RECLAIMING REGULATORY INTERMEDIATION FOR THE PUBLIC

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I
INTRODUCTION

Managerial governance is often operationalized through outsourcing the regulatory function from public institutions—for example, administrative agencies—to private organizations.[1] In virtually any sector, it is possible to identify private "regulatory intermediaries" that step between public agencies and regulated parties to perform tasks traditionally played by government actors—for example, the development of regulatory standards, auditing, compliance assurance, enforcement, and more.[2]

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1. Julia Cohen & Ari Ezra Waldman, *Framing Regulatory Managerialism as an Object of Study and Strategic Displacement*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at i, v (noting that "regulatory managerialism relies heavily on arrangements for industry self-oversight and sometimes also on wholly privatized production of services formerly supplied by government"). Regulatory managerialism is a specific manifestation of the broader "governmentality" of managerialism. *Id*. Managerialism has many dimensions: at the broadest level, it "calls for institutions to be organized around the values of efficiency, productivity, and innovation" and devalues "social welfare, inclusivity, and egalitarianism." Ari E. Waldman, *Outsourcing Privacy*, 96 NOTRE DAME L. REV. REFLECTION 194, 194 (2021). *See also* Cohen & Waldman, supra note 1, at xvii (noting "regulatory managerialism privileges organizational voices and interests over public voices and interests"). These broad goals bend towards certain institutional practices—including, of chief importance here, a heavy organizational reliance on "cadres of compliance professionals and professionalized audit and certification intermediaries" who "perform opaque, technocratic operations." *Id.* at v. What this institutional arrangement enables for managerialists is a shift of power to the organizations that house these structures, where "deregulatory goals" of private organizations can be concealed "beneath a veneer of procedural legitimacy" and insulated from "anti-managerial voices and traditions," including more pro-social agendas. *Id*. Over time, managerialism has come to entail an emphasis on a common suite of technologies of governance—for example, welfarist cost-benefit analysis, market-based regulatory approaches, privatization of inherently governmental functions, and lean government (if not budgetary austerity), among other things. *See id.* at ix–x. As we will see, many of these technologies are present in the private regulatory intermediaries that manage the electric power grid.

2. Kenneth W. Abbott, David Levi-Faur & Duncan Snidal, *Introducing Regulatory Intermediaries*, 670 ANNALS AM. ACAD. POL. SOC. SCI. 6, 6 (2017) (coining the term "regulatory intermediaries" to

For instance, it is now well known that standard-setting organizations (SSOs)—such as the American National Standards Institute (ANSI) and the International Organization for Standardization (ISO)—conduct extensive processes for developing technical standards that public regulators often adopt verbatim.[3] Of relevance to public regulators' recent efforts to adopt regulatory requirements for environmental, social, and governance (ESG) investing, private SSOs were there well before governments were,[4] and now public regulators—like the Securities and Exchange Commission and the European Union's Corporate Sustainability Reporting Directive—have started the process of incorporating these frameworks as the law of the land.[5] Many private regulatory intermediaries are also involved in regulatory compliance and audit activities, with respect to both public law and private standards. Perhaps the most recognizable of these entities is the Financial Industry Regulatory Authority (FINRA), which monitors "billions of daily market events" and brings disciplinary action to enforce both self-regulatory standards and federal securities laws.[6] Such self-regulatory organizations (SROs)—that is, private entities that enforce public and private standards within particular subsectors of industry—are common and go back a

describe the phenomenon); *see also* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 380–81 (2006) (noting that regulation today involves agencies "identify[ing] a broad policy goal" but "leav[ing] for regulated firms the tasks of interpreting the regulatory norm in local context, assessing risk, and determining the appropriate response"). Such private regulatory intermediation is sometimes termed "industry self-regulation" in light of the autonomy that industry enjoys to define regulation for itself. *See* Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 426 (2011) (defining self-regulation as "a regulatory process whereby an industry-level (as opposed to a governmental or firm-level) organization sets rules and standards governing the behavior of the members of that industry and monitors and enforces compliance with the rules"). Although in practice government actors may be involved to some degree in overseeing and enforcing this self-regulation. *See infra* note 10 and accompanying text.

3. *See generally* JOANNE YATES & CRAIG MURPHY, ENGINEERING RULES (2019); Emily S. Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 ADMIN. L. REV. 315 (2019) (explaining the work and impact of various SSOs). A major institution here is the National Institute of Standards and Technology (NIST), which encourages the development of private standards via SSOs as a means of coordinating industry and thereby encouraging "innovation and industrial competitiveness." *About NIST*, NAT'L INST. OF STANDARDS & TECH., https://www.nist.gov/about-nist (last visited Apr. 10, 2023) [https://perma.cc/SP6D-D5KW].

4. *See* Steve Wilkerson, *Introduction into ESG Reporting Standards and Frameworks*, FORVIS (May 4, 2022), https://www.forvis.com/article/2022/05/introduction-esg-reporting-standards-frameworks [https://perma.cc/KB3C-VYVU] (discussing the complex web of ESG reporting standards promulgated by organizations such as the International Sustainability and Standards Board (ISSB), the International Financial Reporting Standards Board (IFRS), and the Sustainability Accounting Standards Board (SASB)).

5. *See generally* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21, 334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (codifying regulatory frameworks); Council Directive 2022/2464, 2022 O.J. (L 322).

6. *About FINRA*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/about [https://perma.cc/5AJT-U7HV] (last visited Apr. 10, 2023); *Monthly Disciplinary Actions*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/rules-guidance/oversight-enforcement/disciplinary-actions [https://perma.cc/WS5W-9KJG] (last visited Apr. 10, 2023).

long way.[7] Some private regulatory intermediaries, like FINRA, do it all—from standards development to enforcement, effectively becoming the only regulatory game in town.

Although this reliance on private regulatory intermediaries may in some cases be highly advantageous to government institutions—since it may sometimes allow government agencies to do more regulatory work than their own resources and capacity might allow[8]—it comes at significant costs of runaway managerialism and a gradual withering away of public values in regulatory governance.[9] As independent organizations operating in the twilight between public regulatory agencies and regulatory targets and beneficiaries, private regulatory intermediaries have both the incentives and the discretion to facilitate an undiluted managerial ethos in the regulation of entire sectors of industry. While government agencies in principle often retain some kind of oversight relationship with private regulatory intermediaries that, in theory, could temper this managerialism,[10] the institutional reality is that the structure of these oversight mechanisms is often entirely reactive, which usually correlates with deference on the part of public government overseers.[11] Even if the oversight were perfect, government actors themselves may often be biased toward

7. *See, e.g.*, Richard L. Stone & Michael Perino, *Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law*, 1995 COLUM. BUS. L. REV. 453, 453–54 (1995) (discussing the role of the New York Stock Exchange in enforcing federal securities laws in the early years of investment banking); *see also* Daniel E. Walters & Hannah J. Wiseman, *Self-Regulation in the Cradle: The Role of Standards in Emerging Industries* 23–24 (Geo. Mason Univ. L. & Econ. Ctr., 2022) (discussing early examples, including industry self-regulation of sprinkler systems standards under the aegis of the National Fire Protection Association in the late 1800s).

8. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 104 (1992) ("Self-regulation . . . is an attractive alternative to direct government regulation because the state simply cannot afford to do an adequate job on its own."); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22 (1997) (arguing that a "litany of concerns about the quality, implementability, and legitimacy of rule making" justify "reorienting the regulatory enterprise around joint problem solving" between public and private actors). For a helpful synoptic account of the attraction of managerialism and managerialism-adjacent frameworks, such as so-called "New Governance," see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004) (collecting and synthesizing various threads in the literature celebrating the ways that private actors can play traditionally public roles). *But see* PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 12–13 (2017) (acknowledging the temptation to outsource traditional government functions but arguing that doing so is self-defeating and dangerous).

9. *See infra* Part I.B.

10. Much self-regulation is overseen by government actors, and when this occurs, regulatory scholars call it "coregulation," or perhaps "meta-regulation." *See* Ayres & Braithwaite, *supra* note 8, at 103 (defining "coregulation"); Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, *in* THE OXFORD HANDBOOK OF REGULATION 146 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010); Walters & Wiseman, *supra* note 7, at 3 (discussing the distinction between "meta-regulation," which involves government oversight of private regulation, and "pure self-regulation," which involves individual firms making unenforceable promises to tie themselves to the mast, perhaps for marketing purposes).

11. Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1710 (2016).

managerialism—as many other contributions to this symposium show—which may eliminate incentives to exercise that oversight in the first place. Thus, regulatory intermediation often gives managerialism a significant toehold in regulatory governance.

This article argues that it is time for the public to reclaim regulatory intermediation from managerialism and redirect it towards public values—that is, those shared by the broader community rather than by some organization or industry sector within the community. What regulatory intermediaries are charged with doing—assisting regulators in a regulatory task—is a quintessentially public function, and to the extent that managerial values and the public interest are misaligned, the public interest should supersede the managerialist interest in this domain. In short, regulatory intermediaries should be understood as owing duties to the public—duties to carry out their regulatory roles with due regard for the public they serve regardless of any narrowly managerialist imperative.[12] I will develop this substantive argument in Part II.

However, even if this is a worthy goal, there are deeply rooted institutional challenges to realizing it, including a lack of consensus about what *is* in the public interest. If managerialism is to be curbed in private regulatory intermediation, it will have to be through institutional and procedural reforms that open contestatory spaces within regulatory intermediation where managerialism's hegemony can be checked by competing value structures advanced by the public.[13] In other words, I suggest a procedural intervention built around the goal of introducing countervailing value structures that challenge managerial ideology and prevent it from crowding out consideration of non-managerial perspectives.

