record, for the purposes of the rational basis test, any "reasonably conceivable state of facts that could provide a rational basis."⁵³

Fair notice arguments under the Due Process clause can serve as a limitation on agency enforcement actions. If a regulated entity could not have known what conduct is forbidden or required under a rule, then it has no fair notice. Courts have found a statute or regulation under unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."⁵⁴

In *FTC v. Wyndham*, the Third Circuit affirmed the District Court's dismissal of the fair notice arguments made by Wyndham.⁵⁵ The FTC brought a Section 5 unfairness enforcement action⁵⁶ against Wyndham for its poor data security practices, which were alleged to have led to a series of breaches by Russian hackers who gained access to credit card and other information of Wyndham consumers. Wyndham argued that the statute alone failed to give them fair notice of the data security obligations the FTC was attempting to enforce. The Third Circuit distinguished between situations where an agency has promulgated a rule or an interpretation of a rule, which

⁵¹ See generally LUDWIG VON MISES, BUREAUCRACY (1944).

⁵² See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵³ *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

⁵⁴ *FCC v. Fox*, 567 U.S. 239, 253 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

⁵⁵ *FTC v. Wyndham*, 793 F.3d 236 (3rd Cir. 2015).

⁵⁶ 15 U.S.C. § 45(a).

then requires “ascertainable certainty” of what the regulation means for fair notice purposes,⁵⁷ and situations in which courts are called upon to interpret statutes in the first instance. In those cases, the standard of fair notice is lower: whether it is “so vague as to be no rule or standard at all.”⁵⁸ In other words, “[f]air notice is satisfied here as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute.”⁵⁹ Applying this lower standard, the court found Wyndham had notice that it could be found liable for bad data security practices, noting in particular that the FTC had a guidebook for businesses which gave a checklist for data security⁶⁰ and that the FTC had previously brought enforcement actions against other companies, including a very similar one against CardSystems Solutions.⁶¹

In sum, the result is that the law gives agencies considerable discretion to make rules, with the main limitations being low-level bars of rationality and clarity.

III. Regulating in Light of Uncertainty: Regulation as a Discovery Process

The account offered in Part II suggests that there is often a mismatch between the purpose for which regulatory authority is given to agencies and what agencies are able to do with that power. Congress often turns to agencies to chart a path through uncertain waters, relying on administrative procedure to gather the best available knowledge and agency expertise to translate that knowledge into actionable regulation. But sometimes it takes more than mere expertise to overcome such uncertainty. In such cases, charting such a path may require first producing new information or knowledge – identifying the unknown unknowns that must be understood before a regulator can even begin charting such a path. In such cases, a primary role of regulatory procedure must be to serve as a discovery process.

The discussion below considers what it may mean for regulation to serve as a discovery process. Three different ways regulation does and could incorporate uncertainty are considered. Part III.A considers self-executing regulation, which is the type of regulation which is designed to respond to change in a predetermined way. Part III.B looks at information-exogenous regulation, which produces information which future regulators can then act upon. Part III.C then describes information-endogenous regulation, which designed to both create and respond to information.

⁵⁷ See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C.Cir.1995) (“In such cases, we must ask whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”).

⁵⁸ *Wyndham*, 793 F.3d at 255 (quoting *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 632 (3d Cir.2013)).

⁵⁹ *Id.* at 256.

⁶⁰ See *id.* at 256-57.

⁶¹ See *id.* at 257-58.

A. Self-executing Regulation

The simplest form of regulation written to respond to uncertainty is static regulation written to respond to changing circumstances in a predetermined way. Such does not respond to uncertainty necessarily by producing new information. Rather, it attempts to predict the likely responses if that uncertainty were overcome, and tailors the regulatory design to those predictions.

The most common form of such regulation is regulation that is based upon thresholds or triggers, or that is indexed to external metrics such as CPI. Such laws and regulations are common. The Hart-Scott-Rodino Act, for instance, which requires companies engaging in a merger to notify the government 30 days prior to the merger's closing, only requires notification for deals above a certain size and indexes that size threshold to inflation.⁶² And it is common for all sorts of industrial and environmental regulation to apply differently to different firms based upon their size.

