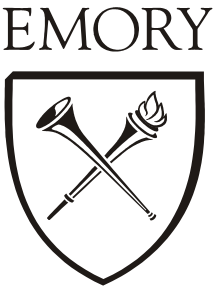

Recognizing the Regulatory Commons: A Theory of Regulatory Gaps

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September 22, 2003
Forthcoming, 89 Iowa Law Review (2003)

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Political economic theories, legal doctrine and political rhetoric frequently assume that overregulation is a pervasive problem requiring remedial measures. Despite the prevalence of these theories, Professor Buzbee demonstrates how a dynamic that he labels the "regulatory commons" problem can create predictable incentives for legislators or regulators to fail to address even broadly perceived social ills. The Article draws on and enriches the "tragedy of the commons" tale, with its usual focus on an underlying common pool resource and conflicts among users of that resource. Professor Buzbee shows how that literature's focus on the underlying resource and multiple resource users neglects incentives for inattention created by the existence of numerous potential regulators. Where numerous regulators share potential jurisdiction over a regulatory opportunity, and there is a mismatch between those regulators' jurisdictions and the causes and effects of a harmful activity, a regulatory commons dynamic is created. The commons resource here is not the underlying threatened amenity, but the shared regulatory opportunity in a situation of jurisdictional mismatch. Where no regulator has primacy over such a social ill, those seeking a regulatory response will be uncertain where to turn, thereby fragmenting their demands and reducing each regulator's perception of a pressing social need. Potential regulators similarly will find ills encountering a regulatory commons dynamic to be unattractive opportunities for political investment and credit claiming. Regulators are unlikely to be blamed for a problematic status quo, will be unable to control other regulators, and if they choose to act may create ineffective regulation due to others' actions. Furthermore, drawing on public choice scholarship and behavioral law and economics, this Article shows how deviation from the status quo baseline will be especially disfavored in the setting of a dispersed social ills and fragmented regulatory frameworks. Professor Buzbee then reviews prominent overregulation theories, many drawn from public choice scholarship, and shows how such overregulation assumptions are reflected in contemporary administrative law jurisprudence. Propensities to ignore dispersed social ills created by the regulatory commons dynamic can be reconciled with overregulation theories. One can anticipate intermittent and sometimes stringent regulation, often created after events galvanize public perceptions of crisis. Stringent regulation, however, should not be mistaken for comprehensive regulation. The Article closes by discussing implications of the regulatory commons dynamic and offering means to surmount it.

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William W. Buzbee[1]

Theories of overregulation abound. Public choice and law and economics scholars often posit that legislator and regulator self-interest prompts legislators to pass yet more laws and regulators to seek to expand their turf and budgets. Interest groups will seek and obtain regulation not to further public ends, but to benefit private interests. These political-economic works have influenced political perceptions, with contemporary political critiques often including battle cries that there is just too much regulation, and poor regulation at that. Crude measures such as references to numbers of pages in Federal Register are bandied about as revealing excessive activity that needs to be derailed through new analytical requirements.[2]

In a related but differently focused body of political economic scholarship, many social ills, particularly in connection with natural resources, are attributed to the "tragedy of the commons." Here, a resource controlled or owned by no one is portrayed as vulnerable to overuse by individually rational actors collectively creating destruction in no one's long term interest, to the ultimate ruin of the resource. Absent derivation of some cooperative mechanism by those

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[2] As stated in a 1995 congressional committee report, "[f]ederal regulations have skyrocketed over the past 25 years, exploding at the same unsustainable rate as government spending. . . .indicators of regulatory costs confirm the explosion in Federal regulations. The Federal Register, the annual compilation of new regulations, climbed from 12,000 pages in 1950 to 70,000 pages in 1993 and may reach 90,000 in 1995. The number of Federal regulators---government officials paid to enforce regulations---increased from 70,000 in 1970 to 130,000 in 1995. The budgets of Federal regulatory agencies has ballooned by nearly 200 percent over this same period." H. Rep. No. 104-120, Report of the Committee on the Budget to Accompany H. Con. Res. 67 (Concurrent Resolution on the Budget, 1996 Fiscal Year).

threatening the commons resource, or a cure from "the state," individually rational users will overtax the resource. In these works on commons problems, the focus is typically on the underlying resource and if the state offers a potential corrective strategy, it is referred to in just such terms—the state, the government, or Leviathan. Little attention is given to the implications of complex multi-layered legal regimes for responses to resource threats in the commons arena.

Thus, one body of political-economy literature posits imprudent excessive regulation, while another focused on underlying commons resources suggests a thorny regulatory challenge leading to resource destruction. Despite the focus in both bodies of literature on regulatory challenges and governance strategies, the two have seldom been linked for insights they might reveal.[3] While differently focused, the two bodies of political economic scholarship point in different directions. Public choice political economic critiques predict excess and imprudence, while the commons literature suggests a dynamic that threatens resource ruin.[4] Linking the political-economic underpinnings of these somewhat disparate bodies of scholarship, however, helps illuminate why certain social ills, particularly those involving environmental harms, may be neglected by potential regulators.

This article suggests a dynamic that this article calls the "regulatory commons" problem creates predictable incentives in complex, multi-layered political-legal contexts for social ills not to be overregulated, but to remain unaddressed, to remain gaps in regulation.[5] A regulatory

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[3]For one work linking these bodies of scholarship, see David A. Dana, Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act, 24 Ecology L. Q. 833 (1997) (exploring how the "government apparatus" itself can be captured by powerful interests and thereby frustrate derivation of a cure for commons overuse).

[4] More recent literature examining commons dynamics from a legal, political science and anthropological perspective, however, has begun to identify circumstances and means by which commons tragedies may be averted. See infra at Part(I)(C).

[5]The phrase, a "regulatory commons," has appeared in a few pieces of legal scholarship in ways that appear somewhat consistent with this essay's definition and focus, but only in passing and without exploration of the implications of the existence of a regulatory commons. See, e.g., William A. Fischel, Voting, Risk Aversion, and the NIMBY Syndrom: A Comment on Robert Nelson's "Privatizing the Environment," 7 Geo. Mason L. Rev. 881, 897 (1999) (suggesting that local governments will overregulate and that the United States' Constitution's takings clause may keep "local governments [from] devolv[ing] into a kind of regulatory commons, in which each knows that its behavior may be harmful to the larger area, but none has the incentive to mend its ways on its own"); Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 Duke L. J. 931, 985 (1997) (suggesting that any legal system "represents a kind of regulatory commons, where effective action is dependent upon alliances of groups overcoming collective action barriers and pressuring administrators to respond"); Carol Rose, Given-ness and Gift: Property and the Quest for Environmental Ethics, 24 Envtl. L. 1, 9 (1994) (asserting that the "tendency of

opportunity arising out of a social ill can itself can be a commons resource, subject to dysfunctions and underinvestment much as found in literature that analyzes natural resource overuse. Under the regulatory commons dynamic, however, overuse of an underlying resource is not necessarily the problematic result. Instead, this article focuses on how regulatory commons settings result in predictable political economic incentives for potential regulators to leave social ills unaddressed. Somewhat paradoxically, where such ills are addressed following perceptions of crisis or successful entrepreneurial political activity, it will not be uncommon to find governmental duplication and stringent regulation. Hence perceptions of overregulation can logically accompany a theory that explains a tendency to leave regulatory gaps. Furthermore, this article is not arguing that overlapping or confused regulatory turfs create only problems. As explored later, regulatory or interjurisdictional competition can create benefits. Instead, this article focuses on a largely neglected dynamic that sheds light on contexts where regulatory inattention, not overregulation, may be found. The regulatory commons problem has to date been a largely neglected variable in literature exploring regulation and regulatory incentives.

The regulatory commons theory offered here posits the existence of a structural regulatory challenge that is the converse of the analysis offered by Michael Heller in his examination of the "anticommons" problem.[6] Where Heller focuses on fragmented real property interests as creating incentives for underinvestment in such property, this article looks at the government side of the commons equation. Drawing on political economic theory and behavioral law and economics, this Article demonstrates that when social ills match no particular political-legal regime or jurisdiction, but instead encounter fragmented political-legal structures, predictable incentives arise for potential regulators to opt against investing in such regulatory opportunities. Relatedly, in such settings of fragmentation and jurisdictional mismatch, those opposed to regulation have numerous means strategically to exploit the complexity, while those seeking regulation are uncertain where to turn for regulatory relief. Fragmented property interests predictably lead to underinvestment in anticommons property, as Heller demonstrates; fragmented political-legal structures that do not match a social ill in cause or effect similarly may be viewed as a regulatory commons and thereby prompt political underinvestment.

By identifying the "regulatory commons" problem and suggesting strategies that could partially address its harmful effects, this Article shows that despite abundant scholarship and political rhetoric positing overregulation, complex legal systems create predictable dynamics that create incentives for regulatory gaps. Overregulation and poor regulation are surely found in some areas, but scholars and political critics of regulation need also to acknowledge the counter-tendency created by the regulatory commons dynamic.

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democratic institutions may be that intensely interested groups dominate the regulatory commons").

[6]Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621 (1998).

Part I starts by discussing briefly three areas of regulatory challenge that reveal attributes of the regulatory commons problem. To set the stage for explication of the regulatory commons concept, this Part revisits the underlying dynamics and language of the "tragedy of the commons" story. This Part also, however, shows how this commons tragedy literature has generally paid little attention to problems of cross-jurisdictional causes and effects of harms, mismatch of underlying resources and government jurisdiction, and the more complex governmental array that typically confronts underlying resource use ills. Part II presents the regulatory commons dynamic in greater depth, starting by explaining the concept of "regulatory opportunity" as a commons resource, and showing how complex legal environments create frequent jurisdictional mismatch conditions. Drawing on insights of the "new institutionalism" and behavioral law and economics, as well as the underlying logic of the tragedy of the commons, this discussion reveals that regulatory commons settings present neglected variable that creates incentives for potential regulators to leave social ills poorly addressed, if addressed at all. Part III briefly offers a way to reconcile the contrasting stories positing overregulation and regulatory omissions and failures, shows how overregulation theories influence public law jurisprudence, but also reviews reasons regulation may be undersupplied. Social ills confronting regulatory commons dynamics will often go unaddressed, but when presented in a crisis setting, fragmented potential regulators may simultaneously find incentives to act, perhaps in stringent and duplicative ways. The observation of a lot of regulation–a proposition difficult to contest–should not be confused with proof that there is too much regulation, especially when dealing with the types of dispersed, multi-jurisdictional social ills that are most likely to encounter the regulatory commons dynamic. Part IV assesses responses to regulatory commons dynamics.

I. The Tragedy of the Commons Story and Its Neglected Variables

Central to this Article's analysis of the regulatory commons problem is utilization of the language and logic of the "tragedy of the commons" tale. To set the stage for analysis of the regulatory commons problem, this Part briefly presents three regulatory challenges that remain poorly addressed–aquaculture, urban sprawl, and global warming. Each presents a variant on the regulatory commons problem analyzed further below.[7] I then present the oft-told tragedy of the commons, updating it with reference to more recent scholarship of Elinor Ostrom and Carol Rose. In its focus on resource limitations, harvester behavior, and reasons "the state" may not always be the optimal cure, this literature has neglected the implications of fragmented governments and legal regimes for efforts to secure responsive regulatory measures. Four distinct forms of regulatory commons problems are presented and contrasted with the usual commons analyses.

A. Regulatory Commons Examples

[7]These four examples are offered to illuminate the problems of fragmented governance in a common pool resource setting, but regulatory commons problems can be found outside the setting of commons resource management disputes. See infra at Part I(A).

Almost any regulatory challenge, especially in the environmental arena, involves resources that are that are in some respect unowned or subject to shared ownership claims. The resource is overused or abused due to the lack of incentives for resource users to invest in its maintenance and protection. This is, in short, the commons tragedy story. However, most literature on the tragedy of the commons focuses on the underlying resource itself–the air, water, field, or fish, for example–and starts with identification of this commonly held resource. The following examples involve elements of the usual commons focus on the unowned natural resource. These examples are discussed here, however, to illuminate challenges posed by fragmented governments and legal regimes. Regulatory commons problems can arise in the setting of an underlying commons natural resource, but as in two of the examples presented below, can also arise where there is not an underlying common pool resource.[8]

Aquaculture provides an excellent example of regulatory commons problems. Aquaculture refers to an industry where harvesters of ocean, river or lake resources do not work in such waters subject to shared use rights,[9] but in confined pens subject to their own maintenance obligations, harvesting rights, and rights to exclude others.[10] Aquaculture is, in essence, a effort to privatize the classic common pool resources of fisheries. Such operations often involve bioengineered fish or introduction of species of fish not indigenous to an area.[11] Aquaculture provides local benefits in the form of employment and tax revenues. The aquaculture industry has expanded in recent years as the result of more intensive competition in the fishing industry due both to increasing scarcity of fish and increasingly widespread reliance on aquaculture to produce

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[8]Another well researched example of regulatory commons problems, although not described in such terms, is in the fragmented regulation of bioengineered foods. See Thomas O. McGarity & Patricia I. Hansen, Breeding Distrust: An Assessment and Recommendations for Improving the Regulation of Plant Derived Genetically Modified Foods (a report prepared for the Food Policy Institute of the Consumer Federation of America) (Jan. 11, 2002). For a slightly more concise exploration of the same issues, see Thomas O. McGarity, Seeds of Distrust: Federal Regulation of Genetically Modified Foods, 35 U. Mich. J. L. Reform 403 (2002).

[9]As discussed below, Elinor Ostrom and others show how resources that at first appear to be common pool resources are often subject to cultural and other behavioral practices and property claims norms that actually render them at least partially reduced to demarcated property claims, albeit claims often not enforced in legal systems. See infra at Part I(C).

[10]See Erin R. Englebrecht, Can Aquaculture Continue to Circumvent the Regulatory Net of the Magnuson-Stevens Fishery Conservation and Management Act?, 51 Emory L. J. 1187 (2002).

[11]Id. at 1194-97.

greater quantities of fish at lower cost.[12] Substantial pollution in the form of concentrated organic matter produced by the fish and fish feed is also produced. Aquaculture also typically involves use of antibiotics and other additions to the environment to reduce threats to the generally confined and monoculture fish.[13] The risks of this seemingly localized type of business are broad due to the risk of fish escapes from the confined aquaculture sites.[14] Fish that escape can, if not indigenous to the area, disrupt the surrounding ecosystem with ripple effects that can easily become regional if not global. If the escaping fish are bioengineered, little is known about how they will affect the environment.[15]

The problem faced by potential aquaculture regulators, at least domestically, is that no primary regulator exists or has reason to step forward. The United States Army Corps of Engineers has partial jurisdiction, as at the federal level do the United States Environmental Protection Agency, Fish and Wildlife Service, and possibly the Food and Drug Administration. State and local fisheries and wildlife agencies also share potential regulatory authority.[16] No single regulator, however, is perceived as the regulatory leader and hence looked to for creation of regimes to deal with transboundary or ecosystem aquaculture risks, nor is any particular regulator likely to be blamed for harms that could result from aquaculture. Local officials who could best oversee particular aquaculture operations have incentives to encourage such local business, but lack incentives to invest in research of aquaculture risks or policing efforts. The broad potential harms of aquaculture are unlikely to befall any one jurisdiction.

Aquaculture operations hence are a geographically identifiable and ostensibly confined activity that arises out of market demands that are global in nature, pollution implications that are far from confined, and ecosystem risks that are global. The mixed media nature of aquaculture and its risks, coupled with the lack of any one prime regulator, has to date left aquaculture subject to incomplete and arguably ineffective regulation. Aquaculture shares attributes with both resource extraction industries and polluting industries. The broader ecosystem risks of aquaculture are particularly unlikely to be effectively regulated: institutions with jurisdiction that match or are commensurate with those risks do not exist, and potential regulators have few incentives to see aquaculture as an attractive subject of regulation.

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[12]See Melissa Schatzberg, Salmon Aquaculture in Federal Waters: Shaping Offshore Aquaculture Through the Coastal Zone Management Act, 55 Stan. L. Rev. 249, 251-55 (2002).

[13]Id. at 255-57; Englebrecht, supra note 10 at 1193-98.

[14]Carol Kaesuk Yoon, Altered Salmon Leading Way to Dinner Plates, but Rules Lag, N.Y. Times, May 1, 2000, at A1, A20.

[15]Schatzberg, supra note 12 at 255-56 (describing frequency and potential harms of fish escapes).

[16]Englebrecht, supra note 10 at 1199-1208.

Urban sprawl is similarly rife with regulatory commons problems. "Urban sprawl" refers to dispersed, usually car-dependent forms of urban growth that typically overlap multiple local government jurisdictions. As cities sprawl, they often leave behind an underutilized urban center as new investment occurs on the urban periphery.[17] Local governments are the prime regulator of land use, although usually guided by state enabling legislation. Local governments make almost all of the key development decisions that lead to sprawl harms, but local governments tend to act as what political scientist Paul Peterson in *City Limits* calls "growth machines," seeking growth and enhanced tax revenues.[18] Despite the local focus on growth, sprawl creates regional or national harms. National or state level measures to address sprawl harms have been few and are difficult to design. Those few federal and state policies influencing sprawl's form, especially federal highway spending and mortgage tax deductions, are a source of political clout and porkbarrel projects and are unlikely to be significantly changed. When sprawl ills have become particularly pressing, political action has occurred in some states, but few such measures have proved effective in addressing broader sprawl ills.[19]

In its causes and effects, sprawl exceeds the reach of local governments. Even seemingly local activity such as home building patterns can generate much larger harms. Viewed in aggregate, sprawling patterns of development are expensive for local governments who must invest in infrastructure, schools and other services as agriculture and green spaces are converted to residential use. In addition, the increasing numbers of commuters travelling long distances create road congestion with associated traffic delay costs and exacerbation of air pollution woes. Urban sprawl resulting from rapid, radiating urban growth patterns may in part reflect rational citizen and consumer preference for McMansions, dislike of cities, and desire for cheaper homes away from urban business centers. It also, however, generates harms far broader than can be addressed by local governments.

Sprawl is thus not inevitable, but results from government policies at all levels, consumer preferences, externalized harms, and dysfunctionally confused regulatory terrains.[20] In the United States, the federalist government structures are mismatched with the market and political dynamics creating typically regional sprawl. Indeed, ameliorative policies tend to be matched

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[17]See, e.g., William W. Buzbee, Sprawl's Dynamics: A Comparative Institutional Analysis Critique, 35 Wake Forest L. Rev. 509 (2000); William W. Buzbee, Urban Sprawl, Federalism, and the Problem of Institutional Complexity, 68 Ford. L. Rev. 57 (1999).

[18]Paul Peterson, City Limits (1981).

[19]See Buzbee, Urban Sprawl, supra note 17 at 94-98, 129-31 (reviewing measures to address sprawl ills harms).

[20]See generally id..

poorly with the traditional powers and expertise of local, state or federal governments.[21] The mismatch of sprawl dynamics and allocations of regulatory authority has hence led to few and often ineffective regulatory measures to address sprawl harms.