While this may sound fanciful, the seeds of such reform are already being planted. I develop this argument by drawing insights from two case studies of private regulatory intermediation in the electric power industry—one on the experiences with Regional Transmission Organizations (RTOs), and the other on the experiences with the North American Electric Reliability Corporation (NERC). Both of these intermediaries have strong managerialist traditions that prioritize economical and technical management of the existing configuration of the industry.[14] At the same time, motivated publics want these organizations to use their authority to reconfigure the delivery of electric power services to pursue

12. *Cf.* Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. 101, 104 (2021) (excavating a "principle of public care" that "already exists . . . but ought to be more deeply institutionalized" and that "requires [public] officials to attend to the needs and values of those who have a stake in law's administration").

13. Here, I build on agonistic democratic theory, which emphasizes that a consensus-based "public interest" does not exist, but that collective action can still be legitimate if it occurs through healthy contestatory processes where conflicting values and policies are forced to engage with each other. In my previous work, I have argued that agonistic democratic theory can provide a normative grounding for the administrative state. *See generally* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022) (extending these insights beyond the private regulatory intermediation sphere).

14. *See infra* Part II.A.

the public's interests in a more efficient, resilient, and decarbonized electric grid, so they are pushing electric power sector intermediaries out of their comfort zones.[15]

As my case studies show, even in an exceedingly technical field with a strong tradition of myopic managerialism, it is possible to use procedural reform to inject public values into regulatory intermediaries' work. Specifically, these case studies demonstrate the potential of two reforms—one procedural and one institutional—that can help constrain unchecked managerialism by introducing competing values into the decision-making process. First, I argue that a large part of the explanation of most RTOs' failures and NERC's relative success in curbing managerial ideology's hegemony in the electric power space is the introduction of standard administrative law tools, such as notice-and-comment rulemaking and other methods of public engagement.[16] While almost nobody believes that the Administrative Procedure Act (APA) is perfect, the absence of an effective procedure for making sure regulatory intermediaries seriously consider public input allows managerialism to run rampant and arguably encourages overreliance on intermediation to avoid the procedural costs of engagement. Thus, I suggest that one way to combat managerialism in regulatory intermediation more generally is to create a Private Administrative Procedure Act (PAPA) that requires baseline public procedures in all regulatory intermediation similar to what would be expected of government agencies.[17] Second, and moving beyond mere procedure, I suggest that early experiences with the Federal Energy Regulatory Commission's new Office of Public Participation (OPP) show the potential for a trans-substantive government agency—which I would call the Office of the Public Interest (OPI)—charged with the authority to impose and enforce process reforms and to promulgate minimum standards of public care for organizations engaged in private regulatory intermediation.[18]

To be clear, implementing these procedural and institutional reforms would not completely extirpate managerialism in regulatory intermediation, let alone in the law and economy more generally. Indeed, it is not clear to me that managerialism *per se* is uniformly problematic or that it could or should be extirpated—there might be virtues of managerialism that have been overshadowed by its excesses, and at any rate it would seem close to an impossible task to uproot an entire ideology. What my proposals would aim to do is to curb unchecked managerialism in an important domain of public decision-making where the ideology runs particularly rampant, and they would

15. *See infra* Part II.B.

16. Of course, my evaluation of the relative success of NERC is contestable. For a generally critical evaluation of NERC, see Joshua Macey, Shelley Welton, & Hannah Wiseman, *Grid Reliability in the Electric Era* (unpublished manuscript) (on file with author). Compared to RTOs, however, NERC has taken its public duties much more seriously. *See infra* Part II.

17. *See infra* Part III.A.

18. *See infra* Part III.B.

do so by balancing out the ideology of managerialism with a strong dose of public-minded inputs.

II

THE PUBLIC INTEREST IN REGULATORY INTERMEDIATION

Regulatory intermediation is in some sense an inevitability in a complex modern economy, where the scale, scope, and complexity of problems demanding regulation often exceed the government's capacity to regulate them by itself.[19] However inevitable this might be as a practical matter, it does not follow, as a normative or prescriptive matter, that sacrifices should be made in terms of the public-serving function of regulatory governance. Regardless of who performs it, regulatory governance must still be in service of the public interest.[20] The regulatory intermediation that is provided should still be thought of as a "public good," not a private one.[21]

This Part explains why, despite the obviousness of these premises, we have in fact drifted away from public-interested regulatory intermediation and towards managerial regulatory intermediation. The story starts with the general atrophy of the idea of the public interest, which came under significant attack in the middle of the twentieth century after a long history of framing the development of public utility regulation.[22] Regulatory intermediation arose as an institutional practice precisely when—and in large part because—ideas of the public interest were waning. As a result, regulatory intermediation never had a strong institutional or cultural commitment to public values—instead, it was free, by virtue of its private organizational form, to pursue regulation for organizational purposes alone.[23] If managerialism is marked in part by its prioritization of the organization over both the individual and collective,[24] the private regulatory intermediary model, which puts private organizations at the center of the regulatory task, is in some sense the paradigm institutional structure of regulatory managerialism.

Recognizing these deep roots of the problem is important for how we think about re-asserting the normative baseline that all regulatory governance serves

19. *See supra* note 8 and accompanying text (examining regulation beyond government regulation).

20. CHRISTIE FORD, INNOVATION AND THE STATE: FINANCE, REGULATION, AND JUSTICE 6 (2017) (noting that regulatory scholars often accept a private regulatory role, but only if it is linked to a "public—and publicly enforced—set of goals" and is characterized by "embed[ed] public-mindedness, compliance, and responsibility").

21. Indeed, this might be why the courts have consistently shown more skepticism about private delegation. *See* VERKUIL, *supra* note 8, at 38–44 (discussing historical and recent developments in the constitutional doctrine governing delegation of government authority to private actors).

22. *See infra* Part I.A.

23. *See infra* Part I.A.

24. Cohen & Waldman, *supra* note 1, at vii ("Where the two dominant political and economic theories of the last century—liberalism and socialism—centered the individual and the collective, respectively, managerialism centers organizations and those that run them.").

the public interest. Reclaiming private regulatory intermediation for the public interest could theoretically happen in two ways: first, social organizations—that is, government agencies—could take back some of the terrain ceded to private regulatory intermediaries, in effect reasserting the social over the organizational; second, private regulatory intermediaries could be forced to reckon with the diversity of non-managerial values held by members of the public, in effect reasserting the individual over the organizational. Understanding that regulatory managerialism became entrenched because of historical contingency and because of a lack of agreement about what, precisely, the public interest entails suggests that it is more practical to focus for now on the second strategy—that is, on reorienting private regulatory intermediaries away from myopic managerialism and toward meaningful engagement with the full spectrum of public interests and perspectives on regulatory problems.[25]

A. The Decline of the Public Interest and the Rise of Unchecked Managerialism Through Regulatory Intermediation

As many scholars are now demonstrating, the story of the concept of the "public interest" is one of atrophy. Traditionally, the common good, which can be understood as an instantiation of the public interest, played a major role in constitutional and legal theory.[26] Historical and institutional work of late—such as the work of K. Sabeel Rahman,[27] William Novak,[28] and William Boyd[29]—has likewise helped to uncover the role that notions of the public good played in regulation. The idea of the public utility—a private firm that would nevertheless serve the public—can be traced back at least to Lord Hale's remark in the sixteenth century that certain private interests are "affected with a publick interest," in which case they "cease[] to be *juris private* only."[30] In *Munn v. Illinois*,[31] the U.S. Supreme Court explicitly endorsed the public utility idea, holding that industries providing "essential services" were subject to the full suite of public oversight and control. For decades after, a dialogue ensued over what,

25. *See infra* Part I.B.

26. *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (studying the role of the common good in constitutional and legal theory).

27. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 72–75, 132 (2017).

28. *See generally* William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (uncovering the role that notions of the public good played in regulation); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN ADMINISTRATIVE STATE (2022) (same).

29. *See generally* William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721 (2018) (arguing that expanded notions of public utility played a critical role in efforts to decarbonize the power sector); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014) (examining the history of "just price" and its influence on public utility regulation in the U.S.).

30. Breck McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 759 (1930).

31. 94 U.S. 113 (1876).

specifically, was in the public interest. Jurisprudence and theorizing around "fair prices" and nondiscrimination fleshed out a thick normative construct—nebulous, to be sure, but identifiable enough to enable one to determine many things (like "coercion or compulsion" in economic transactions) that were *not* in the public interest.[32] The development of ideas of public utility and the public interest in this period was also tightly linked to democratic reforms that sought a greater role for the public in defining the aims of public power.[33] The public interest was not supposed to be a static concept; instead, it was supposed to respond meaningfully to changing demands from the public.[34] All of this meant that the domain of the public was growing, as was the state.

Over time, however, the idea of the public interest was hollowed out.[35] The Supreme Court, for its part, rendered *Munn*'s standard unnecessary by extending the theoretical bounds of the "police power" to virtually any private conduct regardless of how "essential" the services are.[36] In a way, this expanded the notion of public regulation,[37] but it also left the tradition vulnerable to rearticulation. In a recent survey of implementation of statutory provisions calling for regulation in the public interest, Jodi Short argues that definitions of the public interest tend to calcify rather than evolve, as Progressive Era reformers had hoped, and that "efficiency-related arguments are the most raised and accepted justifications for why a particular outcome is in the public interest."[38] Mid-century political and ideological trends toward an economic style of reasoning among the managerial class,[39] as well as growing cynicism about government power on both the political

32. Boyd, *Just Price*, *supra* note 29, at 724–26.

33. *See* NOVAK, *supra* note 28, at 109 ("Much as original notions of utility fueled an earlier era of governmental reform in England, modern concepts of public utility and public service propelled new democratic conceptions of economic and social justice.").