Another example is regulation that is designed to gradually “phase out” as a series of thresholds or benchmarks are met. Or, similarly, laws and regulations that are intended to change in response to changing market conditions. One example of this is Section 202(h) of the Telecommunications Act,⁶³ in which Congress requires the FCC to periodically review its media ownership regulations and eliminate any that are no longer necessary in light of changing market conditions. This example is notable both because it anticipates the need for regulations to change with changing market circumstances, but also because the requirement is embodied in a legislative directive requiring an agency to engage in a periodic review. We could imagine, instead, a statutory requirement that the agency adopt rules suitable to present market conditions, with the expectation that the agency would devise a mechanism to pace its rules to changing market circumstances.

A final example illustrates another source and sort of uncertainty: uncertainty over how courts may interpret a regulation or statute. One remarkable example is recently-enacted legislation in Tennessee that prohibits abortions after 8 weeks of gestation.⁶⁴ It is unclear whether (but likely that) courts will strike this ban down as unconstitutional. But the legislation includes a severability clause that replaces the ban with one at 10, then 12, then 15, and then further increments of weeks.

B. Information-exogenous regulation

The examples considered in Part III.A demonstrate some amount of dynamism and responsiveness to changing circumstances or circumstances that presented uncertainty at the time the law or regulation was adopted. But they are also very limited in their conception of

⁶² See 15 U.S.C. § 18a.

⁶³ See Pub. L. No. 104-104, §202(h), 110 Stat. 56, 111-12 (1996) as amended by Pub. L. No. 108-199, §629, 118 Stat. 3, 99-100 (2004).

⁶⁴ See TN Pub. Ch. 764 (2020).

“uncertainty” – they primarily demonstrate regulatory responses to “known unknowns.” Cases in which the regulator faces more fundamental uncertainty present more difficult, and interesting, challenges.

A first category to consider is information-exogenous regulation. This is regulation that creates information that regulators can then act upon going forward. The, or at least a, primary purpose of such regulation is the production of information that can subsequently be used by the same regulator, other regulators, or Congress, to design future regulation.

Section 6(b) of the FTC Act⁶⁵ is one edge example of this approach as a regulatory modality. This section empowers the FTC to do wide-ranging investigations of industry practices unrelated to a specific investigation. This power dates to the creation of the agency: under the initial design that Congress considered, the FTC would have had no authority other than to study industries and report their findings to Congress, so that they could be acted upon by Congress through the enactment of subsequent legislation.

While the FTC’s investigative powers clearly demonstrate a case where an agency can use its authority to produce information that feeds into subsequent regulatory action, it is not an example of regulations themselves being used to produce information.

As an example of regulations being used to produce information, considers the FCC’s experimentation with its political advertising rules in the run-up to the 2000 Presidential election. The FCC temporarily suspended rules requiring broadcasters to allow political replies for 60 days to test whether, in the absence of the rules, radio and television stations would commit more air time to political and controversial issues without complaints about unfairness:⁶⁶

The FCC today suspended its political editorial and personal attack rules for 60 days, and asked parties to then submit evidence on the effect of the suspension of the rules 60 days after the suspension ends in order to create a better record on which to review the rules.

In a pending lawsuit challenging the two rules, the U.S. Court of Appeals for the D.C. Circuit had remanded the case to the FCC to supplement its analysis of the rules with evidence superior to that which had previously been supplied, and based on that evidence, provide its rationale for retaining the rules. The Order notes that the record previously before the Commission was “old and possibly flawed,” and that the court had encouraged the Commission to “consider modern factual and legal developments” and “to work from a relatively clean procedural slate.”...

The political editorial rule provides generally that if a licensee airs an editorial supporting a political candidate, it must notify other candidates for that office of the

⁶⁵ See 15 U.S.C. Sec. 46(b).

⁶⁶ Stephen Labaton, *In Test, F.C.C. Lifts Requirement On Broadcasting Political Replies*, NEW YORK TIMES A1 (Oct. 5, 2000), available at <https://www.nytimes.com/2000/10/05/us/in-test-fcc-lifts-requirement-on-broadcasting-political-replies.html>.

editorial and provide them an opportunity to respond on-the-air. Similarly, the personal attack rule provides generally that when, during a program on a controversial issue of public importance, an attack is made on someone's integrity, the licensee must inform the subject of the attack and provide an opportunity to respond on-the-air.