Global warming results from ubiquitous sources of pollution, basically any combustion of a carbon-based compound, due to its inevitable byproduct of carbon dioxide.[22] Global warming is the term used to describe the warming of the Earth's surface that occurs as a result of the "greenhouse effect."[23] The concentration of greenhouse gases in the atmosphere has increased significantly in the recent past. Specifically, U.S. greenhouse gas emissions have increased by about 15 percent over the past twenty years. Scientists generally believe that growing industrialization and human activities are the primary reason for the increased concentration of carbon dioxide in the atmosphere. Over the past century, the Earth's surface has warmed by about 1 degree Fahrenheit, with a significant portion of this temperature increase taking place over the last two and a half decades.[24] Making the assumption that concentrations of greenhouse gases will accelerate, the 2,500-member Intergovernmental Panel on Climate Change predicts that average earth temperature could rise as much as 10 degrees over the next century, the fastest rate

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[21]Id. at 91-98.

[22]See Barton H. Thompson, Tragically Difficult: The Obstacles to Governing the Commons, 30 Envtl. L. 241, 253-55 (2000) (discussing global warming and other commons challenges).

[23]The U.S. Environmental Protection Agency describes the greenhouse effect as follows: Energy from the sun drives the earth's weather and climate, and heats the earth's surface; in turn, the earth radiates energy back into space. Atmospheric greenhouse gases (water vapor, carbon dioxide, and other gases) trap some of the outgoing energy, retaining heat somewhat like the glass panels of a greenhouse. Without this natural 'greenhouse effect,' temperatures would be much lower than they are now, and life as known today would not be possible. However, problems may arise when the atmospheric concentration of greenhouse gases increases. EPA's Global Warming Site: What is the Problem?, at http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html (last updated Oct. 31, 2002).

[24] See Intergovernmental Panel on Climate Change, Climate Change 2001: The Scientific Basis 2.27 (Cambridge University Press 2001) ("IPCC"), available at http://www.grida.no/climate/ipcc_tar/wg1/index.htm. (The 2,500-member Intergovernmental Panel on Climate Change has found that Global surface temperatures have increased between 0.4 and 0.8°C (about 1 degree Fahrenheit) since the late 19th century and that most of this increase has occurred in two distinct periods, 1910 to 1945 and since 1976. Since 1976, the IPCC states the rate of temperature increase has been over 0.15°C/decade. See also World Meteorological Organization Press Release, December 18, 2001 ("temperatures are getting hotter, and they are getting hotter faster now than at any time in the past).

in 10,000 years.[25] The predicted consequences of global warming are varied and include rises in sea level, regional effects such as drought, and human health effects such as an increase in the amount of insects carrying communicable diseases and a decrease in air quality that can possibly cause asthma and lung disease.[26] While the exact mechanisms and extent of side-effects of global warming remain subject to debate, a consensus view now exists that global warming is a reality that threatens to create substantial environmental, personal and economic harms around the globe.

Due to increasingly dire predictions and a broadening consensus about global warming causes and effects, an international agreement referred to as the Kyoto Protocal was drafted in the late 1990s and is now in the midst of a two stage approval and implementation process.[27] The Kyoto Protocol requires all countries to develop programs to address greenhouse gas emissions and to report on their progress. In doing so, it sets up mechanisms by which developed countries can take the lead in such efforts. Most significantly, the Protocol commits developed countries to establish programs designed to return greenhouse gas emissions to their 1990 level.[28] In general, greenhouse gas emissions are much greater today than they were in 1990. For instance, U.S. emissions are about 15 percent greater.[29] The Kyoto Protocol has not yet come into effect as the

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[25] IPCC, supra note at 9.3.1.

[26] National Academy of Sciences, Possible Consequences of Global Warming, at http://www4.nas.edu/onpi/webextra.nsf/44bf87db309563a0852566f2006d63bb/0bbadfe6c21e67e685256a8400588e53?OpenDocument (last visited March 14, 2003).

[27] For description of the Kyoto Protocol in the context of a detailed analysis of regulatory tool choice in the global setting, see Jonathan Baert Wiener, Global Environmental Regulation: Instrument Choice in Legal Context, 108 Yale L.J. 677, 712-13 (1999).

[28] "The Parties . . . shall . . . ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by least 5 per cent below 1990 levels in the commitment period 2008 to 2012." Kyoto Protocol to the United Nations Framework Convention on Climate Change Art. III, agreed to by the Parties at the Third Conference of the Parties, Kyoto, Dec. 11, 1997, U.N. Doc. FCCC/CP/197/L.7/Add. 1 (1997), available at http://unfccc.int/resource/docs/convkp/kpeng.pdf (last visited Nov. 6, 2002) (not in force).

[29] See Natural Resources Defense Council, Bush Administration Errs on Kyoto Global Warming Agreement (March 2001), available at http://www.nrdc.org/globalWarming/akyotoqa.asp. While greenhouse emissions for most developed countries have risen steadily since 1990, it is important

"double trigger" of ratification required by the Protocol has not yet been met.[30] The United States in 2001 declared that it would not sign the Kyoto Protocol.[31] An executive branch proposal referred to as the Clear Skies & Global Climate Change Initiatives was released in 2002.[32] Since their release, these Initiatives have done little to change the status quo and have been highly criticized by many environmental groups.[33] While designed to start a process of analyzing and

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to note that some developed countries have made progress. Notably, carbon dioxide emissions in China dropped more than 17 percent between 1997 and 1999. See id.

[30] In order to come into effect, the Protocol requires (1) ratification by fifty-five governments and (2) that the ratifying countries include developing countries representing at least 55% of the group's 1990 carbon dioxide emissions. The first requirement has been easily met; in fact, the Protocol's total membership is 100. Satisfying the second requirement seems to rest solely in the hands of the Russian Federation. Canada's ratification on December 17, 2002 meant that developed country ratifications now account for 43.7% of 1990 CO2 emissions. Since the United States and Australia have already expressed that they will not ratify the Protocol and since other large developed countries (European Community, Poland, and Japan) have already ratified, the Russian Federation (which accounts for 17.4% of the 1990 emissions) is the only government which can bring the tally to over the required 55% limit. Researchers speculate that the Russian Federation will ratify within the next several months. See United Nations Framework Convention on Climate Change, Press Release, Kyoto Protocol Receives 100th Ratification, Widespread Political Support Suggests Protocol may Enter into Force in Early 2003 (December 18, 2002), at http:// unfccc.int/resource/docs/convkp/kpeng.pdf (last visited March 9, 2003); United Nations Framework Convention on Climate Change, Kyoto Protocol Status of Ratification (February 24, 2003), at http:// unfccc.int/resource/docs/convkp/kpeng.pdf (last visited March 9, 2003).

[31]Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts (Office of the Press Secretary, White House Press Release) (March 13, 2001), available at http://www.whitehouse.gov/news/releases/2001/03/20010314.html (Last visited March 10, 2003).

[32]See Global Climate Change Policy Book, available at http://www.whitehouse.gov/news/releases/2002/02/climatechange.html (last visited March 10, 2003).

[33]See Natural Resources Defense Council, Untangling the Accounting Gimmicks in White House Global Warming, Pollution Plans (February 2002), available at http://www.nrdc.org/globalWarming/agwcon.asp. (arguing that the Bush plan fails to provide for mandatory reporting and allows emissions of carbon dioxide and other heat-trapping pollutants to increase by 14 percent over the next 10 years)

addressing global warming risks, they do not constitute compliance with the Kyoto Protocol.[34]

From one perspective, global warming involves the ultimate "tragedy of the commons" type of common pool resource–the world's atmosphere. Global warming also confronts no matching or commensurate political or legal regime that due to the regime's geographical turf, subject responsibilities, or political constituency is logically situated to take the lead and address global warming's causes and anticipated harms.

In short, in all three of the social ills linked here to the regulatory commons problem, the underlying social ill, typically both in its causes and in its associated harms, lacks a matching political-legal regime. Either due to the historical development of political structures (for example, in the context of urban sprawl and aquaculture) or due more to the mammoth scale of a problem (the example of global warming), the social ill is juxtaposed against numerous potential regulators.[35] This uncertain regulatory turf creates both demand and supply side incentives for regulatory inattention. In slightly different ways, each presents a regulatory commons dynamic threatening to leave associated socials ills unaddressed.

B. Simplified Assumptions of Self-interest

As in literature addressing the tragedy of the commons, as well as in most public choice scholarship, this Article assumes self-interest as a crucial regulatory motivator for all stakeholders dealing with a resource use challenge.[36] In contrast to many public choice scholars' inordinate focus on money as the only motivator, I assume a somewhat soft version of "rational actor" theory as a basic premise.[37] This softer version of rational actor theories assumes that government

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[34]Id.

[35] For exploration of political dynamics and statutory interpretation choices, with a similar emphasis on stakeholders' strategic choices and the influence of institutional settings involving multiple actors, see William W. Buzbee, The One-Congress Fiction in Statutory Interpretation, 149 U. Penn. L. Rev. 171, 204-36 (2000) (analyzing reasons regulatory and legislative stakeholders will strategically respond to each others' action and choose similar or different language to achieve similar purposes in different statutory schemes).

[36]By stakeholders, I refer to a broad category of persons who might be interested in issues potentially addressed by relevant institutions. By the phrase "stakeholders," I seek to avoid forcing persons' actions or motivations into a political framework by labeling them citizens, politicians or bureaucrats, or into a market framework with references to consumers, producers or industry, or some other label implying family or community interactions. The article at times below more explicitly identifies types of stakeholders relevant to particular discussion.

[37]For exploration of rationale actor theories within a critique of "public choice" scholarship, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 21-33 (1991).

officials will consider not only monetary, electoral or power goals, but also furtherance of ideological and political preferences.[38] This article will also apply insights from cognitive psychology as developed in behavioral law and economics to suggest how self-interest will be perceived in a regulatory commons setting. Political actors do not merely translate interest group preferences and pressures into policies sought by those demanding action.[39] Political actors may at times act in a public regarding manner, but these officials' perceptions of self-interest will influence their public actions.[40] Similarly, individuals and interest groups seeking or opposing regulation will typically seek to further their own preferences. These preferences may or may not be consistent with public regarding ends. To vary degrees, all of the scholarly models of political economic behavior, including the tragedy of the commons problem, share this same starting assumption of self-interest, broadly construed, as the motivator of all regulatory stakeholders.[41] As will be shown, where this assumption logically leads is a source of great disagreement.

C. The Tragedy of the Commons Story and Partial Solutions

To both define and explore the "regulatory commons" concept, the typical "tragedy of the commons" story must first be restated. References to a "commons" are perhaps a slight misnomer, often actually referring to "common pool" resources that are shared in potential usage and lack social, legal or political regimes that limit the ability to exclude others. Especially in resource extraction areas such as timbering operations, animal grazing, or ocean fishing, there is a typical commons story and attendant problems. Air, water, or soil pollution is also often viewed as a commons problem, but with the commons nature of the resource (for example, the air) leading to excessive degradation. In the interest of simplicity, this article will focus primarily on

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[38]Joseph P. Kalt & Mark A. Zupan, The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions, 33 J. L. Econ. 103-09 (1990) (finding that legislator ideology was a "the most potent explanatory variable" for assessing legislator actions).

[39]For discussion of distinctions between public choice theory and broader conceptions of policymakers' motivations, see generally, Symposium, Positive Political Theory and Public Law, 80 Geo. L. J. 457 (1992), especially Daniel A. Farber & Philip P. Frickey, Foreword: Positive Political Theory in the Nineties, 80 Geo. L. J. 457, 460-62 (1992).

[40]See sources cited infra at Part III(A)(1).

[41]The version of "rational choice" self-interest I will utilize here is much like Professor Schroeder's "broad self-interest," which he defines as positing that "individuals act to maximize their own well-being, however they experience it . . . . This conception rules out very little as a potential source for preferences for individuals." Christopher Schroeder, Rational Choice versus Republican Moment Explanations for Environmental Laws, 1969-73, 9 Duke Envtl. L. & Pol'y Forum 29, 40 (1998). Like Schroeder, I do rule out an assumption that all actors are motivated only by "material egoism." Id. at 40-41.

the resource extraction, sprawl and aquaculture examples, but similar dynamics exist for polluting activities and hence is also discussed in connection with global warming.

As most famously articulated in articles by Scott Gordon and Garrett Hardin, but perhaps explored with greatest nuance in legal scholarship by Carol Rose, the commons tale goes as follows.[42] If a natural resource is not subject to any one person's ownership or political institution's control with rights to exclude, but is accessible to many, the resource is likely to be overexploited due to the following dynamic. Each unit of resource extraction, for example, a fish, benefits the fisher one full economic unit. That single unit of depletion, however, for the fisher only reduces the collectively held fish stocks by a minute fraction. If there are 1000 edible fish, the fisher can sell or eat a fish and capture all of the benefits personally. For that fisher, there is only a 1/1000 depletion of the underlying common pool resource. The fisher thus has incentives to continue to fish and seek to capture personally the benefits of the fish harvest. Other fishers face similar incentives, seeing great benefit in capture (+1) but experiencing only a small percentage diminution of the resource (-1/1000) with each fish captured.

Will the fishers have incentives to be stewards of the resource, given common sense that any resource can at some point be overdepleted? Generally not, since any investments plowed into the resources will be borne as a cost fully by the fisher, but with the benefit shared among all the fish and other fishers. Each fisher thus faces incentives to harvest with little regard for fish population stability and has little incentive to preserve, let alone improve, the underlying resource. Each fisher acting in an individually rational manner is likely to free ride, hoping for ameliorative efforts by others, or perhaps just focusing on short term gain. Especially given the high cost of information about resource extraction science and population dynamics, seldom will individual fishers have incentives to research and produce information about the resource. All will be tempted to free ride and hope that others produce such information.[43] This creates a tragedy of the commons because the result, absent some corrective strategy, is overexploitation of the resource. "Freedom in a commons brings ruin to all," states Hardin.[44]

Professor Rose has explored commons problems in a series of lucid articles during the last

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[42]See H. Scott Gordon, The Economic Theory of Common-Property Resources, The Fishery, 62 J. of Political Economy 124 (1954) (reprinted in John A. Baden & Douglas S. Noonan, Managing the Commons 17 (2nd ed. 1998); Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968). Professor Carol Rose has explored these concepts in a series of articles. For a concise article pulling together strains in her previous articles (and citing to them as well), see, e.g., Carol Rose, Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 Duke L. J. 1.

[43]James E. Krier, The Tragedy of the Commons, Part Two, 15 Harv. J. L. & Pub. Pol'y 325, 335 (1992) (distilling Hardin's insights and Harold Demsetz's exploration of "coordination" barriers to addressing commons dynamics) (citing Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (Papers & Proc. 1967)).

[44]Hardin, supra note 42 at 1244.

fifteen years. Part of her scholarship has refuted the perhaps tempting tendency to see complete privatization as the answer to commons overdepletion.[45] "Free market environmentalists," often writing out of the law and economics tradition, but with a particularly politically conservative slant, criticize regulatory and bureaucratic solutions in favor of more completely delineated property rights to facilitate ownership claims and resource trading among resource users.[46] Professor Rose demonstrates, using both historically oriented legal analysis and theoretically rooted argument, that efficacious property rights approaches and interrelated legal regimes will vary depending on historical and physical context.[47] Commons resources can make sense and be stable in many settings, as can be partial commons arrangements and even fully privatized and demarcated property rights in what were previously commons resources.[48] Similarly, in work influencing Professor Rose, political scientist Elinor Ostrom has analyzed common pool resource management strategies, typically in settings of small communities heavily dependent on a single main resource.[49] Ostrom's focus has been on how community norms, not a government imposed strategy, can overcome the commmons tragedy.[50]

D. The Neglected Commons Governance Variable

Professor Rose offers an additional insight, similarly explored by Professor James Krier, that is missing in the initial literature on the "tragedy of the commons" and is crucial to the next analytical step in this article's exploration of regulatory commons dynamics. Hardin and related work by Harold Demsetz observe how coordination problems among resource users can lead to resource overuse. In suggesting the need for collective agreement requiring self restraint, however, they "assume away" the very coordination problem that creates the commons tragedy

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[45]See, e.g., Carol M. Rose, Energy and Efficiency in the Realignment of Common-Law Water Rights, 19 J. Legal Studies 261 (1990) (hereinafter "Common Law Water Rights").

[46]See Terry L. Anderson & Donald Leal, Free Market Environmentalism (revised ed. 2001).

[47] See e.g. Rose, Common Law Water Rights, supra note 45.

[48]Id.

[49]For example, in Elinor Ostrom, Governing the Commons (1991), Professor Ostrom provides a rich analysis and modeling of commons overexploitation and strategies to avoid the usual overexploitation tragedy. She tends, however, to be battling the assumption that ruin or state intervention are the alternative outcomes. She devotes most of her attention to community norms and arrangements that surmount overexploitation risks. At the conclusion of her book, she briefly alludes to the reality of multiple governments. Id. at 215-16.

[50]Id.

in the first place.[51] Coordination costs in the form of collective action hurdles, with their usual high transactions costs and free rider incentives, create challenges for individuals seeking to devise responses to resource overuse. These coordination challenges to creating and enforcing a privatized or partially privatized commons will often prevent shifts to more privatized or regulated resource regimes.[52] Generally, only increased density or discernible resource stresses will trigger political or social impetus to move from commons arrangements to more demarcated resource rights.[53] Even fully privatized rights in a resource ultimately depend on legal frameworks that allow potential disputants to recognize who has paramount claims to that resource and, when necessary, enforce those rights through judicial or regulatory enforcement regimes.[54]

Professor Krier explains that current beneficiaries of any status quo regime will tend either to defeat shifts to different, perhaps market-oriented, resource frameworks, or gain through politics similar harmful extraction or pollution rights.[55] Building on public choice scholarship and works of Harold Demsetz and Mancur Olson,[56] Krier notes that the same dynamics leading to excessive pollution or resource depletion are likely to confound efforts to coordinate to find commons strategies, be they through community norms or regulation.[57] Those with significant monetary stakes in environmental policy will have great incentives to succeed in markets or politics, and those with possibly greater aggregate interests, but lesser individual stakes, will often have insufficient stakes to remedy market harms or succeed in political competition.[58] Even if stakeholders in their capacity as citizens or consumers collectively prefer resource preservation, the high costs of collective action and temptation to free ride once again may defeat efforts to

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[51]Krier, supra note 43 at 338, 339 (stating that Hardin, Demsetz and more recent works such Anderson & Leal, supra note 46, "assum[e] the problem away, implicitly arguing that a community plagued by noncooperation can improve its condition by cooperating").

[52]See id.

[53]See infra at Part IV(C) for discussion of crisis and entrepreunerial politics.

[54]Krier, supra note 43 at 332-35.

[55]Id.; see also Thompson, supra note 22 at 248-49 (noting strong resistance of fishers to restraining regulation even in face of evidence of resource collapse).

[56]Mancur Olson, The Logic of Collective Action (1965).

[57]Krier, supra note 43 at 332-47 (discussing difficulties in the Anderson and Leal suggestion of constructing a new regime of environmental regulation founded on property rights and common law litigation).

[58]Id. at 331.

adopt resource-preserving regulatory strategies. Pervasive and predictable dynamics thus can lead to market and political failure as resource harvesters are unable to act collectively to address environmental problems and other dispersed risks.