34. *Id.* at 110–11 (discussing the ways that the concept "expanded relentlessly" through almost every corner of American industry).

35. Novak, *supra* note 28 at 142 ("So now we come to a historical conundrum. For here we have this big, powerful, proliferating thing at the very center of American law and political economy between the Civil War and the New Deal—what Felix Frankfurter dubbed "'perhaps the most significant political tendency at the turn of the century.'" And for all intents and purposes, today it has almost disappeared from sight. What was once at the forefront of law, economics, and public policy discussion has been relegated to the backbench—the dustbin—of American history. The words "'public utility'" no longer rouse; they are more likely a soporific. From the cutting edge of political economy, the law of public utilities has become something of a backwater concerning fewer and fewer things—electricity, gas, water—of perhaps ever receding significance. What happened?").

36. Nebbia v. New York, 291 U.S. 502, 531–32 (1934).

37. As Bill Novak discusses, this was "something of a victory" for the public interest tradition insofar as it "fended off attempts to constitutionally limit or cabin state policy power." NOVAK, *supra* note 28, at 112.

38. Jodi L. Short, In Search of the Public Interest 6 (Aug. 15, 2022) (unpublished manuscript) (on file with author).

39. *See* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN THE U.S. PUBLIC POLICY 5–6 (2022).

left and political right, only accelerated this erosion.[40] In this period, thinkers who openly questioned the idea of the public utility helped dismantle regulatory regimes in civil aviation, trucking, and telecommunications.[41] Although it was difficult to appreciate in the moment, what was happening was the general emergence of an ideology we now known as neoliberalism. Neoliberalism replaces the social and the political with an emphasis on "strong property rights, free markets, and free trade" and restricts government to the role of "creat[ing] and preserv[ing] an institutional framework appropriate to such practices."[42]

It was within this context that the push for more reliance on private regulatory intermediaries took place. Perhaps it was historical accident, or perhaps it was more than coincidence[43]—either way, private regulatory intermediation took off at the nadir of robust notions of the public interest and during the rise of neoliberalism.[44] This timing mattered. Even if government institutions retained some control or oversight of intermediaries—a big if[45]—these public institutions

40. *See* PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM 94 (2021) (discussing the Naderite left's attack on regulatory institutions as being "captured," and how that overlapped to a significant degree with the goals of the anti-regulatory movement); NOVAK, *supra* note 28, at 112 (noting that "the last half century or so has witnessed a sustained effort on the part of the law and economics commentary to undermine and undo the public utility idea").

41. *See generally* ALFRED E. KAHN, THE PASSING OF THE PUBLIC UTILITY CONCEPT: A REPRISE 5–10 (1983); STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982).

42. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005). As Cohen and Waldman explain in the introduction to this symposium, "[a]lthough neoliberal political theory privileges market outputs and logics and trumpets the virtues of individual self-sufficiency, it does not seem to contemplate less government," but rather "seeks to reconfigure government" in order to promote these values. Cohen & Waldman, *supra* note 1, at vii; *see also* QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 7–8 (2018) (showing that the architects of neoliberalism in the "Geneva School" sought to craft "ordo-liberal" states powerful enough to impose market-based social ordering on unruly democracies); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 8 (noting that the "opposition between 'market' and 'state' as conventionally posed is nonsensical," and that "[w]hat the neoliberal position advances is not a claim of 'market against state' or even simply a push for 'more market, less state,' but rather a call for a particular kind of state").

43. Cohen & Waldman see more than coincidence here, suggesting that managerialism is something like the operational arm of neoliberalism. Cohen & Waldman, *supra* note 1, at vii ("Managerialism supplies a key missing piece to the puzzle of neoliberalism's progressively deeper entrenchment within government."). On this account, as government capacity was hollowed out by neoliberal reformers, the need for governance remained and was fulfilled by private regulatory intermediaries, which were more easily directed to managerial values of economic growth than the formal state had been.

44. Although private regulatory intermediation can be found earlier, it took off in the 1980s and 1990s in the wake of New Governance thinking. *See supra* note 8 and accompanying text.

45. *See* Hammond, *supra* note 11, at 1705 (discussing the ways that agencies are forced to defer to the self-regulatory organizations that they oversee, and how this is problematic given that agencies themselves receive deference in the way that they exercise their policy discretion). A major problem for agencies seeking to keep tabs on the growing intermediary industry was the increasing informationalization of the regulatory task and the corresponding imperative to rely on expertise that agencies simply did not have in a time of government austerity. *See also* JAMES R. BENIGER, THE CONTROL REVOLUTION: TECHNOLOGICAL AND ECONOMIC ORIGINS OF THE INFORMATION SOCIETY

themselves were losing their public-service orientation. And intermediaries, by virtue of their status as private organizations, were not ever expected to be guided by any particular mission. In the vacuum left by the receding influence of the public utility concept, there was no normative or legal lodestar to guide or constrain the new regulatory intermediaries.

What rushed to fill this gap was an organizational ethos—private regulatory intermediation became governance of organizations by organizations. Unlike a public-sector entity, regulatory intermediaries are permitted to maintain an explicit commitment to promoting the organizations and markets they regulate. To take just one example, FINRA's public website states prominently a goal to "facilitate vibrant capital markets."[46] Indeed, its articles of incorporation statement of objects or purposes begins with "promot[ing] through cooperative effort the investment banking and securities business," and also lists the goal of "provid[ing] a medium through which its membership may be enabled to confer, consult, and cooperate with governmental and other agencies in the solution of problems affecting investors, the public, and the investment banking and securities business."[47] At first glance, this prioritization of organizational prerogatives might appear to be just another example of regulatory capture.[48] However, a deeper look reveals that it is just the predictable result of the kind of industry orientation that regulatory intermediaries, by virtue of their private status and organizational incentives, are permitted to develop without even a pretense of serving public interests.[49] This is not some nefarious plot; it is literally

279 (1989) (discussing the informationalization of regulation in response to technological developments that increased the complexity of industrial processes); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 170 (2019) (discussing the ways that a shift from an "industrial mode of development to an informationalized one, and to an informationalized way of understanding development's harms, has created existential challenges for regulatory models and constructs developed in the context of the industrial economy").

46. *About FINRA*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/about [https://perma.cc/PFM8-BVQB] (last visited Apr. 10, 2023).

47. *Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc.*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial [https://perma.cc/Q4NB-95DZ] (last visited Apr. 10, 2023).

48. *See generally* DANIEL CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1–2 (2013) (discussing the "widespread belief that special interests capture regulation, and that neither the government nor the public can prevent this"). As Cohen and Waldman note in the introduction to this symposium, capture is closely associated with managerialism. *See* Cohen & Waldman, *supra* note 1, at xi–xii.

49. Here I am suggesting that private regulatory intermediation may be our purest form of managerialism. While I agree with other symposium pieces that government agencies themselves often operate from a managerialist orientation, the dominance of managerialism there is obstructed by residua of the old public interest orientation, civil service norms, and administrative law's democratic side. Hence the need for pro-managerialist forces to "gaslight" government agencies, as Jodi Short puts it, in an attempt to eliminate these vestiges. *See* Jodi Short, *Gaslighting Government*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 1. None of this effort is necessary in private regulatory intermediary organizations, which are formed from a managerialist mold and are never seriously asked to serve any other purpose. *See* Willard F. Enteman, MANAGERIALISM: THE EMERGENCE OF A NEW IDEOLOGY 159 (1993);

in the mission statement. And it is possible because regulatory intermediaries operate in the netherworld between public and private functions.

Taking a step back, we should not be surprised that, over time, this governance of organizations by organizations converged on unyielding devotion to the suite of values we associate with managerialism—that is, an emphasis on innovation, flexibility, efficiency, growth, and a particular kind of marketization.[50] As sociologists have documented, organizations replicate through mimetically reproduced practices and procedures in a process called institutional isomorphism.[51] The professionals who populate regulatory intermediary organizations are cut from the same professional cloth and travel in the same professional circles.[52] Most fundamentally, regulatory intermediaries are free to pursue their own interests and incentives, which are of course organizational and closely bound up with the industries they ostensibly regulate.[53] Perhaps managerialism would not have taken hold of private regulatory intermediation if there had been an expectation that regulatory intermediaries, like government agencies, serve public interests over organizational interests. But because notions of public interest eroded in the latter part of the century, that expectation was never encoded in these private organizations, and the government agencies that could have demanded it were themselves losing touch with the public interest and struggling to keep up with the burgeoning intermediary apparatus's regulatory portfolio.

B. The Challenge Going Forward

It makes sense to question the managerial orientation of regulatory intermediation. Managerial intermediation owes its existence in large part to a historical contingency—that is, the decline of notions of the public interest and the rise of neoliberal ideology.[54] If those ideological preconditions are now

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BENIGER, *supra* note 45, at 188–189. Industry forms these organizations and populates them with managers steeped in the managerialist values of the industry. Left unchecked, the result is undiluted managerialism.