The Commission noted that broadcasters have contended generally that the rules have had a "chilling effect" on programming, and specifically that elimination of the political editorial reply rule would increase broadcast station editorializing. The Commission said that temporarily suspending the rule during the current election period would enable it to receive updated information on these issues.

Specifically, the Commission asked broadcasters to report on (1) the number of political editorials run during the suspension period, (2) the number of editorials run during prior election cycles, (3) the nature of the elections on which they editorialize, such as national, state, or local, and (4) whether other media outlets editorialized on those races.

The Commission noted that because the Court of Appeals had asked the FCC to provide further rationale for having reply rules for editorials on political candidates, but not on other topics, it also needs information concerning broadcasters' editorial practices more generally. Specifically, it asked the broadcasters to report on (1) whether they editorialize on topics unrelated to political campaigns, (2) whether the rate of such editorials is increasing or decreasing, and (3) what factors are relevant to a broadcaster's decision to editorialize.

With respect to the personal attack rule, the Commission said it expects broadcasters to collect information regarding complaints concerning personal attacks received while the rule is suspended, and to compare the number and nature of the complaints during this 60-day suspension period to a comparable period while the rule was in effect.⁶⁷

One week after the announcement of this policy, the D.C. Circuit issued a writ of mandamus to the FCC to repeal the rules.⁶⁸ The rules had already been remanded to the FCC to justify them, and the D.C. Circuit did not think the proposed suspension was an adequate fix. Instead, it saw this as an example of a continued failure to provide an adequate government interest in the rules. It was not because of the experimentation itself that the rules were struck down, however, but because the agency failed to justify the continuation of the rules under arbitrary and capricious review.

⁶⁷ *FCC Suspends Political Editorial and Personal Attack Rules for 60 Days; Asks Parties to Submit Evidence on Effect of Suspension* (Oct. 4, 2000), available at https://transition.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0041.html.

⁶⁸ *Radio-Television News Directors v. FCC*, 229 F.3d 269 (D.C. Cir. 2000); see also *See Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999).

Congress has attempted to create mechanisms that force information for regulatory updates through sunseting. Rules on extending compulsory licenses without retransmission consent requirements of certain local network broadcasting to satellite providers are set to sunset every five years and require Congressional reauthorization.⁶⁹

C. Information-endogenous regulation

An even more ambitious form of regulating into uncertainty is regulation that is designed both to produce and respond to new categories of information. For example, an information-endogenous rule could establish testable hypotheses and be designed to gather information needed to evaluate whether the hypothesis was correct. The idea here is to recognize the uncertainty regulators face and create mechanisms to efficiently adjust rules in response to changes in the marketplace. The approach here described is a discovery process for the best rules based upon information-feedback.

This sort of hypothesis-testing mechanism differs from the self-executing modality discussed in Part III.A. The self-executing modality focuses on how regulation should adopt to predictable, knowable, outcomes. The hypothesis-testing modality, on the other hand, is focused on identifying when regulation produces results that differ from what the regulator expected, and charting some course in response to those unexpected results.

The 1996 Telecom Act is a potential example of information-endogenous regulation. The Telecom Act was premised on a hypothesis: the telephone network had long been viewed as a natural monopoly in which competition was not possible, but in the early 1990s it was increasingly the view that competition was possible and desirable in some parts of the network. For instance, while the “last-mile” connection between telephone central offices and customers’ houses could well be a natural monopoly, it was clearly the case that the long-distance market could be competitive. It was less clear, however, whether there could be competition between middle-mile networks – the networks between central offices, for instance – could be competitive. There was similar uncertainty for many business services. And some even argued that last-mile networks could be competitive.