In the commons resource literature, as well as most political economic literature on environmental regulation, a frequent assumption is the existence of a single political-legal institution that will be prodded to derive and enforce a responsive regulatory strategy.[59] Part of this single political-legal institution emphasis results from the rich commons scholarship that uses single resource conflicts in the setting of traditional or primitive communities to draw conclusions about effective responsive strategies. In particular, scholarship of Elinor Ostrom often uses political science and anthropological studies to suggest conditions for effective protection of threatened environmental resources.[60] In such settings, complex institutional arrangements, let alone multiple layers of political-legal venues, are seldom an issue. More often, such scholarship focuses on reasons resources will be conserved through social and tradition-based practices that lead to resource stewardship.[61]

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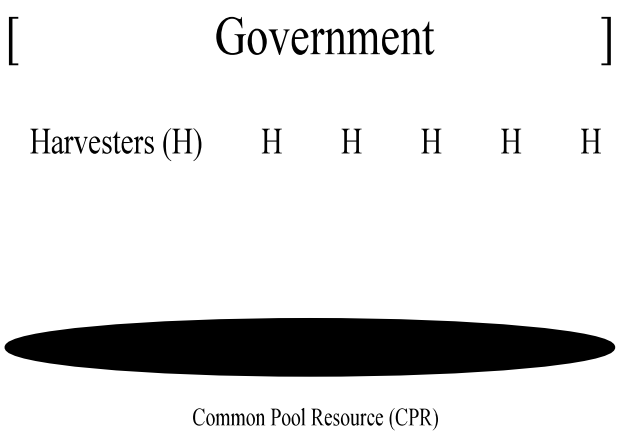
[59]For exploration of this assumption within a discussion of global environmental problems and available regulatory tools, see Wiener, supra note 27 at 701-04.

[60]See C. Dustin Baker & Elinor Ostrom, Human Ecology and Resource Stability: The Importance of Institutional Diversity, 26 Ann. Rev. of Ecology and Systematics 113 (1995); Elinor Ostrom, Institutional Arrangments for Resolving the Commons Dilemma: Some Contending Approaches, within The Question of the Commons: The Culture and Ecology of Communal Resources 250 (Bonnie J. McCay & James M. Acheson, eds.) (1987).

[61] See Ostrom, supra note 49. When the government alternative is mentioned, it is usually discussed as "the state," "leviathan," "public control" or "the central government." See id., e.g., at 9, 14, 15, 20. She does, however, acknowledge that instead of assuming "idealized institutions" in thinking about "privatizers'" or "centralizers'" answers to commons dilemmas, one needs to consider how institutions should be "constituted," "what authority it should have," "limits on its authority," and other issues such as devices to gather information, motivate institutional actors, or define property rights. Id. at 22.

One can envision these various tragedy of the commons stories in accordance with the following diagrams. The basic tragedy of the commons tale offered by Hardin and Gordon is presented by Diagram 1. Numerous resource harvesters (H) see a common pool resource (CPR) that is theirs to harvest, with no norms, regulations, or privatized rights restraining their resource use. The government or state (G) is mentioned with no particular nuance, but the assumption appears to be that if harvesters can agree upon measures that constitute "mutual coercion, mutually agreed upon," or property rights are "allocated,"[62] a government with authority to formalize that agreement and enforce it would exist. Hence, G is presented with boundaries commensurate with the CPR boundaries and the H group.

Diagram 1: Commensurate/Matched CPR& Government



[62]Hardin, supra note 42 at 1245, 1247 (stating that among options are that "we might allocate the right" to utilize the resource and in describing the "mutual coercion" answer assuming that a mechanism for enforcement would exist).

Diagram 2 presents the "mutual coercion, mutually agreed upon" strategy advocated by Hardin, if implemented through the government. The H group is subject to this unitary government, and G, the H group, and the CPR are again presented as coextensive or commensurate. A government solution would, as apparently assumed by Hardin, bind all effectively.

Diagram 2: Commons Government Cure
(Commensurate/Matched Setting)

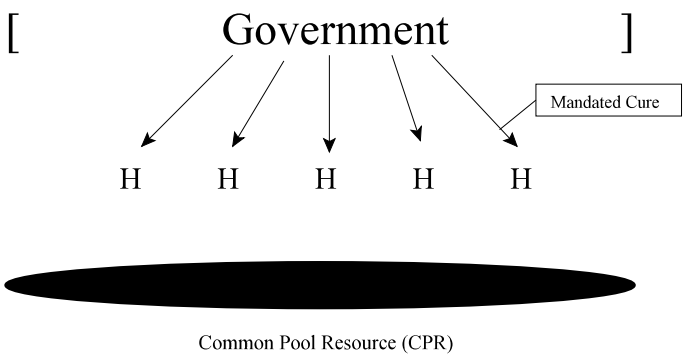
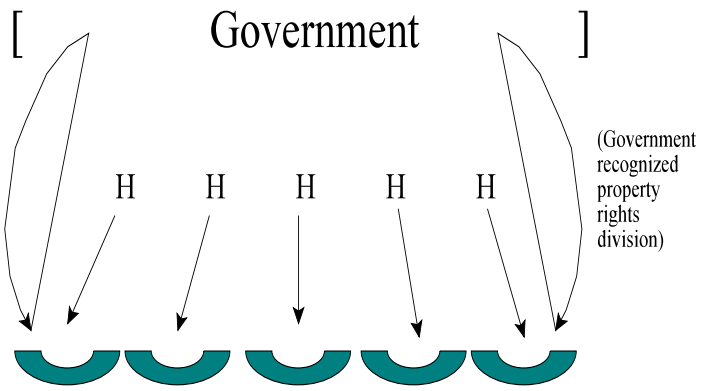


Diagram 3 presents the privatization cure. The government does not mandate behavioral modification by regulation, but instead creates and enforces a newly privatized former common pool resource. Each H is allocated a portion of what was previously a common pool resource. Faced with the repercussions of their own decisions about how to manage and use their allocated portion of the resource, each H is expected to exercise stewardship and thereby avoid the commons tragedy.[63]

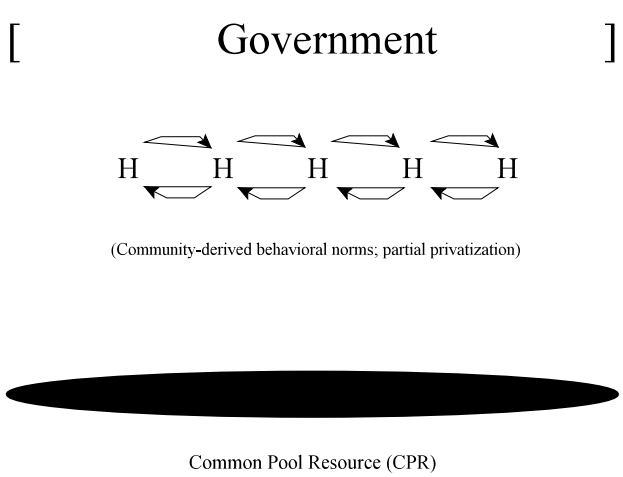
Diagram 3: Commons Privatization Cure
(ex. Western Water rights; privatized pollution rights



[63]This is the solution advocated by Anderson & Leal, supra note 46.

Diagram 4 offers the third commons solution explored by Professors Rose and Ostrom. Rather than a government behavioral mandate or complete privatization (Diagrams 2 and 3), harvesters (the H group) devise their own norms that impose restraint. These often create what can be conceived of as a partial commons. Users are constrained by these self-devised norms, but the underlying resource is not carved up into potentially perpetual complete privatization.[64]

Diagram 4: Commons Community-Norm Cure
(Ostrom, Rose)



[64]In addition to Ostrom's work, Professors Ellickson and Acheson have explored how social norms supplement and sometimes are more important than legal rules in determining resource use patterns. See Robert Ellickson, Order Without Law (1991); James M. Acheson, The Lobster Gangs of Maine (1988).

Diagrams 1 through 4 thus present the commons tragedy story and its three favored solutions. Coordination problems are assumed to exist at the level of the harvesters who must somehow rally themselves to action. As shown in Part II, coordination costs remain a thorny challenge in ways relevant to the regulatory commons dynamic, but additional and to date neglected challenges also exist that this article's next sections address. Most significantly, a single government regulator seldom exists. The more potential regulators are fragmented and mismatched with the underlying resource, or resource harm causes or effects, the less likely it is that regulatory action will occur. In such settings, a regulatory commons dynamic will exist.

II. The Regulatory Commons Problem: Lack of Primacy and Regulatory Opportunity as a Commons Resource

The more complex, multilayered or fragmented the legal and political setting, the more likely it is that regulatory commons dynamics will arise. The simplifying assumption of a single law maker or enforcer threatens to ignore an important reason regulatory challenges, especially in the environmental policy arena, often remain intractable.[65] Central to the regulatory commons dynamic are the concepts of the regulatory opportunity as a commons resource and the idea of jurisdictional mismatch. This Part starts by explaining and diagraming these two concepts, then shows how from both the supply and demand perspective, a regulatory commons creates predictable incentives for political inattention. If a social ill is juxtaposed against a fragmented legal or political setting, especially if the ill's causes and effects do not fall within a particular jurisdiction, the social ill is less likely to be addressed by regulatory action than in settings where a particular institution is viewed by all as having regulatory primacy.

A. The Regulatory Opportunity-Jurisdictional Mismatch Link

Much as commons (or common pool) resources are prone to underinvestment, underprotection and overexploitation, regulation itself can be subject to analogous commons dynamics. Regulatory commons dynamics can complicate efforts to derive and implement regulatory frameworks to address a social ill.[66] A regulatory opportunity is itself the resource to be harvested or capitalized upon through regulatory action, much as fish or a pasture are the resources in the usual commons resource tale. Regulatory commons problems pervade any complex, multi-layered legal setting. Such dynamics could lead to excessive and potentially conflicting regulation by numerous policymakers in diverse institutions, but more often will create

[65] See Wiener, supra note 27 at 701-04 (criticizing assumption of "unitary fiat" in most literature suggesting cures regulatory ills, but in focusing on regulatory tool efficacy in the setting of multiple nation-states subjected to potential regulation dealing with global ills such as global warming, giving limited attention to question of incentives for fragmented actors to create institutions choosing "regulatory instruments" to address such ills).

[66] Professor Fischel is unusual in seeing overregulation as the regulatory commons risk. See Fischel, supra note 5.

incentives for political inattention.[67]

The three examples of regulatory commons ills reviewed above–aquaculture, urban sprawl, and global warming–differ in their reach, the extent to which their risks and harms arise out of local or multijurisdictional activity, and in the extent to which their externalities are likely to cross jurisdictional lines. They share the important trait of having no obvious political-legal regime with regulatory primacy over them. Instead, all are juxtaposed against potential governments and legal frameworks that do not match the underlying dynamics or harms associated with each activity or phenomenon.

This lack of a regulator with primacy over an activity and its effects will be referred to as the problem of "jurisdictional mismatch." Jurisdictional mismatch can be presented diagramatically. Jurisdictional mismatch actually occurs in several forms. Where a social ill or phenomenon encounters more than one form of jurisdictional mismatch, regulatory commons dynamics are particularly likely to create disincentives for regulatory action.

A particularly frequent form of jurisdictional mismatch occurs in the context of United States regulatory federalism, especially environmental federalism.[68] It is common that federal, state, and local governments, as well as each of their administrative agencies, share regulatory turf in uncertain sorts of ways. The problem here is not one of lack of competence, but one of political-legal fragmentation and overlap. No single governmental actor or legal framework will be viewed by regulators or those interested in new regulation as having regulatory primacy. Aquaculture presents a prime example of a Diagram 5 regulatory commons problem. Numerous

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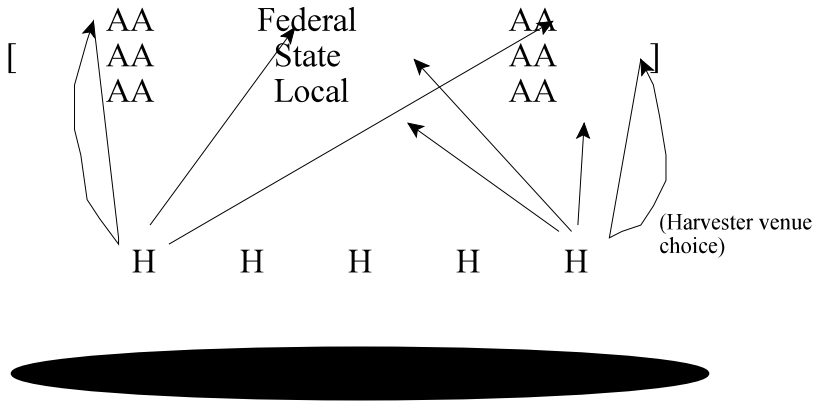
[67]See id.; see also James E. Krier & Edmund Ursin, Pollution and Policy: A Case Essay on the California and Federal Experience with Motor Vehicle Air Pollution, 1940-1975 (1977) (tracing history of regulation of automobile pollution and discussing concerns of automobile manufacturers once states, especially California, started to regulate tailpipe emissions). As discussed infra at Part II, this Article suggests that incentives for inattention is a logical response to regulatory commons dynamics, but that when a crisis creates incentives for regulatory attention, one could also reasonably anticipate occasional duplication and stringency. Furthermore, the different payoffs available to different regulators will predictably shape how those demanding and possibly supplying regulation assess strategies. For example, because federal regulators may have the power to preempt, but the political realm is far larger, the federal forum will often offer a larger and more certain regulatory payoff but also be difficult to provoke to action. See infra at Part II(C).

[68]For a selective and incomplete list of related articles, selected here mainly for their thorough references to related concepts and works by others, see Daniel C. Esty, Revitalizing Environmental Federalism, 95 Mich. L. Rev. 570 (1996); Richard L. Revesz, Federalism and Interstate Externalities, 144 U. Penn. L. Rev. 2341 (1996); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1221-24 (1992); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L. J. 1196 (1977).

potential regulators are likely to receive requests for regulatory action. This type of fragmentation problem is presented in Diagram 5.

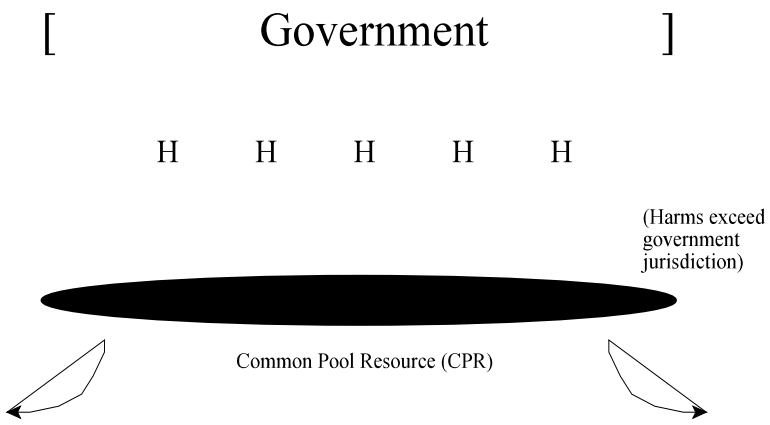
Diagram 5: Commons & Fragmented Government
(National Setting)



Common Pool Resource (CPR)

Diagram 6 presents the problem of a resource and government (or legal framework) that are coextensive, but harms resulting from resource use go outside the utilized resource and also beyond the reach of the government. This is the common problem of interjurisdictional (or transboundary) pollution.[69] Environmental harms are usually dispersed, at least in their ripple effects. Air and water pollution usually cross local and state jurisdictional lines. Even seemingly localized harms, such as wetlands destruction, have ripple effects that spread wide as natural water quality cleansing is lost, species breeding habitat is destroyed, and biodiversity threatened. All three of the paradigmatic regulatory commons examples contain elements of such interjurisdictional harms. Sprawl by definition encompasses numerous jurisdictions in its outward march, while pollution and natural resource losses spread over broad areas. Aquaculture is a highly privatized activity, but escaping fish pose a significant risk of harms reaching many jurisdictions. Global warming is similarly multi-jurisdictional, as pervasive greenhouse gases accumulate in the atmosphere as a result of millions of activities producing carbon dioxide and other greenhouse gases.

Diagram 6: Commons Harm/Government Mismatch



[69]For a perceptive analysis of transboundary pollution ills, including the observation that little enforcement occurs to deal with pollution moving across national borders, see Merrill, supra note 5 at 931, 932, 957-62.

Another form of jurisdictional mismatch occurs when a government is either smaller or larger than the underlying resource that is suffering a harm. Here, the resource and government are mismatched. Diagram 7 presents this situation in the context of a government that is far smaller than a resource that is threatened. Oceans and their resources are an obvious example of Diagram 7 mismatch. The opposite problem, of a government that is larger than the underlying resource, is found where a particular resource is truly confined and local and a government or legal frameworks covers a larger area.

Diagram 7: Commons Resource - Government Mismatch

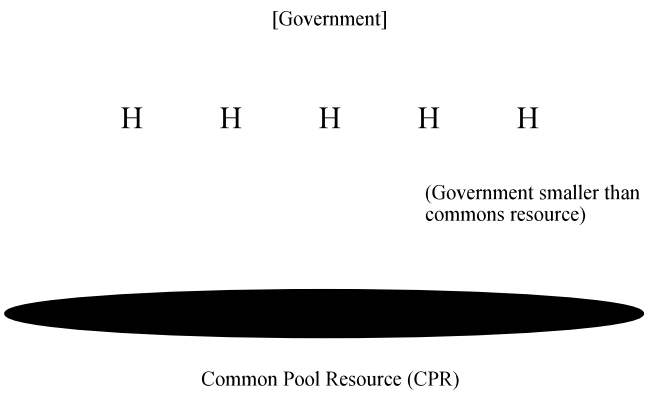
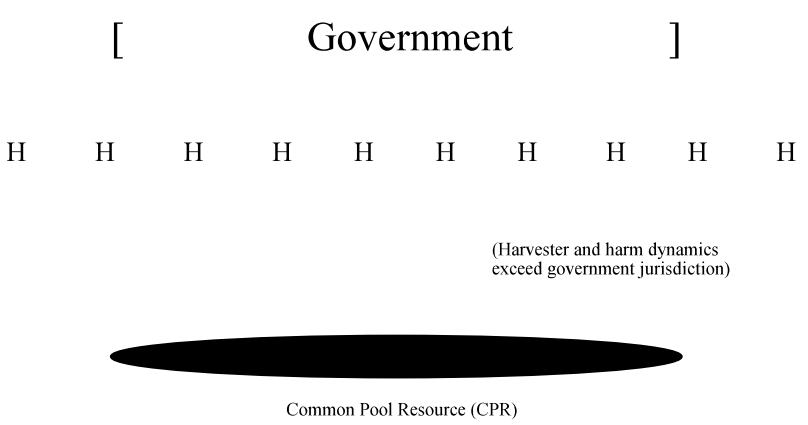


Diagram 8 presents the situation where a social ill arises out of dynamics, incentives or actors outside of a government's jurisdiction.