50. Cohen & Waldman, *supra* note 1, at viii–ix.

51. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149 (1983) (defining institutional isomorphism); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) (showing how institutional isomorphism works in the context of organizational compliance with civil rights law).

52. *Compare* Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773, 807–10 (2020) (discussing the ways that managerialism spreads through privacy law compliance networks as "professionals share their experiences and recommendations with each other through both formal and serendipitous interactions at workshops and conferences), *with* Berman, *supra* note 39, at 16 (discussing the institutionalization of an "economic style of reasoning" focused first and foremost on efficiency).

53. Cohen & Waldman, *supra* note 1, at xvii ("Recall that regulatory managerialism privileges organizational voices and interests over public voices and interests.").

54. *See supra* Part I.A.

themselves eroding,[55] so too should their institutional architecture, starting with their chief operational arm—private regulatory intermediation. Readers of this symposium likely will have no difficulty concluding that, as a normative or prescriptive matter, it is important to reclaim regulatory intermediation for the public.[56]

In reality, the path forward is not so obvious even if it is agreed that intermediation's managerialism must be checked. One path would involve public takeover. It says a lot about how much the ground has shifted that this is actually imaginable, but we are still very far from seeing actual movement in this direction.[57] A major practical problem with this approach is that informationalized regulation is extraordinarily complex and generally now beyond the capacity of resource-strapped government agencies to handle on their own.[58] Eliminating regulatory intermediation without any replacement would be even more problematic: not only would it risk serious negative consequences for society—what intermediaries currently do is generally helpful and necessary, given the complexity of the issues that they often deal with—but it would also raise legal questions about how far government can go in stopping private regulatory intermediation.

However, there is another path that may be more practical and realistic. Instead of public takeover, regulatory intermediation could continue to exist but would be reoriented so that it no longer coalesces around a narrowly managerial ideology. This second path has distinct advantages over the first. An honest appraisal of why the idea of the public interest faded in importance over time,[59]

55. *See, e.g.*, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICAN AND THE WORLD IN THE FREE MARKET ERA 3–4 (2022) (arguing that the "consensus" undergirding neoliberalism has been consistently eroded over the past two decades); Luke Cooper, *The End of Neoliberalism? Why the Current Crisis is Different to 1989, 2001, and 2008*, LONDON SCH. ECON. BLOG (June 24, 2020), https://blogs.lse.ac.uk/covid19/2020/06/24/the-end-of-neoliberalism-why-the-current-crisis-is-different-to-1989-2001-and-2008/ [https://perma.cc/FW4R-5Q6C] (discussing the COVID-19 pandemic and crises of populism and what they mean for the ideological hegemony of neoliberalism).

56. *See supra* note 20 and accompanying text.

57. For instance, in the energy domain, which this article will look at more closely in the next Part, advocates have pushed for more "public power," i.e., municipal utilities and cooperatives that operate someone more independently from the largely RTO-run "macrogrid." *See generally* Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267 (2017). But this effort has advanced only in fits and starts, and often with significant difficulties. *See, e.g.*, Michael Elizabeth Sakas, *Boulder Ends Decade Long Pursuit of City-Owned Power Utility*, COLO. PUB. RADIO (Nov. 20, 2020), https://www.cpr.org/2020/11/20/boulder-ends-decade-long-pursuit-of-city-owned-power-utility/ [https://perma.cc/SS4U-2W4E] (discussing Boulder, Colorado's failed attempt to form a municipal utility through a takeover of private utility Xcel Energy's assets).

58. BENIGER, *supra* note 45. To be clear, it might be possible for government agencies to absorb private regulatory intermediaries, keeping them basically intact so that they can provide expertise on technical matters but locating them within structures of public accountability. *See* Macey, Welton, & Wiseman, *supra* note 16, at 68 (advancing this approach with respect to NERC). In many ways, this suggestion is just the mirror image of many of my proposals to impose the kinds of public duties that agencies have to the public on private regulatory intermediaries. *See infra* Part IV.

59. *See supra* Part I.A.

both in regulatory intermediation and more broadly, has to acknowledge the fact that the concept is difficult to pin down substantively. Even agencies charged with pursuing the public interest have drifted into managerialist tendencies.[60] A government takeover of the regulatory task—if it could even be done—without any agreement about what the public interest entails is liable to lead to more managerial government regulation and probably less effective managerial regulation to boot. Waving a magic wand and saying that regulatory intermediaries are affected with a public interest and must pursue public aims likely would also not accomplish much of anything. There is simply too much disagreement about what is in the public interest to serve as an effective counterweight to managerialist tendencies in these deeply acculturated organizations. And if there is such disagreement, then it is probably hopeless to try to articulate some juridical standard of the public interest that could be enforced in courts or even by more effective oversight by government agencies, for instance. It is hard to imagine at this point what should supplant managerialism, even if all can agree that managerialism is a problematic governmentality.

If a shift away from managerialism in regulatory intermediation is to occur, then it is likely to occur from the ground up: that is, through contestation with the ideology of managerialism that gives meaningful voice to alternative values.[61] Well-designed processes and institutions must be established to counterbalance managerialism and reinforce public inputs in regulatory intermediation.[62] The key question is how to design procedures that actually have this effect rather than simply provide window dressing for continued managerialist orthodoxy. In the next two Parts, I engage with this question of institutional design. I suggest that the project, while difficult, is not impossible. Indeed, as I show through two case studies involving regulatory intermediation in the electric power sector, a strong managerial orientation is being reshaped by persistent demands for greater public say in defining the goals of the organizations that help govern the grid. And lessons gleaned from these case studies may show the way to more general reforms, which I address in Part III.

Some readers may balk at this procedural answer to the problem of managerialist regulatory intermediation as being too weak and compromising, but such a dismissive attitude toward mechanisms for public participation underappreciates the power of mobilization of publics in the formation of

60. Short, *supra* note 38, at 6 (summarizing empirical evidence that "public interest" standards are most often interpreted by regulators to entail "efficiency-related arguments").

61. As Cohen and Waldman note in their introduction, my approach joins several other contributions to this symposium seeking to counteract managerialism's privileging of "organizational voices and interests over public voices and interests" by "reimagin[ing] mechanisms for reintegrating public participation and oversight into regulatory decision-making." Cohen & Waldman, *supra* note 1, at xvii.

62. A model for this institutionalized conflict between values held by the public can be found in my previous work offering a democratic defense of the administrative state. *See* Walters, *supra* note 7.

regulatory ideology. Much of the new literature on the concept of the public interest and public utility emphasizes the ways that actionable conceptions of the public interest emerge through democratic organization of publics.[63] This more democratic and procedural notion of the public interest, rather than some static substantive articulation of the public interest, was the core of the public interest concept during the Progressive Era.[64] While public participation merely opens venues for contestation rather than defining an explicit competitor ideology to managerialism, this democratic contestation can lead to fermentation over the concept of the public interest that can eventually provide a meaningful substantive alternative to managerialism. Viewing public participation as mere procedure misses these long-term dynamics.

III

FROM MANAGERIALISM TO PUBLIC INTERESTS: PRIVATE REGULATORY INTERMEDIATION IN THE ELECTRIC POWER SECTOR

Governance of the bulk electric power grid—the tangled network of transmission lines that deliver wholesale electric power from where it is produced to where it will be used—is a prime example of managerial private regulatory intermediation. To start, the physics of the grid demand that the grid must be perfectly balanced in terms of supply and demand of electricity at the microsecond level.[65] That is, every time a light switch is flipped on, a power plant somewhere must produce that much more energy instantaneously. This delicate task requires someone to exercise substantial control over operation of the grid, even down to the level of ordering that otherwise available and willing power generators curtail operations, or that load be shed—a euphemism for shutting down people's power.[66] That someone, it turns out, is the private regulatory intermediaries that literally operate the switches and determine who gets power, when they get it, and how they get it.

63. NOVAK, *supra* note 28, at 9–10 (linking the development of the administrative state to democratic movements).

64. *Id.* at 16 ("Across diverse and competing struggles, issues, and events, the basic legal and political changes that created the modern democratic state from 1866 to 1932 represented a reassessment of existing American values and institutions amid a full-blown legitimation crisis.").

65. This may be a relatively simple matter in a vertically integrated monopoly utility, as the utility has total control over the system. It is not simple at all when the grid operates, as it does today, more as a commons where formerly regulated utilities sell and purchase power. *See* Kathryne Cleary & Karen Palmer, *U.S. Electricity Markets 101*, RES. FOR THE FUTURE (Mar. 3, 2020), https://www.rff.org/publications/explainers/us-electricity-markets-101/ [https://perma.cc/82V5-7BJB]. There, the need for a highly advanced organization or system with some authority to coordinate grid operations becomes a necessity. Indeed, as William Boyd explains, "it is fair to say that [such a system was] not really feasible prior to [the 1990s and 2000s]" because there was not "software and computational capacity" to perform such complex tasks. William Boyd, *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 MINN. L. REV. 739, 786 (2020).