The 1996 Telecom Act was adopted subject to this uncertainty, and confronted it head-up. A defining part of its structure are mechanisms to allow regulation to “right size” itself to changing industry circumstances – circumstances that themselves are meant to be changed by the Act. Following a partial “ladder of investment” model, the Act is designed to facilitate competitive entry into local telecommunications markets. But it attempts to do so in a staged manner, such that entrants can, and will only have incentives to, enter those parts of the market where competition is economically viable. As such entry occurs and incumbent service providers incrementally face

⁶⁹ See, e.g., Ben Sperry, *It's Time to Let STELA Go Off Into the Sunset and Reform Video Marketplace Regulation*, TRUTH ON THE MARKET (Dec. 19, 2019), <https://truthonthemarket.com/2019/12/19/its-time-to-let-stela-go-off-into-the-sunset-and-reform-video-marketplace-regulation/> (noting “[t]his regulatory scheme was supposed to sunset after 5 years. Instead of actually sunseting, Congress has consistently reauthorized STELA (in 1994, 1999, 2004, 2010, and 2014.”).

competition, the Telecom Act is designed to remove regulatory barriers intended designed for the era of the telephone service as a regulated natural monopoly.

The extent to which the 1996 Telecom Act was successful is debatable – but it was remarkable in its design. Congress recognized that telecommunications regulation needed to be tailored to the efficient structure of the telecommunications market, but that it did not know what that structure was, let alone what the rules to regulate it should be. So it designed a regulatory system that was intended in the first instance to figure out the scope of the market that required regulation and then to develop the rules needed to regulate that market.

This is not a true example of rules being written to respond to “unknown unknowns,” but it does facilitate responding to known unknowns inherent in known unknowns.

IV. Concerns and challenges

Despite the potential benefits of the approach described above, there are potential concerns and challenges. These can be broken down into four general areas: due process, public choice, public accountability, and delegation.

A. Tension with Due Process

As discussed above, one of the limitations on agency discretion even when they receive the highest level of deference is that regulated entities must have fair notice of the rules enforced against them by agencies under the Due Process clause. One potential concern is that if rules become less static, it will result in regulatory uncertainty. In other words, legal certainty is itself an important value that a more dynamic regulatory environment could reduce, which would impact the dynamism of the marketplace.

The Due Process clause requires fair notice to regulated parties. The constitutional standard would be met as long as the regulation does not “fail[] to provide a person of ordinary intelligence fair notice of what is prohibited, or [be] so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁷⁰

Arguably, the rule of law values that undergird the quest for certainty in the Due Process clause would actually be best served by reducing discretion in the hands of regulators. By requiring agencies to have better informational processes, regulation will adapt more efficiently. Nonetheless, there is a tradeoff between legal certainty and adaptability which needs to be considered. While better rules would likely promote more efficiency in the marketplace, there is the possibility that legal uncertainty, even if the possibility is a more efficient rule, will deter investment.⁷¹

⁷⁰ FCC v. Fox, 567 U.S. 239, 253 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

⁷¹ See, e.g., George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295 (2001).

B. Public choice and regulatory capture

While this theory in some ways reduces the discretion of regulators by mandating informational processes, it also in some ways increases the scope of their regulatory ambit. As a result, there is a question as to whether this increases the possibility of organized groups with better information being able to influence agency discretion or capture the process.

Under the approach presented here, it is possible both that special interests could influence the process not only during the initial rulemaking process but also by “gaming” the informational process thereafter. For instance, if regulated entities know that if a regulation will change in a particular way if it fails to live up to the result the agency predicts, then it could try to assure that outcome by changing their behavior.

It is important to note, though, that the regulatory process is already subject to capture and special interest influence.⁷² The current process is heavily reliant on interested parties bringing relevant information to the agencies. The regulated have heavily concentrated costs or benefits from the regulatory process compared to the public a whole and thus a greater interest in the outcomes. The regulated usually have lower knowledge costs as well about the industry under regulation. So the relevant comparison is whether it would be better or worse under this theory.

By requiring better informational processes, regulation would likely be subject to less gaming than currently. The process is justified, under this theory, by how well the agency responds to changing information. It is a valid concern that industry could continue to game the system, but if a rule must change in response to changing conditions, the power of industry to keep affect it is reduced. Greater accountability is fostered by increasing information on the effectiveness of the regulation.