Diagram 8: Commons Harm Dynamic - Government Mismatch



Even the most local of environmental harms, such as soil contamination by hazardous waste, arises in a setting of commerce that, as depicted in Diagram 8, involves many interstate businesses, financing, and competition.[70] Similarly, aquaculture has grown as a result of intensified international competition to produce cheap fish after stocks of previously abundant open ocean fisheries plummeted. At the local government and state level, urban sprawl results in part from local governments seeking to attract new residents and businesses to enhance their vitality and tax base. A much debated example of Diagram 8 jurisdictional mismatch occurs when state or local governments compete to attract or retain business and offer regulatory laxity as a bargaining chip. Under this "race-to-the-bottom" scenario, each state ends up offering less environmental protection than it would seek were it an island state. Although Dean Revesz has articulated reasons this race-to-the-bottom dynamic does not necessarily justify federal regulation, especially where jurisdictions have no choice but to balance various regulatory priorities,[71] critics have demonstrated that such an environmental race to the bottom does indeed occur[72]

Somewhat oddly, much of the literature on the tragedy of the commons, as well as on environmental federalism, does little to distinguish among these various forms of jurisdictional mismatch and their implications. For example, one recent work suggested "the matching principle" as a guide to decide what level of government should be allocated responsibility for an environmental ill.[73] This article focused only upon the location of the harm, arguing that "the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution." In the authors' view, the regulating

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[70]See Robert A. Schapiro & William W. Buzbee, Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication, 88 Cornell L. Rev. 1199, 1206-07, 1245-9 (2003) (in context of a critique of the Supreme Court's recent Commerce Clause jurisprudence, exploring how harms that may be local can have far broader commercial links and repercussions).

[71]See Revesz, Rehabilitating Interstate Competition, supra note 68.

[72]See Kirsten H. Engel, State Environmental Standard-Setting: Is There a Race and is it "To the Bottom"?, 48 Hastings L.J. 271 (1997) (challenging Revesz's conclusion with data indicating frequent state laxity); Esty, supra note 68 (concluding that the appropriate level of government intervention will vary based on the situation); Peter P. Swire, The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law, 14 Yale L. & Pol'y Rev. 67, 91-94 (Symposium Issue 1996) (analyzing reasons why states might frequently underprotect the environment). For a response to some of those criticisms, see Richard L. Revesz, The Race to the Bottom and Federal Environmental Regulation: A Response to Critics, 82 Minn. L. Rev. 535, 545-63 (1997).

[73] Henry N. Butler & Jonathan R. Macey, Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority, 14 Yale L. & Pol'y Rev. 23, 25 (1996).

jurisdiction need not be larger than the regulated activity.[74] They do not consider whether dynamics leading to creation of the harm emanate outside the jurisdiction, whether the underlying harmed resource is somehow confined to one jurisdiction, or whether several regulators might in fact share elements of the problem presented.[75] Jurisdictional mismatch Forms 5, 7 and 8 are largely ignored, with the focus only on the physical site of the pollution harm.[76] As discussed below, the forms of jurisdictional mismatch will influence the regulatory incentives of both government actors (the supply side) and those affected by potential regulation (the demand side).

B. Regulatory Opportunity as a Commons Resource

Regulatory commons problems arise where a social ill does not fall squarely within any particular political-legal regime's turf. This is indeed a frequent situation, as one or more of the forms of jurisdictional mismatch will typically exist in connection with environmental and tragedy of the commons resource harms. It is often unclear what political-legal regime has regulatory primacy or, in an area not previously subject to regulation, is best situated to address the social ill.

The regulatory commons problem requires that in addition to focusing on the common pool resource or those harvesting the resource, political-legal analysts must factor in incentives of potential regulators of the harmful conduct. From the viewpoint of a potential regulator, the various forms of jurisdictional mismatch all create a common conundrum. As long as the resource harm (Diagram 6), the underlying resource (Diagram 7), or the activity causing harm (Diagram 8) are in one or more respects outside that regulator's reach, or shared with other possible regulators (Diagram 5), a potential regulator confronts the essence of the regulatory commons problem. In deciding whether to address a regulatory opportunity offered by this social ill, the regulator will view the regulatory opportunity as a commons resource much as fishers would viewed a shared ocean. In neither case would fishers or potential regulators have strong incentives to invest in efforts to gather information about the resource harms, lead collective

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[74]Id. ("when a particular polluting activity is limited to a particular locality or state, there is very little justification for federal environmental regulation."

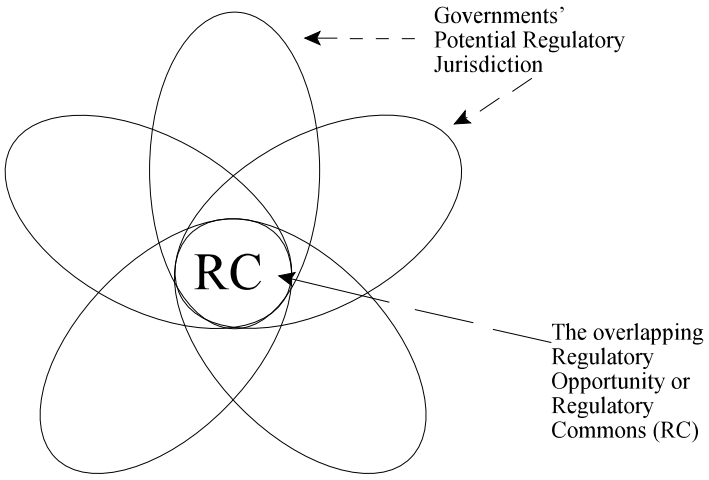
[75]They also do not consider whether regulation might be intended to create benefits that would be multi-jurisdictional, as is arguably a rationale for much legislation enacted under authority granted by the United States Constitution Commerce Clause. See Schapiro & Buzbee, Unidimensional Federalism, supra note 70 at 1243-49.

[76]In their citation to Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956), and their "summary of the literature," Butler and Macey mention the problem of regulatory extrajurisdictional effects, but do not confront reasons the "matching principle's" focus on the geographic location of a pollution is inadequate. Butler & Macey, supra note 73 at 30 & note 18.

efforts to devise curative strategies, or design a responsive strategy.[77] The shared nature of the underlying resource–be it a natural resource or a regulatory opportunity–creates disincentives for such resource stewardship.

Diagram 9 presents the regulatory opportunity problem from the perspective of potential regulators. Numerous regulators could seize the regulatory opportunity offered by the social ill. The overlapping area of regulatory opportunity, marked with the RC designation, is the regulatory commons.

Diagram 9: Another Perspective on Diagram 5, 6, 7 & 8:
The Regulatory Commons



[77]Professor Rose briefly addresses this linkage between lack of ownership of underlying commons resources and incentives for scientific or political investigation. See Carol M. Rose, Scientific Innovation and Environmental Protection: Some Ethical Considerations, 32 Envtl. L. 755, 761 (2002) (stating that "[j]ust as no one is rewarded for preserving open-access commons resources, no one is rewarded for learning about them either").

As reflected in Diagram 9, the regulator cannot take control of the social ill, cannot exclude others from similarly deciding to try their hand at regulating, and cannot stop others from free riding on the regulator's investment in investigating the social ill and designing a regulatory response. The regulator might plunge in nevertheless, much as fishers are expected to overexploit a common pool fishery. However, as explored in the next section, it is more likely that this kind of shared regulatory opportunity will, as a result of supply and demand incentives, create a variable weighing against potential regulators investing in curative regulation.[78]

C. Supply and Demand Dynamics in a Regulatory Commons Setting

The regulatory commons dynamic, by definition, arises when a social ill in some respect is juxtaposed against mismatched political-legal regimes. The tragedy of the commons literature has generally assumed away the issue of how resource users (H, in the diagrams above) would overcome problems of coordination. Professor Thompson's recent essay on "governing the commons" effectively traces disincentives for any one resource user to invest in an effective collective governance strategy,[79] as does Professor Krier in his essay on commons ills and "free

[78]As explored infra in Parts III and IV, in particular historical contexts, especially in settings of widespread perceptions of crisis or disaster, pressures to act may overcome regulatory commons disincentives. Furthermore, where a particular regulator or institution has over time become the prime or traditional regulator of an issue (despite others' potential authority), both supply and demand incentives will change and action is more likely. This article's focus is primarily on issues that have not yet become the prime regulatory turf of any one institutional actor. Also quite distinct is an enforcement or adjudicatory setting where multiple potential enforcers who undoubtedly already have jurisdiction over an issue might have incentives to show enforcement zeal, even if duplicating others' efforts. See Keith N. Hylton & Vikramaditya S. Khanna, Toward an Economic Theory of Pro-Defendant Criminal Procedure, Revised Version of Discussion Paper No. 318, The Harvard John M. Olin Discussion Paper Series (February 2003) at 27 & n. 105 (asserting that in an enforcement setting "vertical fragmentation of the enforcement process means that each individual [enforcement] agent is in a position similar to that of successive owners of the pieces of a long toll road," imposing tolls or sanctions that are in aggregate excessive because agents do not take others' enforcement actions into account); James M. Buchanan & Yong J. Yoon, Symmetric Tragedies: Commons and Anticommons, 43 J. L. & Econ. 1, 11 (2000) (developing a model to further develop Heller's "anticommons" theory, see Heller, supra note 6, and suggesting that in settings such as "bureaucratic barriers to residential construction" or where environmental laws "interpos[e] additional authorities with the right to exclude development of facilities," permit seekers required to obtain multiple approvals from diverse and overlapping agencies may be discouraged in ways not captured by most models of regulatory behavior).

[79]See Thompson, supra note 22.

market environmentalism" proposals.[80] While these insightful analyses fill a gaping analytical hole in first generation commons scholarship by Hardin and others,[81] they remain focused on the relationship between the underlying resource and those who utilize the resource. Consistent with early public choice literature's focus on political outcomes as explained by desires of those demanding regulation, these analyses and Hardin's lauded essay give little attention to incentives of potential regulators and, more particularly, to incentives of regulators where a social ill is juxtaposed against numerous potential regulators. Building off of the logic of these commons analyses, public choice scholarship, and insights of behavioral law and economics, this section demonstrates how regulatory commons dynamics create logical incentives for political inattention.

The starting assumption is that all players in the regulatory commons setting are motivated by self-interest, as broadly defined above.[82] I assume also that an underlying activity causes social ills that are not being addressed by markets or the common law.[83] The assumption is that those harmed by the social ills would, if given a cost-free and effective means to rectify the ills, embrace a regulatory solution. Critical to analysis of the regulatory commons dynamic, however, is the more realistic assumption that those demanding and supplying regulation have limited resources and competing items vying for their attention.[84] From problem attribution, to coordination, to inability to exclude other regulators, to incentives to preserve the status quo, a regulatory commons setting complicates any move from recognition of a social ill to implementation of responsive regulatory measures.

1. Blame and attribution

All legislators and regulators (hereinafter in this section, regulators) have an array of matters competing for their attention and must make choices.[85] While early law and economic

[80]See Krier, supra note 43.

[81]See supra note 42 and accompanying text.

[82]See supra Part I(B) .

[83]Implicit also is that all of these activities or phenomena occur because they respond to wants of citizens, business, and regulators and hence generate goods as well as ills.

[84]See Ronald Coase, The Problem of Social Cost, 3 J. L. & Econ. 1, 15-19 (1960) (identifying pervasive importance of transaction costs as well as government administrative costs, and suggesting that attention to such costs is critical to assess means to address liability for harms).

[85]Legislators and adminstrative agency regulators undoubtedly face substantially different incentives due to their direct or indirect electoral accountability, different levels of judicial oversight, and obligations to explain reasons for their actions. But see William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 Stan. L. Rev. 87 (2001) (exploring differences in legislative and administrative agency functions, but showing how the Supreme

theorists may have oversimplified in assuming that regulatory demands would translate into desired regulatory results, citizen and interest group demands are undoubtedly motivators for political action.[86] Jurisdictional mismatch undercuts the likelihood of effective concerted demands for political action. As explored in attribution theory, an injury moves through a sequence of steps before blame is affixed and demands for action are made.[87] A critical step is figuring out who is to blame for a particular ill.[88] Regulators could be perceived as a cause of a social ill, but also offer the potential venue for regulatory relief. Where numerous regulators could be blamed for the ill, or sought out for relief, demanders of regulation encounter substantial informational and strategic hurdles confounding attribution decisions.[89] If no single regulator is perceived as the institution most responsible for a problem or its correction, no particular regulator will likely be blamed for governmental inattention.[90] Where those harmed by an activity

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Court in recent federalism decisions has required Congress to generate a supporting "legislative record" despite the general absence of such legislative records). This section will for the sake of streamlined writing use the phrase "regulators" to refer to both potential generators of regulatory responses to social ills.

[86]See infra at Part III(A).

[87]William Felstiner et al., The emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . ., 15 Law and Society Rev. 631, 641 (1981) ("Attribution theory asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious.")

[88] The general model for the attribution field is that antecedents, such as information, beliefs, and motivation, lead to attributions or perceived causes, which then have certain consequences in the form of behavioral changes, affects, and expectancies. Harold H. Kelley and John L. Michela, Attribution Theory and Research *in* Annual Review of Psychology 458, 459 (1980)

[89]"If people make very unstable attributions for the injurious experience, they are more likely to conclude that it will go away without any effort on their part, and perhaps just tolerate it." Dan Coates & Steven Penrod, Social Psychology and the Emergence of Disputes, 15 Law and Society Rev. 655, 660, 666.

[90]Justice O'Connor articulated a similar accountability conception in New v. United States, 505 U.S. 144, 168-69 (1992), stating that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . . [I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." Id. The assumption that citizens could discern accountability only to this limited

have difficulty even ascertaining the source of the harm , then these victims confront another attribution hurdle that makes it difficult to discern which potential regulator is best suited to receive requests for action.[91]

Where demands for regulation are splintered among numerous potential regulators, regulators are not likely accurately to perceive the aggregate interest in the underlying ill. Citizens always face collective action and free riding temptations in deciding whether to monitor officials; where there are "multiple service providers, [citizens are] likely to incur [monitoring] costs only with respect to issues in which they have an idiosyncratically high interest."[92] Demands thus will infrequently be made, and due to splintered demands directed to numerous possible regulators, each potential regulator is likely to perceive modest demand for regulation.

New Institutionalism scholarship reaches a similar conclusion, noting that in any multiparty setting where payoffs from engaging in political action are asymmetrical, a common and mutually beneficial outcome may not exist.[93] Although many may seek a regulatory cure, "they will disagree about which institution to choose."[94] Thus, the proposed institutional solution to an ill caused in part by a collective action problem "itself constitutes a collective dilemma."[95] As the number of potential regulators increases, both those demanding regulation and potentially supplying regulation face an institutional dilemma.[96]

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extent has been questioned. Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 517 (1995) (arguing that state government officials can explain to the voters the federal government's requirements).

[91]See Merrill, supra note 5 at 937-38 (in context of transboundary pollution, analyzing how difficulty in identifying a pollution source will frustrate efforts to find the source state regulators and request action).

[92]Clayton P. Gillette, Regionalization and Interlocal Bargains, 76 N.Y.U. L. Rev. 190, 205 (2001) (citing Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 828 (1998)).

[93]Robert H. Bates, Contra Contractarianism: Some Reflections on the New Institutionalism, 16 J. Politics & Soc'y 387, 394 (1988). Bates defines asymmetric payoffs as situations where each party's preferred outcome differs. Id.

[94]Id.

[95]Id.

[96]See James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 65 (1965) (stating that "costs will increase as the size of the group required to agree increases").

2. Diluted credit claims

Relatedly, another central tenet of political economic literature is that regulators choose actions to claim credit.[97] For a regulator choosing among competing demands, a demand for regulation in an area pervaded by regulatory commons problems is not only likely to create fragmented demands, but also lead to competing credit claims. For example, if a state regulator (R1) decided that aquaculture ecosystem risks were worth investigating and regulating, he could anticipate the following. Other potential regulators (R2, R3, and so forth) might choose to act and make competing claims about their leadership. Because regulators could not control each others' actions,[98] others also might regulate in ways creating conflict and undercutting the achievements of R1. Heterogenous demands and regulatory goals would likely lead to clashing regulatory choices. Alternatively, that first state regulator might make the usual free riding decision, banking that someone else would take the lead.

Perhaps equally important, an innovative first regulator in a regulatory commons setting could not patent or otherwise protect his regulatory innovation. With numerous regulators sharing an interest in the regulatory opportunity, others might hang back, then copy R1's innovative effort. Once again, the regulatory investment would create externalized regulatory benefits, plus credit would be divided among all regulators. This assumes, of course, that constituents could even discern what regulators took effective curative actions.

Where the causes or effects of a social ill, or the threatend resource itself, exceed the jurisdiction of a regulator (Diagrams 6, 7 and 8) , then even without other regulators potentially also acting, a regulator would have diminished incentives to act. Either she could not control external causes of the harm, the resource itself would exceed her grasp, or harms would be exported and hence of little concern. The likelihood of effective regulation creating opportunities for credit claiming would be diminished.

3. Information costs

Investigating and devising a regulatory response to a social ill is of course costly.[99] Due both to fragmented demands and lack of control of a regulatory product, potential regulators would have strong incentives not to devote resources to projects offering such uncertain payoffs. Assuming that other regulatory opportunities present fewer regulatory commons problems and greater credit payoffs, a rational regulator might opt against information expenditures necessary to evaluate a regulatory opportunity arising in a regulatory commons setting.

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[97]See, e.g., Morris Fiorina, Congress: Keystone of the Washington Establishment (2nd ed. 1989); David Mayhew, Congress: The Electoral Connection (1974).

[98]This assumes for the moment that no regulator has power to preempt others.

[99]For the classic explication of information costs and their importance to market function, see George Stigler, The Economics of Information, 69 J. of Pol. Econ. 213 (1961).

4. Status quo preservation incentives

Status quo bias and risk aversion tendencies create additional incentives for regulatory inaction, especially in a regulatory commons setting.[100] Any baseline (or status quo) legal framework will create entitlements and shape investments of both regulators and constituents. For example, if urban sprawl has proceeded with trees as an unpriced amenity, then real estate developers will view undeveloped forested lots as a prime development opportunity.[101] They presumably would invest by calculating the return offered by such lots. If the timber could be sold, a forested lot might have an even higher value than a lot already cleared or containing buildings. If, due to green space degradation and air quality concerns, a regulator proposed to limit tree cuts, opposition would immediately arise from those invested in the status quo. Furthermore, where numerous governments share jurisdiction over the pace and location of growth, opponents of a tree preservation regulation might seek protection from more senior regulators in a vertical hierarchy. They also might threaten no longer to invest in the green jurisdiction, setting up an interjurisdictional contest for investment.[102] If such an ordinance responded to citizen concerns, it might pass, but others could quickly imitate this regulatory success or undercut it with their own new measures. Although the ultimate success of such a proposal is uncertain, it is quite certain those invested in the baseline legal setting would oppose an unfavorable legal change.[103]

Such opposition might arise in the jurisdiction proposing new regulation. Opponents might also strategically manipulate potentially applicable regulators and their legal frameworks. Legal frameworks and regulatory tools are not a static given, but a contested terrain where market participants, citizens, and political actors themselves would strategically exploit and seek

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[100]For utilization of similar concepts drawn from behavioral economics literature to derive an argument for regulatory "asymmetric paternalism," see Colin Camerer et al., Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism," 151 U. Pa. L. Rev. (forthcoming 2003).