66. *See Load Shed*, PJM INTERCONNECTION (2022), https://www.pjm.com/-/media/about-pjm/newsroom/fact-sheets/pjm-load-shed-fact-sheet.ashx [https://perma.cc/5EBV-N6VB]

The situation is made even more managerial in light of the way that the modern electric power sector is organized. Rather than leaving operation of the grid to one vertically integrated monopoly utility—which at least limits the challenge of operating the grid to a purely technical one of balancing supply and demand—the modern grid is set up to operate as an inter-regional market where a diverse group of buyers and sellers can trade wholesale energy.[67] These restructured, or deregulated, markets present many additional challenges that must be managed. Of course, power providers—for example, utilities—who use this system to deliver power must be paid. Here we see the most managerial aspect of all: the construction of price-making institutions that, in a stroke of "brilliant PR" were dubbed "markets," but are in fact an "alternative regulatory model."[68] They are based on algorithmic optimization of staggering computational complexity, the details of which are designed and monitored by engineers, economists, and industry participants themselves.[69] The grid also requires long-term planning for future power generation capacity in the network to avoid situations where peak load persistently exceeds the available power generation sources on the network.[70] The federal government has decided that responsibility for managing this incredibly complex system of governance should not be performed primarily by the government itself, but instead largely through private regulatory intermediation.

This Part introduces two examples of private regulatory intermediaries that exercise managerial control over this incredibly complex technical, economic, and political system. It shows how these intermediaries have been able to train their eyes on a narrowly managerial agenda of promoting, optimizing, and protecting the existing configuration of the electric power sector. It then shows how, despite this deeply embedded managerialism, participatory reforms have brought more voices and values to the table and have, in some cases, helped to bring social consciousness and the public interest back into the equation. Even in the most managerial of settings, the public's interest is mounting a comeback.

67. Cleary & Palmer, *supra* note 65.

68. Raymond L. Gifford and Matthew S. Larson, *For RTOs & ISOs: 'Don't Call It a Market' (Props to LL Cool J)*, UTIL. DIVE (Nov. 12, 2018), https://www.utilitydive.com/news/for-rtos-isos-dont-call-it-a-market-props-to-ll-cool-j/541895/ [https://perma.cc/ZMT2-6KEK].

69. Boyd, *supra* note 65, at 783 (noting that wholesale electricity "markets" are in fact a "complex mix of software and hardware that combine specific auction designs, subject to various market rules, with algorithms dedicated to optimizing power flow on the grid").

70. In many parts of the country, this planning is done through regulatory constructs known as "capacity markets," which are there to create "an additional revenue stream for resources that, in return for payments, incur an obligation to be available to provide power on demand." *See* Todd Aagaard & Andrew N. Kleit, *Too Much Is Never Enough: Constructing Electricity Capacity Market Demand*, 43 ENERGY L.J. 79, 80 (2022). Other parts of the country rely on "scarcity pricing"—basically, the potential promise of price gouging during grid emergencies—to incentivize resource adequacy. *See* Gavin Bade, *The Great Capacity Market Debate: Which Model Can Best Handle the Energy Transition?*, UTIL. DIVE (Apr. 18, 2017), https://www.utilitydive.com/news/the-great-capacity-market-debate-which-model-can-best-handle-the-energy-tr/440657/ [https://perma.cc/D7J8-E2P6]. Either way, there is no way to govern the grid without concerning oneself with resource adequacy.

Part III, therefore, takes the lessons of this part and puts them to use in thinking about a broader response to managerialism in private regulatory intermediation.

A. The Private Regulatory Intermediaries Governing the Bulk Power Grid

One important set of private regulatory intermediaries—RTOs (and their cousins, independent system operators)—play the role of coordinating the day-to-day operation and long-term planning of the power grid.[71] Organized mostly as nonprofit corporations, RTOs such as PJM Interconnection, Midcontinent Independent System Operator, the Electric Reliability Control Organization of Texas, and the California Independent System Operator take control of the transmission wires on behalf of the member utility companies that own them and use that control to ensure the reliable operation of the grid.[72] They also frequently operate wholesale markets for electric power where utilities can purchase power from any number of other power generators connected to the system, in theory at prices that are competitively assured to be the lowest cost.[73] All told, RTOs manage the flow of electrons for about two-thirds of the U.S. population,[74] and proposals to expand the RTO model to the other major uncovered regions (the Mountain West and the Southeast) are not uncommon.[75]

Another important private regulatory intermediary whose work overlaps substantially with RTOs is the North American Electric Reliability Corporation (NERC).[76] Unlike RTOs, whose portfolios center around actually operating the grid and facilitating energy exchange in real time, NERC's portfolio centers on developing and enforcing standards for the reliable operation of the grid.[77] Among other things, NERC has written standards that: require grid operators to maintain sufficient reserve capacity—that is, power generating plants on standby—to be able to quickly dispatch additional power generation to balance out extreme and unexpected spikes in load; dictate how much of a margin for error grid operators are permitted to allow as they consider when and how much new long-term generation capacity should be planned; and implement cybersecurity protocols and protections.[78] Perhaps most well known, because of

71. Cleary & Palmer, *supra* note 65.

72. Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543 (2007).

73. Boyd, *supra* note 65, at 788–96 (discussing the common features of these markets).

74. Dworkin & Goldwasser, *supra* note 72, at 544.

75. Daniel E. Walters & Andrew N. Kleit, *Grid Governance in the Energy Trilemma Era: Remedying the Democracy Deficit*, 74 ALA. L. REV. (forthcoming 2023).

76. *About NERC*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/AboutNERC/Pages/default.aspx [https://perma.cc/CRA9-GD6K] (last visited Apr. 10, 2023).

77. *See* Alexandra B. Klass, *Expanding the U.S. Electric Transmission and Distribution Grid to Meet Deep Decarbonization Goals*, 47 ENV'T. L. REP. 10749, 10750 (2017).

78. *See Reliability Standards for the Bulk Electric Systems of North America,* N. AM. ELEC.

their importance in explaining the Texas blackout of 2021,[79] are NERC's winterization guidelines for power plants.[80] NERC's board develops most of these standards "using an industry-driven, ANSI-accredited process."[81] In terms of implementation, NERC divides the four main North American "interconnections" (which span the border between the United States, Mexico, and Canada) into regional balancing authorities (which can be RTOs) and then charges those balancing entities with ensuring compliance with reliability standards.[82] When grid operators fail to follow the rules, NERC's Reliability Coordinator steps in to enforce the standards.[83] In a very real sense, NERC is a private regulator of other private regulators—in the electric power sector, we have a veritable Matryoshka Doll of private regulatory intermediation.

Both RTOs and NERC receive substantial deference from their public overseer, the Federal Energy Regulatory Commission (FERC), which implements the Federal Power Act and other statutes that pertain to the interstate power grid.[84] In the RTOs' case, they are required to file tariffs with FERC that exhaustively delineate the terms of exchange in their service territories.[85] FERC reviews these tariffs before approving them, but only under the incredibly vague standard that the prices charged not be unjust or unreasonable and that access to the transmission grid not be discriminatory.[86] In practice, FERC tends to be quite deferential to the tariffs that RTOs submit.[87] For its part, NERC is the recognized Electric Reliability Organization (ERO) for

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RELIABILITY CORP. (Dec. 6, 2022), https://www.nerc.com/pa/Stand/Reliability%20Standards%20Complete%20Set/RSCompleteSet.pdf [https://perma.cc/BUK2-5LPC].

79. *See* Olivia Houston, *FERC Reliability Standards in Wake of Winter Storm Uri*, DLA PIPER (Oct. 26, 2021), https://www.dlapiper.com/en-us/insights/publications/2021/10/ferc-reliability-standards-in-wake-of-winter-storm-uri [https://perma.cc/9EEH-Z8DW] (discussing FERC and NERC's postmortem on Winter Storm Uri, which highlighted the need for additional "changes to mandatory reliability standards").

80. *See* Hannah J. Wiseman, *Regional Cooperative Federalism and the U.S. Electric Grid*, 90 GEO. WASH. L. REV. 147, 186–92 (2022). In true managerial fashion, NERC had, until relatively recently, only recommended winterization. *Id.* at 204–205.

81. *Standards*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/Stand/Pages/default.aspx [https://perma.cc/PBW9-GMKT] (last visited Apr. 10, 2023). It also frequently subdelegates authority to regional entities to set regionally tailored reliability standards. *See Regional Standards Development*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/Stand/Pages/RegionalStandardsDevelopment.aspx [https://perma.cc/FM37-DSRW] (last visited Apr. 10, 2023).

82. Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy Governance and U.S. Carbon Emissions*, 43 ECOLOGY L.Q. 143, 184–85 (2016).

83. 16 U.S.C. § 824o(e).

84. *See generally* Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783 (providing an overview of FERC's statutory authority and discussing present-day debates about the limits of this authority in the context of demand-response and other industry developments).

85. Dworkin & Goldwasser, *supra* note 72, at 558.

86. New York v. FERC, 535 U.S. 1, 7 (2002) (citing 16 U.S.C. §§ 824d(a)-(b)).

87. Walters & Kleit, *supra* note 75.

the United States.[88] Under the Energy Policy Act of 2005, which passed in the wake of a devastating power grid blackout in the Northeast United States, Congress required there to be such an ERO, and NERC won the role.[89] Again, FERC reviews all of the proposed reliability standards that NERC develops to ensure that they are "just, reasonable, not unduly discriminatory, and in the public interest," giving "due weight to the technical expertise of the Electric Reliability Organization."[90] Much as with FERC's approval of RTO tariffs, reliability standards developed by NERC have received a great deal of deference.[91]

All this deference has historically given RTOs and NERC substantial freedom and discretion to implement an unapologetically managerialist agenda. For RTOs, this managerialism is most apparent in the complex array of markets that RTOs set up and manage. These are not so much markets as they are algorithms for optimizing enormous amounts of data about generator availability, grid operation parameters, and energy needs.[92] The algorithms implement reverse auctions where generators submit bids for the lowest price for which they are willing to provide energy, the bids are then stacked by the RTO algorithm from lowest cost to highest cost, and the market clearing price is determined by the price of the last increment of generated electricity that is necessary to satisfy the total amount of demand.[93] The complexity of these determinations is staggering: taking just one RTO as an example, the PJM Interconnection, to serve its 65 million customers, "must contend on a daily basis with multiple offers from over 1,300 generators; 20,000 demand bids; 60,000 virtual bids and offers; 9,500 different pricing nodes; 20,000 different transmission elements; and some 6,000 different transmission contingencies that must be

88. 16 U.S.C. § 824o(2) ("The terms 'Electric Reliability Organization' and 'ERO' mean the organization certified by the [Federal Energy Regulatory] Commission under subsection (c) the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.").