C. Public accountability under other models of the regulatory state

The presidential administration model argues that since the President is a national leader subject to public scrutiny, and has the ability to oversee the executive branch, then he or she would be properly interested and able to assure the regulatory agencies are acting in the public interest. Agencies are further held accountable, according to the transmission belt model, because Congress has control over the purse strings and can hold hearings to question what they are doing if it is outside of the intent of Congress. The challenge to the dynamic model presented here is why is it necessary if the legislative and executive branches, which are subject to public accountability, already have oversight to assure the agencies are acting according to the will of the people.

⁷² See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

There are other reasons to doubt the ability of the President or Congress to promote the type of responsive regulation advocated herein. The most relevant is transaction costs.⁷³

Information is costly to gather. For public accountability purposes, this is information about the regulations and their effectiveness. It is not reasonable to expect that members of the voting public would have as much information about regulations or their effectiveness as the regulators or the regulated. While congressional committees or the President may have more information available, there is still considerable ignorance from those groups about individual rules promulgated by agencies. The likelihood that the public could hold Congress or the President accountable for regulators they are likely ignorant of is very low.

Monitoring costs are similarly high. A lot of political issues divide attention of not only the public but government officials as well. This is just as true of regulations. Since Presidential elections only happen once every four years, while Senators are elected every six, and Representatives every two, even a highly informed public would be unlikely to be able to vote out those who are supposedly keeping the regulators accountable in a relevant period of time that would make regulators feel any need to respond.

The information discovery model can actually complement and enhance public accountability. By requiring agencies to explain not only the relevant information that is important to adopting a rule, but also what would be the type of information that would show the rule is successful or unsuccessful, the public would have better information available. Monitoring costs would similarly be reduced for Congress and the President with clear criteria to judge the effectiveness of regulation.

D. Greater delegation of responsibility to agencies

One of the things implicit in this approach is that agencies are actually given broader scope to regulate. Other than the nondelegation doctrine, agencies are supposed to have an intelligible principle to act upon. The question that arises is whether this approach to regulation would subvert the Constitution's separation of powers by making agencies into legislatures.

Courts have found "in the public interest" to be an intelligible principle.⁷⁴ In other words, agencies are already given extremely broad powers under administrative law. This focus of this theory of regulation is not on the scope as much as the process. The information requirements reduce the discretion of regulatory agencies.

⁷³ Transaction costs include search and information costs, which are those of finding goods in a marketplace; bargaining and decision costs, which are those involved in coming to an agreement with others in a transaction; and policing and enforcement costs, which are those dealing with monitoring the agreement. See Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

⁷⁴ See *Hampton Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

The requirements of the information discovery model is not just about agencies explaining the basis for the rule choices they make, as under current law. It is also about explaining what information would show the agency's chosen approach is wrong. Compared to the current approach, this drastically reduces agency discretion, which is extremely broad under the law.

Effectively, this approach forces agencies to consider the error costs of getting it wrong.⁷⁵ This would be much like antitrust law, which involves a broad scope of analysis in the consumer welfare standard, but narrowed discretion under that standard as shaped by economic analysis and an appreciation for getting it wrong. The result is a broad delegation of authority, but narrowed discretion in application.

Conclusion

Regulation almost always occurs in the face of uncertainty. Yet our approach to regulation almost always masks that uncertainty with a veneer of artificial certainty. We mythologize the legislative and regulatory process, presenting it as a process by which we craft rules that are wise and well-reasoned. To admit uncertainty invites legal challenge and suggests that rules are arbitrary and capricious, or too uncertain to satisfy basic purposes of due process.

But this veneer of certainty does us no favors. This article has argued for a more scientific approach to regulation. This is an approach in which the process of regulation itself is used as a discovery process – in which regulators expressly acknowledge that which they do not know and consciously use regulations to fill in these knowledge gaps. This dynamic approach to regulation – what we call regulation as a discovery process – is starkly different from the more traditional static model of regulation. Endogenizing uncertainty in this way would certainly make regulation a more fraught, transient, exercise – but in the long run, it would produce more robust, beneficial, rules.

⁷⁵ See Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984).