[101]For a brief conference discussion of tree preservation policies as a measure to deter sprawl harms, see William W. Buzbee, Smart-Growth Micro-Incentives and the Tree-Cut Tax Case, 17 Ga. State U. L. Rev. 999 (2001).

[102]See supra notes 68-72 and accompanying text for discussion of "race-to-the-bottom" dynamics.

[103]Similar incentives have been observed in connection with the legislative process, where interest groups seek to preserve the status quo by engaging in sequential and strategic efforts in multiple venues. See William N. Eskridge, Jr., et al., Legislation: Statutes and the Creation of Public Policy 798-99 (3rd ed. 2001); Buzbee, supra note 35 at 206-19; William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L. J. 331, 334 (1994).

to modify legal regimes or shift disputes to the most favorable political-legal venue.[104] Especially in this era of increased globalization, but even in state and local contexts, seldom will any person or institution be able to control outcomes, let alone prevent other stakeholders from strategically using institutional options to obtain favorable treatment.[105] In democratic systems, it is far easier to block change through use of "veto gates" and effective supermajority requirements than it is to achieve a regulatory change.[106] Stakeholders, be they regulators, demanders or opponents of regulation, also would predictably seek legal "trumps" to escape unfavorable outcomes.[107]

Elizabeth Rolph's empirical study of regulatory regimes and their implications for pre-regulatory wealth and endowments is also consistent with expectations that preservation of the status quo is a likely regulatory outcome.[108] Her research found that a "common theme" of

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[104]Cf., William N. Eskridge & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L. J. 523 (1992) (analyzing United States federal legislative process as a "sequential game" in which stakeholders strategically respond to each other).

[105]See Andrew T. Gutzman, Choice of Law: New Foundations, 90 Geo. L. J. 883, 910-12 (2002) (observing shift from weak regulation of antitrust in Europe due to inability of nations to "apply their laws extraterritorially," to more comprehensive regulation following European Union unification due to ability to "regulate . . . entire transaction[] rather than just a small portion"); but see Brian Bercussion, Regulatory Competition in the EU System, in Regulatory Competition and Economic Integration: Comparative Perspectives 242-46 (Daniel C. Esty & Damien Geradin, eds. 2001) (analyzing ways European integration could reduce "social dumping" concerns leading to lax labor protections, but also via European Union standard setting designed to increase overseas competitiveness could prevent nations from setting protective standards).

[106]"[T]o succeed, a bill must survive a gauntlet of veto gates in each chamber, each of which is supervised by members chosen by their peers to exercise gatekeeping authority." McNollgast, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, Law & Contemp. Probs., Winter/Spring 1994, at 22. For explication of effective supermajority requirements, see Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1339-40 (2001).

[107]Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 Va. L. Rev. 1347 (1997) (noting expectation of exercise of trumps by central over decentralized governments, but analyzing rationales for allowing decentralized trumps of central government baselines).

[108]Rolph's study examined government policies that sought to allocate the following public goods: offshore oil reserves (drilling leases); radio and t.v. airwaves (FCC broadcast frequencies); California groundwater (pumping licenses); segments of the California coastline (coastal development permits); the air (pollution rights); truck operating licenses; farm subsidy acreage allotments; and federal oil and natural gas price controls and quotas. See Elizabeth S. Rolph, Government Allocation of Property Rights: Who Gets What?, 3 J. Pol'y Analysis &

regulatory design was "the maintenance of the status quo," rather than regulatory design achieving immediate or major redistributions of wealth.[109]

Behavioral economics insights reveal further reasons changes from the status quo will often be resisted. Among the most robust observations of cognitive psychology are several linked tendencies for people to oppose change. The first is the endowment effect. Contrary to economists' tendency to assume that people will equally value efforts to acquire or sell an object, psychologists find that people actually demand far more to give up an object than they would pay to acquire it.[110] People consistently reveal themselves to be risk or loss averse.[111] Their weighing of outcomes are "path dependent," in the sense that initial settings influence assessments of value.[112] People also tend to overweigh recently received information under what is referred to as the "availability" heuristic.[113] These linked observations have several implications for efforts to overcome the status quo by initiating new regulatory action.

Those benefitting from the status quo regulatory setting, as well as regulators who have invested in the status quo either through enactment or implementation efforts, will not only literally have sunk money and effort into that baseline, but they are likely to become attached to it. Regulators and those benefitting from the status quo will require more convincing to change policies than they would invest in the status quo in the first place. Given predictable entreaties by status quo beneficiaries to retain the status quo, regulators considering a change will likely give inordinate weight to the most frequent and latest lobbying efforts.[114] Simply because a regulatory

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Mgmt. 45, 47–49 (1983).

[109]Id.

[110]See Richard H. Thaler, The Winner's Curse: Parodoxes and Anomalies of Economic Life 63-78 (1992). For application of this observation in the setting of global warming policy, see Thompson, supra note 22 at 256.

[111]Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263 (1979); William Samuelson & Richard Zeckhauser, Status Quo Bias in Decisionmaking, 1 J. Risk & Uncertainty 1, 7 (1988) (both cited and discussed in Camerer et al, supra note).

[112]See Jennifer Arlen, The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law, 51 Vand. L. Rev. 1765, 1772 (1998).

[113]Daniel Kahneman & Amos Tversky, Judgment Under Uncertainty: Heuristic and Biases, 185 Science 1124, 1127-28 (1974) (stating that "people assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind").

[114]This insight from cognitive psychology is consistent with results anticipated by public choice theory predictions that those with concentrated interests in an issue will more often than dispersed groups overcome collective action hurdles to seek favorable regulation. See Krier,

approach was initially embraced, it will be given a higher value than if offered anew.

Not all cognitive psychology insights lead to a preference for the status quo, but when one combines all of the economic, political and psychological incentives, the status quo is likely to be a strongly favored outcome.[115] When one adds in regulatory commons insights about splintered demands for regulation and diluted credit opportunities,[116] regulatory change becomes even less likely. Regulatory commons dynamics exacerbate status quo preservation tendencies and heighten collective action problems, coordination costs, and free riding temptations. Potential regulators' incentives to invest in new regulation to address a social ill are substantially diminished by regulatory commons dynamics created by a mismatch between a social ill and jurisdictional lines.

III. Reconciling the Overregulation and Regulatory Commons Story

Regulatory commons dynamics thus create logical incentives for lack of political investment in regulatory solutions. Given the prevalence of social ills that match no particular jurisdiction, but in fact could be addressed by numerous potential regulators, some degree of regulatory commons dynamics will be found in most regulatory settings. This pervasive disincentive to address social ills, particularly in the environmental arena, should therefore be expected. This theory of regulatory gaps, however, stands in substantial tension with a vast literature, mostly growing out of early public choice scholarship, that posits excessive and imprudent regulation. That literature's skepticism about the public benefits of regulation and hypothesis of overregulation is reflected in political initiatives of the past twenty years and administrative law jurisprudence. This Part finds the overregulation hypothesis actually to be a partially inaccurate generalization of pathbreaking public choice analyses.

This Part shows how attention to structural variables and context, combined with the usual political economic fundamental assumptions of stakeholder self-interest as a chief motivator for regulatory activities, offer a means to reconcile the regulatory commons story and expectations of regulatory excess and imprudence. Stringent and duplicative regulation can occasionally be expected, if and when a social ill is addressed by regulation. As others have observed, regulation of dispersed risks tends to follow a galvanizing public crisis or confluence of

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supra note 43 at 331 (stating that "groups interested in disrupting the environment generally have a comparative organizational or lobbying advantage over groups interested in preserving it").

[115]In particular, cognitive psychologists note several linked tendencies leading to "overoptimism" about a proposed course of action, including inability to assess accurately the probabilities of failure, underestimation of bad outcomes, and excessive optimism about one's own abilities. See Arlen, supra note 112 at 1773-74; Kahneman & Tversky, Judgment Under Uncertainty, supra note 113 at 1128-29. In addition, others suggest that lay person fears of highly unlikely but fear-inducing risks may lead to excessive and unfounded demands for stringent regulations. See infra note 169 and accompanying text.

[116]See supra Part II(D).

unusual political events.[117] Broad based concerns about overregulation, in the sense of comprehensive regulatory intrusion, actually finds little support in the logic of public choice scholarship, especially when one factors in the existence of regulatory commons dynamics. Gaps and overregulation of addressed risks can logically go hand in hand.

A. The Overregulation Expectation

A political economic theory suggesting incentives for regulatory inattention and gaps is significant primarily in its tension with far more prevalent theories positing overregulation as a pervasive problem in the modern administrative state. A substantial body of political economy scholarship anticipates overregulation. This literature usually starts with assumptions that one should look at issues of politics, law and regulation by utilizing private interest or public choice theory assumptions of rational, self-interested regulators (the supply side) and individuals and interest groups seeking or trying to prevent regulation (the demand side).[118] Such concerns about overregulation are reflected in recent political efforts to reform regulation, as well as in jurisprudential doctrines that facilitate regulatory inaction. As suggested in the final section of this part, a less developed literature has begun to question the prevalence of overregulation, observing areas of regulatory failure and inaction. The expectation of overregulation pervading much political economic theory, however, neglects incentives to ignore regulatory opportunities when they arise in the setting of social ills that confront complex regulatory environments with no clearly matching or commensurate governmental jurisdiction.

1. Overregulation Theories

George Stigler's influential early work posited that interest groups would generally demand and receive regulation not to further the public interest, but to gain advantages in the marketplace through such a regulatory intervention.[119] While his simplified theory has been criticized and enriched on many grounds, among them that interest groups will have divergent interests, that politicians have their own incentives, and that an efficiency coalition will often exist in addition to a rent seeking coalition,[120] his basic starting assumption of political self-

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[117] See infra at Part IV(C).

[118] See supra Part I(B).

[119] George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

[120] Stigler's theory of economic regulation has been challenged on a number of grounds. See Gary Becker, A Theory of Competition among Pressure Groups for Political Influence, 98 Q.J.E. 371 (1983) (arguing that regulators have a larger constituency than simply the regulated interests); John Binder, Measuring the Effects of Regulation with Stock Price Data, 16 Rand. J. Econ. 167 (1985) (examining the stock market following 20 regulatory changes from 1889 to 1978 and finding no systematic increased industry wealth as suggested by Stigler); Steven Croley,

interest as a pervasive motive and his cynicism about politics has spawned a large literature.[121] Scholars have now suggested additional motivations such as the representative's desire to be reelected,[122] become more influential in Congress, present sound policy, prepare the ground for a post-political career, and increase personal gain.[123]

While these public choice theories vary in their focus, an underlying assumption is that citizens too are motivated by self-interest in their voting decisions.[124] A key move in this literature is the assumption that rational voter ignorance will provide legislators or regulators slack to pursue politically advantageous actions that actually may not accord with constituent needs or desires.[125] Therefore, politicians can demand payment from interest groups in return for passing

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Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1 (1998) (arguing Stigler's public choice theory of regulation puts excessive weight on legislator's electoral goals, and is inconsistent in its treatment of principal-agent and collective action problems between the regulated, regulators, legislators and voters); Roger Noll, Economic Perspectives on the Politics of Regulation, in, Handbook of Industrial Organization, 1254-87 (Richard Schmalensee and Robert D. Willig, eds. 1989) (asserting that Stigler's theory of monopoly capture by regulated interest occurs only in the extreme rare cases and that Stigler's theory overemphasizes the ability of politicians to control the administrative agencies); and Cass Sunstein, After the Rights Revolution: Reconceiving the Regulatory State, 47-73 (1990) (arguing regulation occurs for a variety of justifications beyond Stigler's interest group transfer).

[121]See e.g. Farber & Frickey, supra note 37 at 22 & nn.44-45 (1991) (relying on George J. Stigler, The Citizen and the State (1975); Stigler, supra note 119; Kenneth A. Shepsle, Prospects for Formal Models of Legislatures, 10 Legis. Stud. Q. 5, 12-13 (1985); and William Landes & Richard Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 877 (1975) ("legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation...Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes")).

[122]Id. at 22 n.46 (basing this conclusion on Sinclair, Purposive Behavior in the U.S. Congress, 8 Legis. Stud. Q. 117, 126 (1983) and Stigler, supra note 117). See also Mayhew, supra note 97 at 5, 13; Fiorina, supra note 97.

[123]Farber & Frickey, supra note 37 at 21 & n.40 (citing Richard Fenno, Congressmen in Committees 1 (1973)).

[124]Id. at 23 n.48 (citing Barry R. Weingast et al., The Political Economy of Benefits and Costs, 89 J. Pol. Econ. 642 (1981) noting that pork-barrel politics are "based on constituent interest"; Sam Peltzman, Constituent Interest and Congressional Voting, 27 J.L. & Econ. 181 (1984)).

[125]Id. at 23.

favorable regulation,[126] or even extort money by threatening to pass adverse regulations unless they receive funding.[127] The less predictable the legislator, the easier it is to sell his vote. And because these votes can only be rented, not purchased, the industry must repeatedly court the representative.[128] Thus, this theory proposes that politicians act to further their self-interest and not merely out of a desire to advance the public good.[129] Political activity is the means for politicians to gain advantage and wealth.

Central to these public choice explorations of legislative and regulatory activity is the

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[126]Fred S. McChesney, Regulation, Taxes, and Political Extortion, in Regulation and the Reagan Era 223, 226 & 238 nn.18-20, 227 & 238 nn.23-25 (Roger E. Meiners & Bruce Yandle, eds., 1989) (quoting Robert E. McCormick, A Review of the Economics of Regulation, in Regulation and the Reagan Era, supra, to support the assertion that "groups supply votes and campaign contributions to politicians who in turn supply regulation"); see also David Kaun, Minimum Wages, Factor Substitution, and the Marginal Producer, 79 Q.J. of Econ. 478-94 (1965) (noting that minimum wage legislation helped "capital-intensive rivals"; Michael Maloney & Robert McCormick, A Positive Theory of Environmental Quality Regulation, 25 J.L. & Econ. 99 (1982) (linking contributions by firms to regulations adverse to their competitors); Peter Pashigian, The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares, 27 J.L. & Econ. 1 (1994).

[127]McChesney, Regulation, Taxes, supra note 126 at 227-228 & 238 n.26 (citing Larry Sabato, PAC Power: Inside the World of Political Action Committees (1984) as demonstrating that the dairy industry pays for continuous milk-price supports, and physician and dental associations also contribute generously to maintain their cartel-like self-regulation). McChesney has also written extensively about extortion of payment. He posits that politicians propose laws that they have no intention of passing for the sole purpose of 'milking' private producers for payment so that the legislation is not enacted. Thus, there are 'cash cows', 'juice bills', and 'fetcher' bills, which are used solely to squeeze cash out of PACs. Politicians are paid not to legislate: "money for nothing." A high profile example is the Clinton health plan, which led to the drop in pharmaceutical company stock value and, in response, huge contributions to politicians by the threatened companies. Fred S. McChesney, Money for Nothing 29-30, 41, 57-58 (1997).

[128]Richard L. Stroup, The Unpredictable Politics behind Regulation, in Regulation and the Reagan Era, supra note 126, 249-250 & n.14 (explaining that Alfred E. Kahn, The Economics of Regulation (1971) attributed the failure of the railroad industry to its inability to maintain its powerful lobby in the Interstate Commerce Commission, which allowed the trucking industry to push the railroads to the brink of bankruptcy). Sam Peltzman declined to see interest group activity as a zero-sum game where one group wins at the expense of another. Instead, he viewed the activity as an auction, where regulation is sold to the highest bidder. McChesney, Money for Nothing, supra note 127 at 16.

[129]See Anderson & Leal, supra note 46 at 54-55.

relative power of interest groups compared to dispersed citizen interests. Even if citizens actually know and care about an issue, entities with concentrated interests in the regulatory issue will have far greater incentives to act in the political arena, typically by forming groups and thereby overcoming temptations to free ride found in settings requiring collective action. Mancur Olson's classic analysis of collective action dynamics acknowledges that the very decision to form a group requires unlikely efforts overcoming free riding proclivities.[130] Still, those with a concentrated stake in a regulatory issue are, due to their relatively higher monetary stake and their smaller numbers, more likely than dispersed citizens to overcome collective action hurdles. Such concentrated interest stakeholders are thus likely to dominate politics and more often succeed in obtaining desired political results.[131] From Olson's and Stigler's focus on industry domination, more recent critics of regulation hypothesize that environmental and union groups can also take advantage of their individually high stakes in regulation and seek forms of regulation advantageous to their own interests.[132] They may lack the wealth of industry, but for such groups regulatory success is key to their survival; their relative interest far exceeds that of citizens.[133]

Scholarship building on the hypothesis of William Niskanen posits that regulators too will exploit the political process for personal gain. According to Niskanen, regulators are motivated to seize opportunities to gain turf and expand budgets, typically by promulgating yet more regulation.[134] Unconstrained by concern about regulatory compliance costs borne by others, regulators (according to this literature) will give little heed to the aggregate costs of regulatory burdens and hence will regulate in ways creating private sector losses and inefficiency.[135]

A forthcoming analysis of the administrative state also suggests that there is excessive regulation, but roots that argument less in public choice frameworks than in incentives for

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[130]Olson, supra note 56.

[131]Id. at 125-31, 141-48.

[132]Daniel A. Farber, Politics and Procedure in Environmental Law, 8 J.L. Econ. & Org. 59-81 (1992)); Michael S. Greve, Introduction: Environmental Politics without Romance, in Environmental Politics: Public Costs, Private Rewards, supra note , at 8; Todd J. Zywicki, Industry and Environmental Lobbyists: Enemies or Allies?, in The Common Law and the Environment, supra note , at 189, 190

[133]See Farber, supra note 132.

[134]William Niskanen, Bureaucracy and Representative Government (1971). See also Andre Blais & Stephane Dion, The Budget Maximizing Bureaucrat 4, 5 (1991). Proponents of this view suggest there is little motive for bureaucrats to ensure that programs are implemented efficiently, but will be interested in increasing their agency's budget. See Anderson & Leal, supra note 46 at 57.

[135]See Blais & Dion, supra note 134.

"regulatory accretion."[136] As regulations accrete, compliance burdens grow and the ability to comply with all extant regulations diminishes. In Bayless Manning's phrase, America suffers from "hyperlexis," and we are "drowning in law."[137]

These various theories of regulation have strong strains of concerns about excessive and imprudent regulation, but do not all necessarily point in the direct of overregulation in the sense of comprehensive intrusive regulation. After all, the sum of politician and regulator self-interest, combined with industry and not-for-profit regulatory demands, will not necessarily result in onerous regulation, or any regulation at all. Politicians, be they legislators, the President, or regulators, may out of their own rational self-interest view the political skirmishing and decide that public regarding regulation, inaction or a weak regulatory intervention makes best sense.[138] Despite this logical possible outcome under these theories, the more general hypothesis of excessive regulation has taken hold and is reflected in political debates, administrative law analytical requirements, and administrative law jurisprudence. The incorporation of overregulation fears into our laws and jurisprudence is addressed in the following section.