89. DAVID NEVIUS, THE HISTORY OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION: HELPING OWNERS, OPERATORS, AND USERS OF THE BULK POWER SYSTEM ASSURE RELIABILITY AND SECURITY FOR MORE THAN 50 YEARS 88 (2d ed. 2020).

90. 16 U.S.C. § 824o(d)(2).

91. Hammond, *supra* note 11, at 1712 (noting that SROs like NERC "enjoy deference from their oversight agencies").

92. Boyd, *supra* note 65, at 783 ("The organized wholesale electricity markets in the United States are structured around a series of auctions, which are themselves embedded in a set of algorithms that match the results of the auctions to the physical constraints of the grid.").

93. *Id.* at 788. This is a gross oversimplification in service of readability. The auction clearing price is just a starting point for a complex mathematical process of determining the locational marginal price, which takes account of congestion and other factors to adjust the market price for specific locations (what is referred to as nodal pricing). *Id.* at 793–94. All of this happens automatically in real time. But this is just on the energy market; RTOs sometimes also run capacity markets, where the market is for future energy production. *See* Aagaard & Kleit, *supra* note 70, at 90.

modeled."[94] PJM does this with only 985 employees,[95] which points to the importance of automated systems in the work RTOs do. With such reliance on automated systems set up and administered by an RTO substantially comprising market participants, questions about the neutrality and integrity of these markets are endemic.[96] The primary answer to these concerns is thoroughly managerial: RTOs have set up, or contracted for, "independent market monitors" who "guard[] against the exercise of market power" and "assist[] in the maintenance of competitive and nondiscriminatory markets."[97]

For NERC, the emphasis is less economized but no less managerial. As NERC makes clear, it views its primary task as ensuring the reliability and security of the grid.[98] In practice, this has typically meant giving technocratic grid engineers the space and the resources to model risks to these goals, such as the risk of mismanaging "resource adequacy."[99] These studies are supported by an elaborate informational infrastructure led by the Electricity Information Sharing and Analysis Center (E-ISAC), which "gathers and analyzes security data, shares appropriate data with stakeholders, coordinates incident management, and communicates mitigation strategies with stakeholders."[100] E-ISAC works with grid operators every two years to run GridEx, "the largest grid security exercise in North America."[101] Lessons learned through these industry exercises and risk analyses inform standard setting, which occurs through an "ANSI-accredited process" that starts when drafting teams "made up of industry volunteers and supported by NERC staff . . . work collaboratively to develop requirements using results-based principles that focus on . . . measurable performance, risk

94. Boyd, *supra* note 65, at 796.

95. *Working at PJM Interconnection*, ZIPPIA, https://www.zippia.com/pjm-interconnection-careers-35031/ [https://perma.cc/9XGD-DUKQ].

96. Boyd, *supra* note 65, at 804–05 (discussing the Enron market manipulation scheme and concerns about participants' ability to exploit "market design flaws and software errors in the RTO and ISO markets").

97. *Independent Market Monitor*, PJM INTERCONNECTION, https://www.pjm.com/about-pjm/who-we-are/pjm-board/independent-market-monitor [https://perma.cc/9BVQ-X2HJ]. In some RTOs, the market monitor is simply the Midcontinent Independent System Operator, the market monitor is a firm called Potomac Economics, Ltd.

98. *About NERC*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/AboutNERC/Pages/default.aspx#:~:text=About%20NERC,-It%20looks%20like&text=The%20North%20American%20Electric%20Reliability,and%20security%20of%20the%20grid [https://perma.cc/S38W-8MFA] (last visited Apr. 10, 2023).

99. *Event Analysis, Reliability Assessment, and Performance Analysis*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/RAPA/Pages/default.aspx [https://perma.cc/7NDM-UA76] (last visited Apr. 10, 2023).

100. *Electricity Information Sharing and Analysis Center*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/CI/ESISAC/Pages/default.aspx [https://perma.cc/J2MB-JB45] (last visited Apr. 10, 2023).

101. *GridEx*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/CI/ESISAC/Pages/GridEx.aspx [https://perma.cc/P554-8GKV] (last visited Apr. 10, 2023).

mitigation strategies, and entity capabilities."[102] On the back end, NERC runs a sophisticated and highly technocratic "risk-based" Compliance Monitoring and Enforcement Program (CMEP) to audit the Energy Reliability Organizations under its aegis.[103] In highly managerial language, CMEP emphasizes that its compliance "[f]ramework" is "tailor[ed] . . . to areas that pose the greatest risk to [bulk power system] reliability," and that "[f]ramework elements are dynamic and are not independent; rather, they are complementary and interdependent."[104]

B. Democratic Deficits and Democratic Innovation in Private Regulatory Governance on the Grid

As technical a task as the management of the power grid may seem, lurking just beneath the surface are substantial questions of public policy that inevitably implicate values beyond managerialism.[105] First, an influx of new entrants to the electric power sector beyond the usual players—many bringing new business models that challenge the traditional electric utility model to its very core[106]—has raised persistent concerns about the degree to which ostensibly neutral policies oriented toward reliability and cost are actually a front for anti-competitive discrimination against these new entrants.[107] Second, climate change and the imperative to decarbonize the electric power sector have also introduced a third goal—sustainability—that is sometimes in tension with the narrow managerialist goals of keeping the flow of power going at the lowest price the market will bear.[108] Where the public interest lies in this energy trilemma is not entirely

102. *Standards*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/Stand/Pages/default.aspx [https://perma.cc/E7VA-TFRT] (last visited Apr. 10, 2023).

103. *Risk-Based Compliance Monitoring and Enforcement Program (CMEP)*, N. AM. ELEC. RELIABILITY CORP., https://www.nerc.com/pa/comp/Pages/Reliability-Assurance-Initiative.aspx [https://perma.cc/Q7BU-TJ8R] (last visited Apr. 10, 2023).

104. *Id.*

105. Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 582, 583 (2018) (noting that "people are starting to recognize that the world of energy involves fundamental ethical questions," and that this "growing recognition is evident in recent protest movements—and violent reprisals—over new oil and gas pipelines, in strangely cross-partisan state battles over solar energy policy, and in hard-fought state ballot initiatives considering whether to adopt carbon taxes").

106. These new entrants range from independent power producers to "distributed" energy producers that act as mini-utilities, selling their excess power from rooftop solar back to the grid. *See* Amy L. Stein, *Distributed Reliability*, 87 U. COLO. L. REV. 887 (2016); Felix Mormann, *Clean Energy Equity*, 2019 UTAH L. REV. 335 (2019); Gina S. Warren, *Vanishing Power Lines and Emerging Distributed Generation*, 4 WAKE FOREST J.L. & POL'Y 347, 348 (2014).

107. *See* Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1 (2021) (critiquing RTOs for using their power over transmission planning to favor incumbents); Seth Blumsack & Kyungjin Yoo, *RTO Governance Structures Can Affect Capacity Market Outcomes*, *in* HCI IN BUSINESS, GOVERNMENT, AND ORGANIZATIONS (Fiona Fui-Hoon Nah & Keng Siau eds., 1st ed. 2021).

108. Walters & Kleit, *supra* note 75, at 3; Welton, *supra* note 105, at 583 (noting that "climate change obliterates the idea that energy law can continue to be—if it ever was—a value-neutral exercise best left to utilities and their regulatory oversight bodies").

certain, at least in the short term,[109] but it seems relatively certain that managerialism can offer no technical answer to what the grid of the future should look like.

The story I want to tell here is of an on-the-ground institutional adaptation to this more public project of squaring governance of the grid with public perspectives. As several scholars closely engaged with the movement for "energy democracy" recently observed, "[o]ur nation's decisions about how to produce, transport, and use energy were once seen as the province of a narrow band of specialists," but in recent years "energy policy has moved squarely into the public zone of concern," as people have begun to realize "energy's profound implications for public health and safety, national security, and climate change," and even "equity and justice."[110] The fight occurring within energy intermediaries is, in essence, about taking back energy democracy from the managerialists. In general, RTOs have stubbornly resisted the injection of non-managerial values by tightly controlling opportunities to participate in decision-making and elevating the concerns of industry players. In contrast, NERC has opened itself to engagement with the public interest in the energy transition through its more open procedures. We can learn from the failures and from the successes of these organizations as they have reckoned with this public awakening.