2. Political and Jurisprudential Reflections of Overregulation Fears

The most constant reflection of overregulation fears is evident in regulatory reform debates and efforts. Since the Reagan administration's advocacy of deregulation, a strong refrain

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[136]JB Ruhl & James Salzman, Regulatory Accretion in the Administrative State, Georgetown L. Rev. (forthcoming 2003).

[137]Bayless Manning, Hyperlexis: Our National Disease, 71 Nw. U. L. Rev. 767 (1977); see also Robert C. Ellickson, Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue Into the Twenty-First, 74 S. Cal. L. Rev. 101, 105 (2000) (similarly exploring and doubting benefits of laws and regulations that have "grown like kudzu"). In the quite distinct settings of decisions to take enforcement actions or respond to individual adjudicatory requests for permits or regulatory authority, others have in analogous ways posited likely excessive action. See discussion and sources supra note 78.

[138]See Gary Becker, A Theory of Competition among Pressure Groups for Political Influence, 98 Q.J.E. 371 (August 1983) (positing that rent extraction by interest groups would destroy the political benefit of regulation for legislators and that the political process will create a more efficient distribution of regulation than Stigler predicted); Sam Peltzman, Toward a More General Theory of Regulation, 19 J. Law and Econ. 211 (August 1976) (stating that "no single economic interest captures a regulatory body"); see also Sam Peltzman, The Economic Theory of Regulation after a Decade of Deregulation, Brookings Papers Econ. Activity, 1, 6 (1989) (hereinafter "Deregulation") (asserting that regulators are agents of both the legislature and executive, as well as responsive to interest group demands).

has been that there is too much regulation.[139] Relatedly, proponents of regulatory reform then and now advocate creation of analytical hurdles such as cost-benefit analyses to slow the pace of regulation and force attention to regulatory costs. Efforts in the 104th Congress to pass comprehensive legislation requiring all major regulations to pass some version of a cost-benefit test represented a culmination of years of critical assessments of the administrative state.[140] While major regulatory reform legislation was defeated, slightly more modest cost-benefit analysis requirements are now law in the Unfunded Mandates Reform Act, as well as in Executive Order 12,286.[141]

Solicitude for targets of regulation and general lack of concern about agency inaction pervade administrative law jurisprudence. Most notably, the Supreme Court in *Heckler v. Chaney* created high hurdles for anyone seeking to prod a reluctant agency to act; through *Heckler* and its progeny, nonenforcement and resource allocation decisions are presumptively unreviewable in the courts.[142] The Court explicitly stated reduced concern for checking inaction, "not[ing] that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are often called upon to protect."[143] Burdens of regulatory action, not inaction, were the Court's concern.

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[139]See generally, The Reagan Regulatory Strategy: An Assessment (George C. Eads & Michael Fix, eds, The Urban Institute 1984).

[140]See William W. Buzbee, Regulatory Reform or Statutory Muddle, 5 N.Y.U. L. J. 298 (1996); Robert L. Glicksman, Regulatory Reform and (Breach of) the Contract with America, 1996 Kan. J. L. & Pub. Pol'y 1; Thomas O. McGarity, Deflecting the Assault: How EPA Survived a "Disorganized Revolution" by "Reinventing" Itself a Bit, 31 Envtl. L. Rptr. 11249 (2001) (analyzing battles over cost-benefit analysis and other efforts to restrict United States Environmental Protection Agency authority). For broader recent debate over imposing cost-benefit analysis requirements on agencies, compare Thomas O. McGarity, A Cost-Benefit State, 50 Admin. L. Rev. 7 (1998) (criticizing reliance on cost-benefit analysis) and Cass R. Sunstein, Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State, 48 Stan. L. Rev. 247 (1996) (embracing cost-benefit analysis as a default rule for all regulatory legislation).

[141]See McGarity, Deflecting the Assault, supra note 140 at 11252.

[142]See Ronald M. Levin, Understanding Unreviewability in Administrative Law, 74 MINN. L. REV. 689, 756 (1990) (discussing Heckler v. Cheney, 470 U.S. 821, 836 (1985) and subsequent decisions rendering agency inaction virtually unreviewable absent explicit legislative language overcoming that presumption).

[143]Heckler, 470 U.S. at 832 (emphasis in original). Justice Marshall, in dissent, questioned this solicitude for targets of regulation, stating that "requests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable . . . or to obtain palpable benefits that Congress has intended to bestow . . . ." Id. at 847 (Marshall, J., dissenting).

In constitutional standing doctrine, an area of Supreme Court doctrinal vacillation for approximately a decade, the Court has rendered "substantially more difficult" establishing standing for beneficiaries of regulation seeking to compel or challenge government action.[144] As enunciated by Justice Scalia in *Lujan v. Defenders of Wildlife,* agency programs and practices that fail to cause particularized harm to an individual will "rarely, if ever [be] appropriate for federal court adjudication" notwithstanding allegations of illegality,[145] since "[v]indicating the public interest . . . is . . . the function of Congress and the Chief Executive."[146] Justice Scalia adopted a similar approach in *Lujan v. National Wildlife Federation*, an earlier constitutional standing case in which the Court refused to recognize litigation as a means to prod an agency to rectify alleged "programmatic illegality" by that agency.[147] Instead, as in *Defenders of Wildlife,* the Court made clear that parties who sought "sweeping actions" aimed at "systemic improvement" of underperforming regulatory agencies would be left to obtain what remedies they could through the political processes of "the other branches."[148]

Similar concerns with overregulation are also reflected in some of the Supreme Court's regulatory takings jurisprudence, again particularly in opinions of Justice Scalia. In this setting, the Court's deference to the political process to rectify agency inaction and misconduct is curiously absent, but the Court's approach again leads to an anti-regulatory result. The Court reveals an open mistrust of the process by which the challenged regulatory actions are either legislatively enacted or administratively enforced. In *Lucas v. South Carolina Coastal Council,* for example, the Court stated that regulations which deprived real property of all "economically beneficial or productive options . . . carr[ied] with them a heightened risk that private property [was] being pressed into some form of public service under the guise of mitigating serious public harm,"[149] since "legislative crafting of the reasons for its confiscatory regulation" was more open to subversive manipulation than a judicially fashioned body of property rights.[150] In a memorable

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[144]Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

[145]504 U.S. at 568.

[146]504. U.S. at 576.

[147]*National Wildlife Federation* involved allegations that the Bureau of Land Management violated numerous statutory guidelines in managing public domain lands. See 497 U.S. 871, 879 (1990) (reviewing complaint's allegations).

[148]497 U.S. at 894; see also id. at 891 (observing that "programmic improvements are normally made . . . in the offices of the Department or the halls of Congress").

[149]505 U.S. at 1018 (emphasis added).

[150]505 U.S. at 1032 n.18 and 505 U.S. at 1025 n.12.

turn of phrase, Justice Scalia declined to show deference under any Takings Clause rule that predicated the validity of land-use restrictions on the legislature's mere proffer of justifiable reasons: this would amount to nothing more than a "test of whether the legislature ha[d] a stupid staff."[151] Justice Scalia's dissent in *Babbitt v. Sweet Home Chapter* evidenced a similar skepticism for the political process, this time in the context of agency rulemaking.[152]

Synthesizing these doctrinal strands reveals a prevalent concern with too much regulation and little concern with agency failures to act. Attributing a motivation of concern with overregulation is difficult, but the inconsistent assumptions about politics are revealing. While regulatory "beneficiaries" who seek regulatory enforcement are denied judicial relief on the ground that the political process presents an adequate and responsive realm, that same process is assumed to be intrinsically dysfunctional when the Court is asked to protect regulatory "targets" from allegedly overbroad policies and enforcement practices. Consistent with general overregulation concerns growing out of public choice jurisprudence, the Court's jurisprudence shows discomfort with regulatory burdens while offering arguably irreconcilable visions of politics.[153]

B. Overregulation Distinguished: Imprudence v. Comprehensiveness

Despite the sympathetic reception of overregulation theories in administrative law jurisprudence, most political economic literature actually does not support an expectation of pervasive and comprehensive regulation. Most significantly, the pathbreaking early work of Professors Stigler, Becker and Peltzman is primarily concerned with how diverse interest groups will compete for regulatory spoils.[154] The result of this competition is typically not excessively

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[151]Id. at 1025 n.12.

[152]515 U.S. 687 (1995).

[153] Similarly, Professor Jody Freeman attributes the increased privatization of services and actions that were previously handled by government agencies as rooted in desire to "shrink the state" and a preference for "private over public ordering." See Jody Freeman, Extending Public Law Norms Through Privatization, 116 Harv. L. Rev. 1285, 1291-92 (forthcoming 2003). One distinction that may deserve attention is between incentives for action when in a setting of potential initial creation of legislative or regulatory frameworks, where this article suggests there will often be incentives for inaction, and settings of overlapping regulators who already have enforcement authority. See discussion and sources cited supra note 78. Only empirical observation, however, could begin to determine in the enforcement setting whether excessive or duplicative enforcement actions are a frequent problem. This article posits disincentives for initial regulatory or legislative action when a dispersed social ill does not match well with existing jurisdictional turfs. See supra Part II.

[154]See sources cited supra at notes 119-21.

burdensome regulation addressing social ills, but regulation favoring regulatory targets, weak regulation, or no regulation at all.[155] It even can lead to laudable regulation designed to enhance efficiency, as theorized by Becker.[156] Deregulation also poses challenges for theories positing that more and more regulation will be produced, as do areas of regulation such as often stringent environmental laws.[157]

Niskanen's agency expansionism hypothesis has been challenged and enriched on several fronts. First, it is far from clear that money motivates regulators when they consistently face budgetary constraints imposed by others.[158] In addition, it remains unclear why legislators or interest groups would empower agencies to enrich themselves and expand their turf.[159] Furthermore, if one starts with the assumption that all stakeholders in regulatory battles will seek to further self-interest, then one must also assume some tasks will be dodged as a result of risk averse decisions by regulators.[160] One recent analysis critical of Niskanen convincingly posits an

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[155]See Peltzman, Deregulation, supra note 138 at 6-13.

[156] Becker, supra note 138 (cited and discussed in Peltzman, Deregulation, supra note 138 at 12, 16-17)

[157]Peltzman, Deregulation, supra note 138 at 2, 17.

[158]See, e.g., Ronald N. Johnson & Gary D. Libecap, Agency Growth, Salaries and the Protected Bureaucrat, 27 Econ. Inquiry 431, 433- 48 (1989); Ronald N. Johnson & Gary D. Libecap, Bureaucratic Rules, Supervisor Behavior, and the Effect on Salaries in the Federal Government, 5 J. L., Econ. & Organization 53, 54 (1989).

[159]Fiorina suggests that legislators will create dysfunctional laws so legislators can score points with constituents when they provide constituent services, but Fiorina's thesis would lead one to expect intentional underfunding of agencies, not legislative generosity. See Fiorina, supra note 957 see also Croley, supra note 120 at 5 (arguing that attention to nuances of administrative process better reveals the nature of regulatory activity than public choice and other linked theories that mix "positive, descriptive and normative elements") ; David B. Spence, A Public Choice Progressivism, Continued, 87 Cornell L. Rev. 397, 433-34 (2002) (distinguishing legislative and administrative agency incentives with an emphasis on ways agency process and limited subject competence limit abuse).

[160]See William W. Buzbee, Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability, 80 Minn. L. Rev. 35, 91-94 (1995) (analyzing how regulator avoidance of a risk-laden tasks is consistent with United States Environmental Protection Agency's failure to expand its efforts to facilitate voluntary cleanups of contaminated sites).

array of factors weighed by agency officials.[161] From the agency perspective, adverse feedback from the groups interacting with the agency can lead to oversight, budgetary reductions, or procedural requirements, all which reduce the autonomy and independence of the agency.[162] Therefore, when agencies decide whether to take action, they seek to maximize positive feedback and minimize adverse reactions, with budgetary aspirations as only one among numerous restraining factors.[163]

If, instead of assuming overregulation, one starts with the basic political economic literature assumption of stakeholder self-interest and engages in rigorous context-specific analysis, regulatory outcomes are likely to be far more mixed.[164] Occasional examples of capture and private interest deals would be found, while other laws might enhance efficiency. Some might even reflect benefits genuinely provided to broad and dispersed beneficiaries. After all, it is "devilishly hard to calculate whether the public interest benefits of doing something about environmental protection are overwhelmed by the costs of private-interest deals that are in the interstices of the legislation."[165]

Mendeloff and others also suggest that where unusual events prompt political attention to dispersed risks, those moments of heightened attention may lead to stringent regulatory mandates.[166] Such moments of crisis or heightened political awareness are also likely to give rise to multiple government actors enacting similarly targeted laws, sometimes virtually simultaneously.[167] At other times, innovative regulatory regimes are adopted by one jurisdiction, then others later follow with their own version modeled on the first mover's template.[168]

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[161]Mary Olsen, Substitution in Regulatory Agencies: FDA Enforcement Alternatives, 12 J. L. Econ. & Org. 376, 377 (1996).

[162]Id.

[163]Id at 377-78.

[164]Such context-specific analysis is called for in Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393 (1996).

[165]Jerry Mashaw, Greed, Chaos and Governance 39 (1997).

[166]John M. Mendeloff, The Dilemma of Toxic Substance Regulation 1-4 (1988).

[167]See Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 Harv. L. Rev. 553, 583-626 (2001) (tracing areas of state and federal environmental regulation, frequently revealing state and federal regulation of similar problems within close periods following events provoking political attention).

[168]Id.; see also William W. Buzbee, Brownfields, Environmental Federalism, and Institutional Determinism, 21 Wm & Mary Envtl. L. & Pol'y Rev. 1, 27-58 (tracing sequence of federal and state efforts to regulate contaminated sites and remediate brownfields, and suggesting

Regulatory action is also more likely when the nature of the underlying harm or risk creates broad-based citizen concerns, such as with nuclear power risks, or carcinogens in water.[169] There might be no particular single crisis event, but broad and deeply felt risk concerns might suffice to prompt regulatory attention. In addition, even with overlapping authority and frequent jurisdictional mismatch, some government entity often has a perceived leadership role. If such an agency is perceived as having regulatory primacy, then there will be a focal point for demands for regulation, leading regulatory commons dynamics to recede in importance. In all of these contexts, regulatory action becomes far more likely.

When battles before agencies and courts erupt over efforts to promulgate and implement regulations, especially regulations that may be stringent, the challenge is often by industry claiming an unjustified regulatory burden.[170] Similarly, when the Office of Management Budget receives an agency's proposed regulation and subjects it to cost-benefit analysis, opponents will claim that a regulation is unjustifiably costly.

For purposes of this discussion, the significance is the impressions left by such public battles. Stringency in a particular regulation comes at the end of a long and highly improbable process. Any proposed regulation must surmount collective action hurdles to prompt the legislature to act, and later convince the agency to target a particular problem and actually propose and finalize a regulation. When regulations are rejected as unduly stringent, however, the impression left may be one of pervasive overregulation. Such a conclusion, however, is far from justified. As Professor Mendeloff observes, overregulation in particular cases may not only be an unusual event, but also is often accompanied by foot dragging and regulatory reluctance to propose other stringent regulations that will provoke stakeholder ire.[171] Such regulatory battles thus present easily observed acts of commission. Sins of omission, in contrast, are far less visible and arguably far more pervasive. It is easy in politics to point to acts of excess. It is far more

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a "first-mover" hypothesis to explain the frequent federal environmental leadership role).

[169]Professor Sunstein, in particular, raises concerns with excessive regulatory action in settings where "intuitive toxicology," influenced by the "affect heuristic," lead citizens to seek stringent regulation where more quantitative assessments of risk might raise questions about the priority of the risk or the stringency of a resulting regulation. See Cass R. Sunstein, The Arithmetic of Arsenic, 90 Geo. L.J. 2255, 2262-63 (2002); see also Thomas O. McGarity, Professor Sunstein's Fuzzy Math, 90 Geo. L.J. 2341 (2002) (criticizing Sunstein's discounting of lay person perceptions of risk and argument that cost-benefit analysis remains a valuable tool despite its many manipulable assumptions).

[170]See, e.g., American Textile Manf'rs v. Donovan, 452 U.S. 490 (1981) (rejecting an industry challenge to the stringency and costs of proposed cotton dust regulations).

[171]Mendeloff, supra note 166 at 2-3, 73-102 (observing slow pace of regulating, small number of actually issued toxics standards, and complete failure to address broad categories of risk).

difficult to score political points by pointing to a legislative or regulatory failure to act unless obligations to act and blame attributions are clear.[172] The regulatory commons dynamic is another variable contributing to such sins of omission.

The regulatory commons dynamic hypothesis suggested here is consistent with many of the underpinnings of public choice scholarship, but its attention to context and stakeholder incentives suggests a pervasive structural incentive for political inattention, not excessive regulatory activity. The regulatory commons theory is inconsistent with public choice insights offered at "too gross a scale,"[173] but does begin to explain why social ills offering regulatory opportunities in fragmented regulatory settings may be left unaddressed. Insights offered by "new institutionalism" and behavioral law and economics further illuminate why certain social ills will often be left unaddressed. Most significantly, observations of overregulation in particular regulatory settings are not irreconcilable with regulatory commons dynamics and other political economic factors contributing to inaction and regulatory gaps.[174]

[172]See supra Part II(C)(1) (discussing blame and attribution as key steps to provoking regulatory action).

[173]Mashaw, supra note 165 at 39.

[174]McChesney's Money for Nothing, supra note 126, also lends support to the expectation that social ills will be left unaddressed. His basic theory, illustrated through economic theory and abundant anecdotes, is that legislators will feign interest in legislative change to provoke interest group attention and monetary support. In McChesney's world, politics is an unseemly business, but the end result will often be no legal change of the status quo.

IV. Surmounting Regulatory Commons Hurdles

One is tempted to find the odds of effective and public regarding regulation too long to justify any hope. After all, regulator and interest group self-interest always threatens to lead to private interest outcomes. Regulatory commons dynamics create substantial disincentives for regulators ever to address the ills that are multi-jurisdictional in cause and effect. One response is to point to political reality. Numerous stringent environmental laws and regulations exist despite dire political economic predictions.[175] They are undoubtedly imperfect and subject to much slippage from statutory edict to implemented reality, but complete inaction has not been the norm.[176] Unfortunately, the laws and regulations that have been most effective are those that in regulatory design target small numbers of highly visible targets, such as factories, or that utilize crude but administratively easy approaches such as technology-based emission limitations.[177] The kinds of activities creating dispersed harms leading to jurisdictional mismatch and regulatory commons dynamics, such as urban sprawl, aquaculture, and global warming, have been poorly addressed. This Part assesses implications of the regulatory commons dynamic theory and possible responses.

A. Anti-regulatory Jurisprudence and the Regulatory Commons

The regulatory commons dynamic is one of numerous reasons agencies and legislators may decline to address even broadly acknowledged social ills. Where an underlying social ill is widely dispersed, numerous potential regulators will exist, setting in motion regulatory commons dynamics. It remains difficult to discern if political proposals to create yet more hurdles for risk regulation or arguably anti-regulatory jurisprudence actually spring from misconceptions of pervasive overregulation.[178] They may instead reflect opportunistic embrace of such theories to further a normative preference for less regulation. They could even spring from disinterested efforts of institutional actors to further the public good. The Supreme Court's recent decisions and political trends also tend to free industry from regulatory constraint, and hence may also reflect old-fashioned industry political capture and dominance in litigation due to industry resources and comparative organizing advantages.[179]

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[175]See Mashaw, supra note 165; Peltzman, Deregulation, supra note 138.

[176]Farber, supra note 132.

[177]See Wendy E. Wagner, The Triumph of Technology-Based Standards, 2000 Ill. L. Rev. 83 (2000). For an earlier defense of technology-based regulation, see Sidney A. Shapiro & Thomas O. McGarity, Not So Paradoxical: the Rationale for Technology-based Regulation, 1991 Duke L.J. 729.

[178]See supra Parts III(A) and (B).

[179]This is not necessarily to suggest that the Supreme Court responds to wealth directly. Wealthy or highly committed organizational repeat player litigants, however, can pursue, settle

Regardless of affixing a motive for these trends, the regulatory commons dynamic adds another argument against broad brush addition of analytical burdens, disabling of senior institutions best able to reduce fragmentation problems, or creation of generally applicable barriers to judicial relief when regulatory action is sought.[180] Again, imprudence and overregulation remain possibilities, but counter tendencies should also be acknowledged.

B. Addressing Fragmented Governance

One response is to suggest modification of legal frameworks to reduce the amount of regulatory fragmentation. In settings such as aquaculture, for example, the many federal agencies sharing regulatory responsibility could be subject to a congressional reallocation of responsibilities. Of course, such a reallocation would itself first require advocates to overcome collective action and regulatory commons hurdles to seek legislative relief. Because a legislative cure at the federal level would actually be the task of the legislature and the President, the regulatory commons problem of fragmented venues for political action would be presented in a mild form.[181] Efforts targeted at agencies asking them to surrender turf to other agencies would likely meet with staunch resistance unless the risk of aquaculture work outweighed the benefits of handling related regulatory tasks.[182] For example, recent proposals to roll numerous agencies' functions into the new Homeland Security Department met with opposition from legislators and agency officials concerned with surrendering authority to the new department.[183]

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and appeal cases and thereby are more likely to influence what cases will make their way to the Supreme Court than are occasional or single case litigants. See Marc Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law and Society Review 165 (1974); see also Paul Rubin & Martin Bailey, The Role of Lawyers in Changing the Law, Journal of Legal Studies 807 (1994) (challenging Galanter's hypothesis and arguing lawyers shape legal doctrine to further their own interests); Paul Rubin & Martin Bailey, A Positive Theory of Legal Change, International Review of Law and Economics 467 (1994) (evaluating litigation settlements' influence on development of legal doctrine).

[180]See Buzbee, Regulatory Reform, supra note 140 (arguing that rather than creating broadly applicable cost-benefit analytical requirements, Congress should on a statute by statute basis decide where such requirements make sense).

[181]Because the President and two houses of Congress might have different views on such a proposal, and committees and coalitions within each chamber would need to be convinced of the need for change, even a single legislative venue creates a somewhat mild form of regulatory commons dynamics. See supra Part II(C)(4) (discussing "veto gates" and effective supermajority requirements to enact legislation).

[182]See supra at Part II(B) (reviewing theories of agency motivation and risk aversion).

[183] Alaska Representative Don Young's opposition to the Homeland Security Department is illustrative: as chairman of the House Transportation and Infrastructure Committee, Young

In settings such as urban sprawl and global warming, efforts to reduce the number of potential regulators would also likely meet resistance, assuming a vehicle to carry out such broad reorganizations could be found and persuaded. Creation of regional authorities in the sprawl setting and treaties such as the Kyoto Protocol are the unlikely but possible answers to excessive fragmentation preventing regulatory intervention.[184] The likelihood of more fundamental reorganization of general local, state and federal governments appears too far fetched to justify much attention. As shown below, however, reallocation of responsibilities in particular subject areas is a viable answer, provided substantial regulatory commons hurdles and other collective action and coordination hurdles can be overcome.[185]

Some degree of regulatory fragmentation is a virtual inevitability, but incentives for regulatory inattention due to regulatory commons dynamics can be alleviated. By reducing the number of potential regulators, or designating certain regulators as having more significant regulatory roles, both supply and demand incentives would change. Those demanding regulation would have a smaller number of potential regulators to target for persuasion, while potential suppliers of regulation might be blamed for failing to address a social ill, would perceive increased demands for action and might possess greater powers to create an effective regulatory response. Thus, reducing regulatory fragmentation and creating hierarchies of regulatory authority would reduce propensities for regulatory inaction.[186]

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stood to lose significant jurisdictional "turf" under the President's proposal to shift the Coast Guard out of the Transportation Department, an agency overseen by Young's committee. Notebook, The New Republic, Aug. 5, 2002, at 8. Agency officials also voiced opposition. See John Mintz, Ridge's Rise from Adviser to "Mr. Secretary", Washington Post, Mar. 2, 2003, at A5 ("[W]hen [Secretary of Homeland Security] Ridge proposed merging border agencies such as the Immigration and Naturalization Service and Customs Service[,] [t]op Justice, Treasury and Transportation department officials bitterly protested their loss of turf and derided the idea as dead on arrival."). Perhaps anticipating the bureaucratic backlash, President Bush excluded department heads from participating in drafting the Homeland Security bill despite the bill's significant transfer of resources away from existing departments. See Ryan Lizza, Big Deal, The New Republic, June 24, 2002, at 10 ("Cabinet secretaries didn't know about the plan until the last minute. For instance, Secretary of the Treasury Paul O'Neill, who stands to lose $5 billion worth of his department, wasn't informed until the day before Bush's speech.").

[184] See Buzbee, Urban Sprawl, supra note 17 at 94-98 (discussing reliance on special purpose regional authorities to address sprawl ills); supra notes (discussing the Kyoto Protocol's goals and status).

[185]See infra Part IV(D).

[186]A clever legislator or regulator seeking to respond to demands for regulation, but also concerned with creating excessive regulatory burdens, might utilize strategies suggested by the regulatory commons dynamic. By splintering regulatory duties among numerous regulators, the odds of inattention and implementation "slippage" would be enhanced. See Daniel A. Farber,

C. Do Nothing: Public Choice Fears and Constitutional Affirmation

In the domestic setting, some might applaud the regulatory commons dynamic and its associated barriers to regulation as consistent with constitutional structure and values. The regulatory commons dynamic, after all, will arise in any setting of divided government. The United States Constitution intentionally divides power internally into the three branches and vertically in the form of federalist structures. As repeatedly asserted in the Federalist Papers, federalism's divisions of authority are an institutional mechanism for safeguarding individual liberty through the diffusion of government power.[187] Constitutional scholars similarly characterize the federalist division of power as an intentional means to limit government's reach.[188] Although the Supreme Court has often praised federalism as a means to enhance

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Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 Harv. Envtl. L. Rev. 297 (1999) (discussing "slippage" at each level of environmental implementation, rendering law less rigid and burdensome than indicated by statutory and regulatory edicts). Such fragmentation, however, could in enforcement or adjudicatory settings create the risk of duplicative and burdensome actions. See supra note 78.

[187] See, e.g., Federalist No. 28, *in* The Federalist Papers 178, 181 (Clinton Rossiter ed., 1961) (Hamilton) ("Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress."); Federalist No. 45, *in* The Federalist Papers, supra, at 288, 292–93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and infinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."); Federalist No. 51, *in* The Federalist Papers, supra, at 320, 323 (Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

[188] Akhil Reed Amar, Sovereignty and Federalism, 96 Yale L.J. 1425, 1450 (1987) ("[F]ederalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal's affections by monitoring and challenging the other's misdeeds."); id. at 1500–01 ("The People could confidently confer broad powers upon national agents precisely because they had also created a second set of specialized agents [the States] to monitor the first set and orchestrate resistance to its abuses."); David P. Currie, The Constitution of the United States: A Primer for the People 26 (2d ed. 2000) ("The limited nature of federal authority reflected . . . the fear that a strong central government would be dangerous to liberty."); Deborah Jones Merritt, The Guarantee Clause and

responsiveness through decentralization,[189] it too sees federalism as "one of the Constitution's structural protections of liberty."[190] This has been a central theme in its recent revival of federalism as a limitation on federal power.[191] Furthermore, a now substantial literature suggests that horizontal divisions of authority among the states allow for innovation and, over time, lead to adoption of legal frameworks less susceptible to political opportunism.[192]

State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 4 (1988) ("twentieth century commentators stress the ability of independent state governments to check the oppressive power of a strong central government"); Richard B. Stewart, Federalism: Allocating Responsibility Between the Federal and State Courts, 19 Ga. L. Rev. 917, 918 (1985) ("a federal system provides checks against the concentration of irresponsible governmental power at either the local or national level"); Mark V. Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law 9 (1988) ("Federalism diffuses power vertically by granting only specifically enumerated powers to the national government" such that "neither local nor central government can become too powerful."); Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 849–56 (1979) ("the case for a federal form rests most fundamentally on the capacity of a federal system to enhance and protect individual liberty").

[189]As stated in Gregory v. Ashcroft, 401 U.S. 452, 458 (1991),"This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."

[190] Printz v. United States, 521 U.S. 898, 921 (1997).

[191] See *Printz,* 521 U.S. at 921 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *Gregory,* 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty").

[192]See, e.g., Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 7–10 (1988) (arguing that federalism increases participatory democracy, enhances regional political and cultural diversity, and allows States to serve as laboratories for social and economic experimentation); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–511 (1987) (contending that federalism promotes government "responsiveness to diverse interests and preferences," dissuades "destructive competition for the benefits of government," and encourages "innovation and competition in government"). For a small cross section of the corporate charter competition literature, see, e.g., Roberta Romano, The Genius of American Corporate Law 15-16 (1993); William J. Carney, The Political Economy of Competition for Corporate Charters, 26

Responses are several to this deep rooted constitutional argument.[193] The degree of regulatory fragmentation is subject to substantial modification, even while preserving divided government under the Constitution. In addition, the Constitution contains both grants and limitations on federal power, undoubtedly allowing a degree of latitude for the federal role to adjust in meeting national needs.[194] To use Rubin and Feeley's memorable phrase, we should not let federalism become a "national neurosis" preventing recourse to federal authority where it is feasible and prudent.[195] In the regulatory commons setting, recourse to federal authority will generally be a constitutionally palatable option.[196]

At the state or international level, far greater latitude exists for deriving governmental institutions able to address ills exacerbated by political fragmentation and associated regulatory commons dynamics. In those settings, the challenge is the second order problem of overcoming the very same regulatory commons, collective action and coordination challenges that give rise to the need for new institutions in the first place.

D. Crisis and Political Entrepreneurial Activity

One response is to create or hope for conditions that will give rise to unusual political activism on the part of citizens, politicians and regulators. This is concededly a weak ploy that assumes away much of the regulatory commons problem and other hurdles to spurring regulatory action. Nevertheless, even in settings of dispersed harms and victims, as well as fragmented

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J. Legal Stud. 303 (1997); John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications, 93 Nw. U. L. Rev. 641, 650 (1999); Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 Stan. L. Rev. 679 (2002).

[193] Others similarly argue that minimizing the state's role and preserving free markets are a means to preserve liberty. See, e.g., Milton Friedman, Capitalism and Freedom 7-10 (1963); Robert Nozick, Anarchy, State, and Utopia (1974).

[194]See Schapiro & Buzbee, supra note 74.

[195]Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903 (1994).

[196] Federal responses to regulatory commons problems will often be constitutionally authorized where the social ill crosses state lines, is caused by activities implicating numerous states, or is caused by commercial activity. See Merrill, supra note 5 (analyzing responses to transboundary pollution); Revesz, supra note 68 (analyzing rationales for federal regulation of interstate harms); Schapiro & Buzbee, supra note 70 (suggesting a "regulatory prism" model for understanding different sorts of "activities" that have historically justified federal regulation under the Commerce Clause).

governments, regulatory schemes are periodically created that address such ills.[197] Despite contrary political economic predictions, a combination of crises or highly publicized social ills, growing public awareness, and political incentives to seize regulatory opportunities, can together generate momentum for enactment of risk regulation. In addition, risks that by their nature have great salience with the public may lead to political demands for action even without a particular crisis.[198]

Furthermore, a burgeoning literature identifies circumstances giving rise to "political entrepreneurs." Policy entrepreneurs emerge when they can advance politically by offering constituents a collective benefit, even where constituents lack sufficient interests to finance concerted political action.[199] Entrepreneurs will seek to rally unorganized citizens and public interest groups because of resulting political benefits.[200] A highly public crisis can act as a catalyst, triggering political attention to a problem even before citizens or interest groups have begun to act collectively and make political demands.[201]

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[197] These unlikely bodies of regulation cannot easily be characterized as the product of capture or symbolic politics. See Mashaw, supra note 165 (noting areas of regulation contrary to public choice predictions and questioning utility of the theory); Peltzman, Deregulation, supra note 138 at 17, 26 (characterizing abundance of risk regulating regimes and deregulations hurting industry groups as in tension with early economic theories of regulation and "normative analysis as a positive theory").

[198]See note 167 and accompanying text (citing Sunstein, supra note 169, concern with "intuitive toxicology" and cognitive error leading to excessive demands for regulation when dealing with risks that provoke lay person fears).

[199]Policy entrepreneurs "may be candidates for elective office who recognize that even though a group may not be organized, it may nevertheless exist as a latent group and its members might be more inclined to vote for candidates who seek to provide the group some collective benefit". Russell Hardin, Collective Action 35 (1982). Hardin argues that Senator Edmund Muskie and Richard Nixon in fact received electoral support from early environmentalists who thought they would further their interest in the environment. Id.

[200]See David B. Spence, A Public Choice Progressivism, Continued, 87 Cornell L. Rev. 397, 436 (2002) ("politicians . . . tap into latent public interest groups in an effort to win support and ultimately, to gain or retain office). See also Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Governance Law, 86 Mich. L. Rev. 930, 976 (1998) (political entrepreneurs emerge when they can "serv[e] as a symbol around which diffuse, nonorganized individuals can coalesce").

[201] See Carol M. Rose, Environmental Lessons, 27 Loyola L.A. L. Rev. 1023, 1026 (1994) (noting that "large, remote, and sometimes suddenly erupting forces that cause large-scale havoc and lingering pain to some identifiable group of innocents" invites "its own rush of legislative responses"); Marc K. Landy et al., The Environmental Protection Agency: Asking the

Relatedly, increased activity and publicity about an issue can over time change stakeholder perceptions and possibly preferences. Such stakeholders may become increasingly amenable to proposals of a political entrepreneur who senses incipient but broadly held citizen interests and helps that incipient interest become salient.[202] Thus, a sequence of crisis, increased attention, and then possibly modest political responses can change information and stakeholder desires.[203] Information cost barriers to perceiving shared collective interests will be reduced, while political entrepreneurs articulating that shared interest can provide a focal point for political action. A "tipping point" may eventually be reached, giving rise to concerted regulatory activity.[204] A linked and largely consistent theory suggests that environmental groups, once organized, have had incentives to remain active and ensure that they are given enforcement roles in regulatory enactments, while they create a "symbiotic relationship" with legislators by providing them information.[205]

Thus, a combination of external events, political incentives, and changing information and political perceptions can create conditions for enactment of unlikely regulatory schemes. The enactment of numerous stringent federal environmental laws in the early 1970s followed a period of fragmented environmental governance and laws, providing support for the proposition that regulatory commons dynamics create proclivities, not impossibility. While aquaculture's fragmented regulation remains unaddressed, some entrepreneurial sprawl politics have led to sprawl policy reform, and the Kyoto Protocol itself, while perhaps doomed, reflects improbable collective efforts.[206] The question that remains is whether one can offer more general

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Wrong Questions 133 (1994) (observing that "Superfund" legislation was "passed slightly more than two years after one of the most widely publicized environmental disasters in history, Love Canal").

[202]See Schroeder, supra note 41 at 49-52.

[203]E. Donald Elliott et al., Toward a Theory of Statutory Evolution: The Federalization of Environmental Law, 1 J. L. Econ. & Org. 313, 316, 327, (1985) (offering theories and anecdotes to support proposition that "rational legislators can make use of the changing political environment to further their own goals" and tracing increasing stringency of clean air legislation to "competitive credit claiming" of presidential aspirants Senator Edmund Muskie and President Richard Nixon).

[204]Id. at 54 (citing to Thomas Shelling, Micromotives and Macrobehavior 102-10 (1978) for the tipping point observation).

[205] See Farber, supra note 132 at 61. Even largely ineffective laws can over time shape legal norms, thereby moving the implemented law in the direction manifested at first in primarily aspirational laws. See Merrill, supra note 5 at 989-90.

[206]See Marc Schneider & Paul Teske, The Antigrowth Entrepreneur: Challenging the 'Equilibrium' of the Growth Machine, 55 J. Pol. 720, 734 (1993); see also Buzbee, Urban Sprawl,

observations about means to overcome regulatory commons dynamics and address underlying social ills. The following final section offers such guidance.

E. Dispersed Governments, Ills and Optimal Institutional Arrangements

Legal structures influence both what regulatory initiatives will be undertaken and what regulatory tools will be effective.[207] While legal scholarship tends to focus on issues of "instrument choice"[208] or issues of which governmental actor is best suited to handle a task,[209] initiation of efforts to achieve regulatory change will be influenced by baseline conditions and predictions about what can be achieved with a particular regulatory instrument or actor. Finding an "optimal" regulatory arrangement is always a difficult task.[210] It requires attention to the causes and types of harm, as well as to means to harness effectively both decentralized and larger jurisdiction regulators.

1. Dispersed Causes and Large Aggregate Impacts

To address the regulatory commons dynamic requires grappling with a problem that often confounds regulation: designing and enacting strategies to deal with large aggregate harms that arise from the small acts of many. Statutory schemes attempting to protect ambient environmental quality where large harms are created by diverse causes are often unsuccessful.[211] The mixture of sublocal causes and broad effects not only creates regulatory commons hurdles to

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supra note 17 at 129-32 (reviewing increased political activity addressing sprawl ills following substantial press coverage, often in conjunction with election cycles).

[207]See supra Part II(C)(4) (discussing effect of status quo arrangements on efforts to achieve regulatory change).

[208]See, e.g., Wiener, supra note 27.

[209]See, e.g., Revesz, supra note 68; Revesz, Public Choice Federalism, supra note 167.

[210]See Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L. J. 65 (1983). Diver's categories of regulatory options and tradeoffs of precision and flexibility remain valuable, but his analysis does not include attention to conditions giving rise to new regulatory initiatives.