1. RTO Responses to Calls for Energy Democracy

RTOs are currently under a great deal of pressure to expand the voice and power of the full spectrum of stakeholders in grid management.[111] This is a profoundly uncomfortable position for the leadership of many of these organizations who previously had to balance at most two major interests—those of the transmission line owners and those of power producers who wanted to use those lines to bring their power to market. This focus was hardly unexpected, given the blank slate that FERC gave to RTOs to self-organize around these

109. The story may be different in the long run, as clean energy technologies such as distributed generation will begin to have clear advantages in terms of reliability and security. *See* Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 978 (2022) (suggesting that, in the long range, there will be a "true convergence of energy and environmental policy" since "the only way to secure a reliable grid under conditions of climate change is to rapidly engage in a clean-energy transition in the electricity sector").

110. ALEXANDRA KLASS, SHELLEY WELTON, HANNAH WISEMAN, & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, THE FEDERAL ENERGY REG. COMMISSION'S NEW OFF. OF PUB. PARTICIPATION: A PROMISING EXPERIMENT IN "ENERGY DEMOCRACY" 4 (2022), https://cpr-assets.s3.amazonaws.com/documents/ferc-public-participation-rpt-0422.pdf [https://perma.cc/4PMU-DDNM].

111. *See* Stephanie Lenhart & Dalten Fox, *Participatory Democracy in Dynamic Contexts: A Review of Regional Transmission Organization Governance in the United States*, 83 ENERGY RSCH. & SOC. SCI. 102345, at 1 (2022) ("In the United States, RTO decision-making processes are increasingly being challenged by diverse and conflicting stakeholder interests."); Dworkin & Goldwasser, *supra* note 72, at 596; Walters & Kleit, *supra* note 75. This is part of a broader phenomenon within the energy policy space (which goes beyond electric power provision to include fights over energy infrastructure, like pipelines). *See* Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581 (2018).

industry incumbents.[112] As I have written with Andy Kleit,[113] the RTO model in practice seems highly analogous to the corporatist form of governance that some have linked to managerialism.[114] For instance, RTOs structure decision-making processes so that industry subsectors are formally represented in organized negotiations, while public stakeholders are often cut out of the decision-making process altogether.[115] But making corporatist or managerial organizations less corporatist or managerial when they have already entrenched themselves as such is exceedingly difficult. So far, RTOs have resisted demands from new entrants, states, and public interest groups to make their decision-making processes more pluralistic.

To be sure, the news is not all bad. As Shelley Welton has documented, the California Independent System Operator (CAISO) has been at the forefront of RTO efforts to democratize decision-making about grid management. CAISO is, unlike the rest of the RTOs, quasi-public: its board is selected by the California Governor rather than by the organization itself.[116] Moreover, its "decision-making operates similarly to 'the standard administrative process of a government agency,'"[117] incorporating such standard administrative law elements as the petition for rulemaking—which CAISO calls "issue papers"—and notice-and-comment rulemaking—which CAISO calls "straw proposals"—all of which are open to all comers regardless of status as a member or market participant.[118] Finally, CAISO follows an "Open Meeting Policy" that presumptively records audio and video of all meetings.[119] A relatively advanced online platform—where you can browse through initiatives, view associated documents, view already submitted comments, and submit your own comments—augments all of this.[120] This inclusive starting point, which never gave managerial interests an

112. *See* Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209, 221 (2021) (discussing the origins of RTOs and noting that, "to entice utilities to join, FERC left the design details up to industry," instead merely offering a "list of required 'characteristics' and 'functions' that RTOs must have," including "most centrally . . . that RTOs be (1) independent, (2) regional, and (3) responsible for the operation of the grid").

113. *See* Walters & Kleit, *supra* note 75. The article argues that corporatist RTOs are unable to manage the energy trilemma and a more pluralist governance should be implemented instead.

114. WILLARD F. ENTEMAN, MANAGERIALISM: THE EMERGENCE OF A NEW IDEOLOGY 185–87 (1993) (acknowledging similarities but also highlighting some theoretical differences).

115. *See* Lenhart & Fox, *supra* note 111; Welton, *supra* note 112; Walters & Kleit, *supra* note 75.

116. Welton, *supra* note 112, at 229.

117. *Id.*

118. *Id.*

119. *Understanding and Participating in California ISO (CAISO) Processes*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/understanding-and-participating-california-iso-caiso-processes [https://perma.cc/7ATJ-C3FU] (last updated July 14, 2022).

120. *Policy Initiatives*, CAL. INDEP. SYS. OPERATOR, https://stakeholdercenter.caiso.com/ [https://perma.cc/SV42-E8FC] (last visited Apr. 10, 2023); Rashele Wiltzius, *Stakeholder Commenter Tool Training*, CAL. INDEP. SYS. OPERATOR (Aug. 3, 2020), http://www.caiso.com/Documents/Presentation-StakeholderCommentingTool.pdf [https://perma.cc/KJE3-8YP7].

exclusionary toehold, has arguably allowed CAISO to be more responsive to a broader set of public interests. Specifically, CAISO has managed to align itself with state policies promoting renewable energy that might well have been watered down by a CAISO that was myopically focused on using its authority to promote reliability and cost concerns.[121] Presumably, because of its governance structure, if public sentiment in California ever shifted drastically, CAISO would be open enough to respond to that shift as well, although it arguably would enhance democracy even more by providing yet another forum for the articulation of the public interest.

Now to the bad news: none of the other RTOs come anywhere close to CAISO's openness to democratic inputs, either in terms of recognizing the importance of state policies or in terms of creating space for meaningful public participation in RTO decision-making. For the most part, RTO stakeholder governance processes have become "dense, convoluted" processes that make it extremely difficult for meaningful participation to occur.[122] A distinctive institutional design feature of most of the RTOs is a heavy reliance on elaborate committee processes, which are meant to foster consensus recommendations to the boards. The boards ultimately render an independent decision but often follow committee recommendations.[123] These committee processes are generally only open to members; non-members, which include state public utility commissions as well as consumer and environmental groups, may participate in discussions but do not typically get a vote in any decision-making processes.[124] To be sure, this committee process is democratized compared to a governance structure that runs entirely through the boards of RTOs, but it is hardly democratic when compared to the CAISO model. Because of the typical voting structure in RTOs, it is very difficult to advance proposals through the process unless a policy appeals to multiple incumbent constituencies.[125] Likewise, it is fairly easy to advance consensus proposals where the majority of incumbent industry players approve—even though these may be precisely those proposals that would most likely be opposed by those who do not have a seat at the table.[126]

A paradigm example of these distortions is the minimum offer price rules (MOPRs) developed by two Eastern RTOs—PJM Interconnection and ISO New England.[127] In both cases, FERC oversaw the RTOs' reforms in so-called "capacity markets" to prevent alleged distortions that FERC believed threatened

121. Welton, *supra* note 112, at 268.

122. *Id.* at 226.

123. Lenhart & Fox, *supra* note 111, at 10.

124. *Id.*

125. Walters & Kleit, *supra* note 75.

126. Wiseman, *supra* note 80, at 17.

127. For an exhaustive overview of this saga, see Joshua C. Macey & Robert Ward, *MOPR Madness*, 42 ENERGY L.J. 67 (2021).

grid reliability.[128] Capacity markets incentivize generators to promise to be available to provide power to the grid at certain times in the future in exchange for whatever price emerges through an auction process among potential suppliers.[129] FERC's concern was that the capacity markets were going to fail to procure enough future capacity to keep the power grid balanced in the long-term future.[130] The proposals the RTOs developed were seemingly oblivious to the broader politics around the clean energy transition. The RTOs would have imposed limits on the ability of subsidized resources—a category largely consisting of state-supported clean energy resources—to bid into these capacity markets.[131] According to the RTOs, a central problem with the capacity markets' under-procurement had to do with the downward pressure on auction clearing prices created by renewable energy's exceptionally low marginal costs.[132] In essence, renewable power sources were outcompeting other sources of purportedly more reliable "baseload" power and driving the price so low that too few traditional generators were clearing the market. While this is hardly a problem from a clean energy transition standpoint, the RTOs' present-minded concern was that a lack of traditional generation sources would make it difficult to balance the grid in light of a lack of currently existing infrastructure to handle extremely high proportions of intermittently available renewable energy.

The debate over the MOPRs could have been an important opportunity for public contestation over visions for the future of the electric grid. But rather than do any number of things that might have solved this problem without curtailing renewable power bids into capacity markets—such as invest in the transmission infrastructure to support a renewable-dominated power grid[133]—the RTOs required renewable power generators to refrain from bidding into markets except at an artificially high price well above renewables' fixed costs.[134] The proposal would have eliminated an important potential revenue stream for new, clean power generation, which in turn would have made it less likely that these sources would ever be built.[135] In effect, MOPR solved the technical problem facing the

128. Deandra Fike, *Regional Electricity Markets and the Struggle to Integrate State Clean Energy Subsidies*, 46 COLUM. J. ENV'T. L. 523, 546, 554 (2021).

129. Macey & Ward, *supra* note 127, at 74.

130. *Id.*

131. *Id.* at 89.

132. Grace Brosofsky, *Affordable Renewables—Unjust and Unreasonable?*, 105 CORNELL L. REV. 227, 247 (2019).

133. *See generally* Daniel E. Walters, *Lumpy Social Goods in Energy Decarbonization: Why We Need More Than Just Markets for the Clean Energy Transition*, 93 U. COLO. L. REV. 541 (2022) (discussing the importance of a buildout of transmission infrastructure to support a clean energy transition); *see also infra* notes 137–139 and accompanying text (discussing a region where the grid operator has elected to do away with capacity markets entirely in favor of a planned approach).