[211]See, e.g., Oliver A. Houck, The Regulation of Toxic Pollutants Under the Clean Water Act, 21 Envtl. L. Rep. 10528 (1991) (discussing difficulties and regulatory failures associated with ambient based efforts to deal with toxic water pollutants); Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 Stan. L. Rev. 1267 (1985) (tracing difficulties encountered in more individualized and context-sensitive portions of laws regulating risk).

provoking regulatory action, but also renders difficult efforts to find an effective regulatory response. Where the small acts are similar in nature, as often is the case with activities like aquaculture, then a behavioral mandate may work.[212] If a regulatory answer appears viable, that will influence regulatory stakeholders assessing whether to act at all.

Unfortunately, most harms arising out of the dispersed cause-aggregate harm confluence arise from disparate types of activity. This is undoubtedly the case with both sprawl ills and global warming. A wide range of actors engaging in diverse acts create accumulating harms. With global warming, a few pollutants have been identified as most significant, thereby creating the possibility of incentives or mandates directed at that those few key pollutants. In the sprawl setting, in contrast, one finds diverse actors engaging in small and large acts, causing a wide range of discomforts that run across several media. These sprawl harms may be large in the aggregate, but they are of different types. Thus, the dispersed cause-aggregate harm conjunction requires regulatory efforts to take into account diverse harm-causing activities, diverse actors causing such harms, harms that are poorly matched with the geographic reach of any particular regulator, and absence of uniform regulatory tools due to the diversity of underlying causes. Anyone seeking to provoke regulatory action would also need to consider costs of triggering initial regulatory action and administrative costs of implementing alternative strategies.[213]

Finding an apt response is a tall order, but general guidance can be offered. Utilizing both more central or large units of government and small governmental units will be necessary, with different tasks allocated to each. Dividing regulatory tasks in such a manner will itself create regulatory commons dynamics when efforts to provoke implementation occur, and also will reduce the political benefit (or payoff) to each regulator. Any other regulatory approach, however, would be highly unlikely to create effective regulation.

Addressing this dispersed cause-aggregate harm conjunction that often underlies the regulatory commons dynamic calls for attention to the following variables. First, the nature of the harm and its sources will influence responsive strategies. For example, if the sources of a harm are many and dispersed, especially if they are small relative to the aggregate resulting social ills, then a combination of larger government information production and local implementation will be needed.[214] Where causes of a harm are dispersed (as in Diagram 8 above), then both causes of the

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[212]See infra at Part IV(E)(2) for discussion of flexible means to identify best practices.

[213]Mendeloff attributes OSHA's slow pace of regulatory workplace toxics in part to the high costs, complexity and uncertainty of devising defensible standards. See Mendeloff, supra note 166 at 105-41. He suggests that were statutes to require less stringent regulation, then industry opposition would similarly recede. Id. This assertion has been strongly challenged. See Sidney A. Shapiro & Thomas O. McGarity, Not So Paradoxical: The Rationale for Technology-Based Regulation, 1991 Duke L.J. 729, 730-39 (asserting and offering examples for the proposition that OSHA's actual experience in standard setting demonstrate that it is "nai[ve]" to believe "that less stringent standards will reduce industry opposition").

[214]See infra at Part IV(E)(2) for further exploration of issues of task allocation and the need to facilitate informational feedback.

harm and smaller unit regulators will have little incentive develop responsive measures. Larger units of government would have relatively greater incentive than small units to create information necessary to make regulatory choices. Where, as in United States federalism, the central government has power to preempt, mandate or encourage actions by subunits of government, as well as target sources of harm directly, then those seeking regulation will logically focus much of their activity on efforts to enlist the central government. Due both to the greater power of central government regulators and the likelihood they will be the subject of such concerted constituent pressure, central government regulators may more often find taking action a worthwhile endeavor.

Where sources of harm are small and heterogenous in type, effective regulatory tools may simply not exist. Small sources of harm are always difficult to monitor, plus they are likely to have fewer resources to devote to risk reduction. Heterogenous sources also present challenges for efforts to gather information and offer guidance on means to reduce such harms.[215]

2. Capitalizing on Central and Local Regulatory Strengths

In the setting of dispersed, multi-jurisdictional harms, potential regulators confronted with jurisdictional mismatch will, in ordinary times, predictably have few incentives to seize regulatory opportunities.[216] Any approaches to overcome inertia created by regulatory commons dynamics therefore must address both the dispersed and often heterogenous sources of broadly distributed harms, as well as create incentives for likely reluctant regulators to act. Authority to issue regulatory mandates by central governments must be retained, but in most regulatory commons settings the goal must be to capitalize on central and local regulatory incentives and strengths.

Command and control regulation has become a pejorative term for many, but remains a valuable tool in the regulatory arsenal.[217] For example, if scientific research and observed repercussions of aquaculture reveal widespread harms resulting from raising of bioengineered or non-indigenous species, that widespread and potentially irreversible harm might justify mandates.[218] Global warming harms might similarly be viewed as posing catastrophic risks

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[215] The compliance break given to many small sources of harms in environmental laws is consistent with this observation. See, e.g., The Clean Air Act, 42 U.S.C. 7401, 7411, 7501-09 (2003) (requiring new "major sources" of pollution to utilize stringent control efforts and only imposing obligations on increasingly small sources as an air quality region suffers from higher levels of ambient pollution).

[216]During periods of unusual issue salience, such as following a crisis, regulatory activity is more likely to arise. See supra at Part IV(D).

[217]See notes 177 and 211 (sources reviewing merits of technology-based regulation).

[218]If such risks were posed by many countries' aquacultural firms, then a domestic edict would only constrain domestic actors, possibly to their business disadvantage. Avoidance of such

justifying behavioral regulatory mandates, but the ubiquitous nature of activities causing such harm and the need to enlist all nations in such an effort undercut a call for regulation by mandate.[219] Less catastrophic ills such as found with aquaculture pollution, sprawl harms, and similar aggregate threats to air and water quality arguably call approaches utilizing diverse regulatory tools facilitated by both local and more central regulators.[220] Even in the setting of harms that are dispersed in cause and effect, however, central actors may rationally set minimum standards of protection that subordinate agencies and more local regulators must strive to meet.[221]

Several analogous innovations in law and business suggest means to overcome regulatory commons barriers.[222] These innovations share the goal of allowing context-sensitive and flexible implementation efforts by decentralized actors. They also utilize more centralized actors to set goals, discourage parochialism, and foster information sharing.

By creating decentralized business units with managerial autonomy, central managers in the setting of business firms are not encumbered with impossible information demands and subunit managers can more flexibly achieve their goals.[223] A pervasive challenge, however, is to

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a business disadvantage could prompt nations to seek an international standard, much as businesses and states have at times been willing to accept federal regulation. See Stewart, supra note 68 (discussing rationales for federal regulation in the domestic setting). As with global warming efforts, overcoming nations' temptation to free ride or escape regulation would remain a challenge. See supra Part I(A).

[219]See Wiener, supra note 27.

[220]If administrative costs of implementing or enforcing alternative arrangements were too high or would lead to undue delay, less flexible regimes might remain preferable. See supra note 211 (sources debating idealized flexible environmental law approaches versus less finely calibrated approaches that have been more easily implemented).

[221]See, e.g., The Clean Air Act, 42 U.S.C. Sections 107-10 (2003) (provisions mandating setting of ambient air quality standards based on health data, set with an "adequate margin of safety," which in turn become a mandatory goal of state implementation plans).

[222]For a thorough linking of business and legal insights about institutional design and the benefits of decentralization, see Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998).

[223] Julian M. Birkinshaw & Allen J. Morrison, Configurations of Strategy and Structure in Subsidiaries of Multinational Corporations, 26 J. Int'l Bus. Stud. 729, 736 (1995) (noting that "inability of top management to fully understand the complexities of their various subsidiaries and peripheral operations" necessitates the downward delegation of decisional authority to more localized units); Laura Poppo, Influence Activities and Strategic Coordination: Two Distinctions of Internal and External Markets, 41 Mgmt. Sci. 1845, 1846–47 (1995) ("Decentralized operating decisions economize on information processing costs; vertical information transfers are prone to

overcome subunit parochialism, ensure subunits perceive economies of scale that could be achieved with other subunits, and devise means for such decentralized units to learn from each other.[224] If decentralized business units hoard information about means to greater success, other members of the larger firm will be unable to adapt in light of such information.[225] To overcome such risks, businesses now utilize liaison arrangements[226] and strategies to identify and share "best practices" on a firm-wide basis.[227] Through such "pragmatic collaborations," firms can retain

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error and cause delays in decision making."); Jeffrey A. Alexander, Adaptive Change in Corporate Control Practices, 34 Acad. Mgmt. J. 162, 165 (1991) ("Through selective decentralization of decision making under conditions of uncertainty, multidivisional organizations are relieved of the burden of making complex operational and local strategic decisions at a corporate level."); Hans Wissema, Unit Management: Entrepreneurship and Coordination in the Decentralised Firm 11–12 (1992) (arguing that "rapidly changing markets and new competitive environments" require "an increase in 'entrepreneurial density'" within firms that may be attained by decentralizing management decisions).

[224]Peter Klibanoff & Jonathan Morduch, Decentralization, Externalities, and Efficiency, 62 Rev. Econ. Stud. 223, 240 (1995) ("Without coordination, . . . firms will under-invest in projects with positive spillovers" produced by the "accumulation of skills or new insights."); Laura Poppo, Influence Activities and Strategic Coordination: Two Distinctions of Internal and External Markets, 41 Mgmt. Sci. 1845, 1847 (1995) (discussing risk that decentralized firm actors may further their own goals even to detriment of the whole). Others suggest that a centralized, hierarchical management organization more effectively deters free riding among units than a loosely aggregated, decentralized organization. See Edward P. Schwartz & Michael R. Tomz, The Long-Run Advantages of Centralization for Collective Action: A Comment on Bendor and Mookherjee, 92 Am. Pol. Sci. Rev. 685, 692 (1997) (concluding that "under most scenarios, a centralized regime for monitoring and enforcement will prove superior to a decentralized one" in deterring free-riding from under-performing units).

[225]Rolf W. Habbel, The Human Factor: Management Culture in a Changing World 66 (2002).

[226]Henry Mintzberg, Structure in 5's: A Synthesis of the Research of Organization Design, 26 Mgmt. Sci. 322, 326 (1980); see also Nitin Nohria et al., Changing Fortunes: Remaking the Industrial Corporation 32 (2002) (noting General Electric's creation of "executive teams" consisting of managers from different parts of the corporation to facilitate intra-unit coordination and the dissemination of "best practices").

[227]See James W. Dean, Jr. et al., Advanced Manufacturing Technology and Organization Structure: Empowerment or Subordination?, 3 Org. Sci. 203, 222 (1992) (describing how a process of "formalization" through which operating procedures or "best practices" are standardized among decentralized units may more efficiently integrate new technologies than the alternative of centralized control).

benefits of decentralized flexibility while also retaining information and reduced transaction cost benefits of more centralized organizations.[228]

In the business setting, however, the shared profit motive creates incentives for adoption of such structures once their advantages are recognized. Even with decentralized firm arrangements, a central management unit creates a single actor with means and motive to devise and impose optimal arrangements. For legislators and regulators considering creation of regulatory regimes, the common metric of money to overcome parochialism and opportunism is far less prominent.[229] In addition, business institutions are not expected to be transparent and politically accountable in their actions. Finally, unlike business firms choosing decentralized organizational forms, there often is no single central governmental actor with power to impose discipline on subordinate units.[230]

Despite these differences, methods analogous to decentralized business strategies are now in use in the European Union as a means to overcome similar regulatory risks of political fragmentation in the setting of European nation-states. Under the "open method of coordination" ("OMC"), European Union member states engage in a mutual feedback process of planning, examination, comparison and adjustment of policies in light of each others' experiences.[231] The OMC method was a concept introduced by the Lisbon European Council in 2000 to enhance competitiveness, with a focus on employment conditions and social cohesion.[232] Since that time, the OMC has been expanded to other regulatory fields.[233] The goal of this feedback and

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[228]Susan Helper, et al., Pragmatic Collaboration: Advancing Knowledge While Controlling Opportunism, 9 Ind. & Corp. Change 443 (2000).

[229] But see McChesney, supra note 126 (positing that legislative proposals are a device to provoke interest group activity and contributions).

[230]As the Supreme Court has repeatedly made clear since 1995, federal power is not unlimited, even with the federal power to preempt and broad grants of authority under the Commerce Clause and, to a lesser extent, the 14th Amendment. See Schapiro & Buzbee, supra note 70.

[231]Jos Berghman & Kieke Gh Okma, The Method of Open Co-ordination: open procedures or closed circuit? Social policy making between science and politics, available at http: //eucenter.wisc.edu/OMC/Pa.PDF (last visiting March 24, 2003) (citation omitted) (describing benefits of open method of coordination but also questioning its lack of openness and transparency).

[232]Maria Joao Rodrigues, The Open Method of Coordination: A New Governance Tool, 2-3 Europa/Europe 196 (2001).

[233]Fritz W. Scharf, The European Social Model: Coping With the Challenges of Diversity, 4 JCMS 645, 652-56 (2002).

adjustment process is "mutual correction, not uniformity."[234] A panel of member state experts evaluate and share information about each nation's regulatory efforts in a broad range of policy areas.[235] This innovative regulatory approach is quite new and hence difficult to evaluate for long term success or failure. It appears, however, that the practice is picking up momentum and allowing for mutual learning. This feedback and learning process is facilitated by the central institution of the European Union, while member states through the OMC process are able reduce fears of parochial manipulation of regulatory approaches to give member states an economic advantage.[236]

Recent calls for "democratic experimentalism" in the United States build on business organization literature and similarly advocate a shift to regulatory approaches that allow greater experimentation and information sharing.[237] As with business strategies to optimize decentralized firm forms and the European experiment with the "open method of coordination," decentralized actors are given a critical role, as are central actors in creating conditions to foster beneficial experimentalism.[238]

The regulatory commons dynamics described in this paper arise to varying degrees as social ills are juxtaposed against numerous potential regulators. The business decentralization, "open method of coordination," and democratic experimentalism innovations all rely on central institution creation of incentives and institutions for information sharing, with retention of decentralized autonomy. Where all regulatory actors perceive a common end, as arguably do business and European Union members in their goals of fostering competitiveness, a collective embrace of feedback mechanisms as just described might occur. Where regulators have disparate interests and perceive different gains from regulatory action, however, inertia may be difficult to overcome.[239]

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[234] Joshua Cohen & Charles F. Sabel, Sovereignty and Solidarity: EU and US (forthcoming book chapter), available at http: //eucenter.wisc.edu/Public.PDF.

[235]Id.

[236]Thus, the OMC provides an alternative means to address "race-to-the-bottom" concerns. See supra notes 68-72 and accompanying text. But see Scharf, supra note 233 at 656-57 (suggesting ways OMC and other European Union institutions could lead to a loss of regulatory protections, but also noting that "this has not happened yet").

[237]See Dorf & Sabel, supra note 222.

[238]In the administrative agency setting, for example, Dorf and Sabel advocate greater institutional flexibility within current arrangements, but also suggest creation of novel forms of organization that would create greater information sharing. See id. at 354-56.

[239]In addition, where regulatory actors such as states are in competition, a risk of race-to-the-bottom dynamics remain a possibility. See supra notes 68-72 and accompanying text.

The tragedy of the commons literature may, once again, offer a partial solution to this regulatory puzzle. Resource user conflicts have on numerous occasions been overcome, at least in small community settings.[240] As with businesses and the European Union, a common economic interest is a central motivator for commons management successes. An additional lesson, however, is that practices and trust built over time can provide a means to overcome this variant on a prisoners' dilemma.[241] Successes at General Electric or in Europe are surely attributable in part to central institution creation of feedback and information-generating mechanisms that over time become routine. Thus, central institution creation of routine methods and venues to increase information about regulatory goals is one means to start to overcome regulatory commons incentives for inaction.

Central regulator monetary incentives can help overcome the information cost element of regulatory commons dynamics. In the domestic setting, use of conditional federal spending has been and should continue to be a means to overcome state and local regulatory parochialism.[242] In the European Union OMC setting, the European Union uses its own monetary resources to play a critical role in drafting, convening and assessing regulatory initiatives. Information generating and sharing mandates should continue to be used, if necessary through encouragement offered by monetary incentives. Even without reliance on direct monetary incentives, central regulator sharing of information about regulatory successes could serve to change perceptions and preferences of both constituents and other regulators.[243]

These mechanisms to reduce regulator disincentives to act thus all rely on decentralized actors, but all also rely on the existence of central actors, be they states, the federal government, European or global institutions, to set create such incentives and facilitate information sharing. These recent regulatory innovations thus weigh against broad disabling of central institutions. They also weigh against pursuit of an anti-regulatory agenda by reducing funding for central

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[240] See supra Part I(C).

[241] See Ostrom, supra note 49 at 3-5.

[242] See Buzbee, Urban Sprawl, supra note 17 at 107-24 (describing influence of federal and state dollars on urban form and suggesting use of such dollars to create incentives for measures addressing sprawl harms); Wiener, supra note 27 (concluding that with decentralized nation-states confronting global environmental harms, monetary incentives are among the most viable strategies due to the absence of venues for imposition of mandates).

[243] To allow information sharing strategies to work, exclusive reliance on underfunded and overworked central regulators is unlikely to succeed. The Supreme Court, however, has under one statutory scheme precluded citizen enforcement of a statute compelling periodic industry disclosure of toxics use and pollution. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998); see also Bradley C. Karkkainen, Information as a Environmental Regulation: TRI and Performance Benchmarking: Precursor to a New Paradigm, 89 Geo. L.J. 257 (2001) (describing merits and limitations of information sharing strategies for environmental protection efforts).

institutions. Generating and sharing information is costly, but will often be an effective means to reduce regulatory inertia created by the regulatory commons dynamic.

Conclusion

The regulatory commons dynamic presents a pervasive structural disincentive for efforts to regulate social ills arising in settings of fragmented governance. Where a social ill is juxtaposed against multiple potential regulators, all will be tempted to ignore that social ill and free ride on the anticipated actions of others. The tragedy of the commons literature offers a useful framework for perceiving disincentives for investment in stewardship of a common pool resource. The regulatory commons creates analogous disincentives for potential regulators to make such political investments where a regulatory opportunity is shared by many. Theories of overregulation are not necessarily inconsistent with regulatory commons dynamics predictions. First, this article suggests only that regulatory commons problems will create incentives or temptations to ignore a social ill, not preclude regulatory action. Second, observations of alleged overregulation occur at the end of many steps and may only reflect stringency of a particular proposal, not comprehensive overregulation of social ills. Many regulatory gaps exist, as predicted by this theory and other studies of regulatory inaction. To overcome regulatory commons dynamics and design effective regulation will require exploration of several responsive steps. Reduction of regulatory fragmentation and clarification of regulatory hierarchies and responsibilities will reduce regulatory commons dynamics while also reducing risks of duplicative enforcement. In addition, to address the dispersed causes and effects of many regulatory commons ills will necessitate enabling more central regulatory institutions to play a role in gathering information, occasionally issuing regulatory mandates, and creating incentives for action by decentralized regulators. Ideally, given the usual dispersed nature of regulatory commons harms, authority allocated to or preserved for more local institutions should allow for tailoring of goals to local needs, while facilitating horizontal sharing of information. Regulatory commons dynamics are pervasive, but they do not create inevitable regulatory failure.