134. Macey & Ward, *supra* note 127, at 87. To be fair to the RTOs, these proposals were somewhat moderated from the initial push from FERC, which was heavily influenced by President Trump's efforts to revive the coal industry. *See* Wiseman, *supra* note 80, at 211–12.

135. Brosofsky, *supra* note 132, at 229.

RTOs' carefully crafted and managed capacity markets, but only by walking headlong into a fierce public debate about the future of the grid and the response to climate change. Perhaps not surprisingly, when word got out about how this seemingly technical change to market participation rules would impact clean energy development, a public backlash ensued, and the RTOs backed away from the MOPRs.[136] When managerial organizations like RTOs make decisions without grappling with the full range of public interests in those decisions, the result is decisions that appeal only to managerialists.

CAISO, for its part, was able to avoid these dynamics and respond to the need for capacity planning without tanking renewable energy, and it is not a stretch to see how its governance structure might have contributed to this success. CAISO does not operate a capacity market *per se*, but it does help plan for the future through Resource Adequacy Planning.[137] Under this process, which CAISO jointly manages with the California Public Utilities Commission (CPUC), regulators use load forecasts and other tools to determine how much power generation might be needed in the most extreme demand periods and then require load-serving entities to procure the necessary margin to safely meet peak demands.[138] Rather than relying on highly artificial markets to set this price, CAISO and CPUC just make these regulatory plans through a publicly accountable process. Although the Resource Adequacy Planning process is far from ideal and might even need an extra dose of managerial expertise,[139] the process is—compared to the capacity market approach of Eastern RTOs—more attentive to balancing the traditional managerial goals of grid operators with public goals of being a leader in the decarbonization of the electric power grid.

For instance, beginning in 2018, CAISO examined its Resource Adequacy Planning rules. Starting with the issue paper produced by CAISO staff, engagement was high. Twenty-two commenters—mostly utilities, but also several cities and more renewable-centric utilities, such as NextEra—chimed in.[140] Over the course of the next three years, commenters participated seventeen times in various meetings and in drafting of the proposal, with the pool of commenters

136. Ethan Howland, *PJM's 'Focused' MOPR Takes Effect, Boosting Renewables and Nuclear as FERC Commissioners Deadlock*, UTIL. DIVE (Sept. 30, 2021), https://www.utilitydive.com/news/pjm-focused-mopr-takes-effect-ferc-capacity-market/607417/ [https://perma.cc/WTM3-MRUH]; Miriam Wasser, *Feds Approve Plan to Delay Scrapping a New England Energy Rule That Harms Renewables*, WBUR (May 28, 2022), https://www.wbur.org/news/2022/05/28/mopr-decision-ferc-iso-ne-renewables [https://perma.cc/B3WG-9KGT].

137. *Navigating CAISO*, SUSTAINABLE FERC PROJECT, https://sustainableferc.org/navigating-caiso/ [https://perma.cc/Z6K6-HLRP] (last visited Apr. 10, 2023).

138. Fredrich Kahrl, *Fixing California's Resource Adequacy Woes*, UTIL. DIVE (Sept. 14, 2022), https://www.utilitydive.com/news/california-resource-adequacy-puc-caiso-Kahrl/631720/ [https://perma.cc/TAX5-MQPA].

139. *Id.*

140. *Initiative: Resource Adequacy Enhancements*, CAL. INDEP. SYS. OPERATOR, https://stakeholdercenter.caiso.com/StakeholderInitiatives/Resource-adequacy-enhancements [https://perma.cc/VQ3U-E9VZ].

diversifying over time.[141] Utilities still dominated, but the CPUC Public Advocate's Office, the Environmental Defense Fund, the California Energy Storage Alliance, and the American Clean Power Association all submitted comments.[142] Moreover, because of the written record created by the commenting process, it was relatively simple for each commenting organization to reprise their concerns—to the extent not addressed by CAISO—once CAISO submitted proposed tariff changes to FERC. In the proceeding before FERC on the first phase of the Resource Adequacy changes, nineteen organizations intervened, and eight commenters objected to specific aspects of the tariff changes.[143] In the end, FERC substantially upheld CAISO's tariff changes as just and reasonable under the Federal Power Act, but in doing so, it noted that "CAISO has taken steps to limit the impact of its proposal."[144]

While it is difficult to tease out the impact of CAISO's relatively democratic governance processes, they undoubtedly played some role in ensuring that CAISO's proposal, unlike the MOPRs, would not cater entirely to incumbent utility interests. Although the issues discussed in this proceeding were quite technical and would not be easily accessible by individuals, the injection of a variety of perspectives into a publicly available record likely made it difficult for CAISO to adopt changes to the Resource Adequacy Requirements that completely disregarded various constituencies—environmental interests, community organizations, and state agencies—that had their own interests in the future of the grid.

2. NERC's Responses to Calls for Energy Democracy

Although NERC has also had its share of growing pains,[145] the story is quite a bit more positive with this organization than it is with the RTOs other than CAISO. Despite having a technical task in front of it, NERC has been able to recognize much more quickly and effortlessly the ways that grid reliability intersects with values-laden questions and raises the need for public participation and feedback.[146]

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141. *Id.*

142. *Id.*

143. *Motion for Leave to File Answer and Answer of the California Independent System Operator Corporation to Comments and Protests*, Docket No. ER21-1551-000, FERC (Apr. 28, 2021), http://www.caiso.com/Documents/Apr28-2021-Motion-Leave-Answer-Answer-Comments-Protests-ResourceAdequacyEnhancemnts-ER21-1551.pdf [https://perma.cc/5XYF-HCUT].

144. *Order Accepting Tariff Revisions*, 175 FERC ¶ 61,168 (May 28, 2021), http://www.caiso.com/Documents/May28-2021-OrderAcceptingResourceAdequacyEnhancements-ER21-1551.pdf [https://perma.cc/FC8Q-BVGW].

145. Emily Hammond, *supra* note 11, at 1741–42 (noting that the relationship between FERC and NERC was at first "rocky," since "NERC viewed itself as having expertise superior to FERC and as a result resisted efforts to share data").

146. Macey, Welton, & Wiseman, *supra* note 17 at 44–47 (concluding that "NERC understands the challenges" of maintaining reliability during the energy transition). To be sure, it may be that NERC understands the challenges but fails to effectively address them. *See id.* at 47 ("On the whole, however,

At least part of what sets NERC apart from most RTOs—and aligns it with CAISO—is its institutional design. As a creature of statute with an explicitly public-regarding mission, NERC is in some sense quasi-public. To be sure, it remains a corporation, but, like Amtrak, it operates under a public mandate, blurring the lines between public and private.[147] In terms of internal governance, a condition of certification as an ERO was that the ERO have "established rules" that, among other things, "provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties."[148] As part of the certification process for NERC, FERC elaborated on standards for public participation that NERC must follow as it develops reliability standards[149]—far more clearly, it might be added, than FERC's efforts to delineate process expectations for RTOs.[150] NERC's Standard Process Manual implements these requirements by requiring NERC to maintain an ANSI-approved process.[151] This process endorses due process in standard setting—defined as including a presumption that "[p]articipation shall be open to all parties who are directly and materially interested in the activity in question," that "[v]oting membership on the consensus body shall not be conditional upon membership in any organization, nor unreasonably restricted on the basis of technical qualifications or other such requirements," that "[t]imely and adequate notice of standards development activity shall be announced in media suitable to demonstrate that a meaningful opportunity for participation . . . was provided," and that "[p]rompt consideration shall be given to the written views and objections of all

NERC's forward-looking reports and assessments do not consistently translate to modern standards or recommendations. NERC has a two-faced approach to modern grid reliability: talking a good talk, on the one hand, about changing the grid, but failing to do much about it, on the other."). For my purposes, though, it may be enough that NERC talks the talk—expressing attentiveness to a diverse array of public interests in the energy transition makes is rather the goal of combating managerialism's hegemony, even if contestation over policy does not yield consistently pro-renewable outcomes.

147. *Cf.* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 846 (2014) (discussing Amtrak and other entities that are "neither an executive agency nor an independent regulatory commission, yet [are] still at least partially federal," and that "reside at the border between the federal government and either the private sector or another government, whether state, foreign, or Native American tribal").

148. 16 U.S.C. § 824o(c)(2)(D).

149. *See* Macey, Welton, & Wiseman, *supra* note 16 (citing Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards, 71 Fed. Reg. 8661 (Feb. 3, 2006) (to be codified at 18 C.F.R. pt. 39)).

150. To be clear, FERC has developed some mandates for RTO processes. *See* Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 64099 (Oct. 17, 2008) (to be codified at 18 C.F.R. pt. 35). But its efforts have been hampered by federal court rulings that have interpreted FERC's authority to direct the internal governance of a private corporation. *See* Wiseman, *supra* note 80, at 170–71. This concern is not present for NERC, which has explicit statutory authority to govern internal processes of NERC. *Id*. at 209

151. N. AM. ELEC. RELIABILITY CORP., STANDARD PROCESSES MANUAL: VERSION 3, at 3 (June 27, 2013), https://www.nerc.com/pa/Stand/Documents/Final_Appendix_3A_StandardsProcessesManual_June_26,_2013.pdf [https://perma.cc/5RLW-TJGJ] [hereinafter STANDARD PROCESSES MANUAL].

participants."[152] One of NERC's standard processes involves responding to comments received during the comment period,[153] much as administrative agencies are required to respond to salient comments received during informal rulemaking under the Administrative Procedure Act.[154] NERC's board is also required to "assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decision-making in any [of its] committee[s] or subordinate organizational structure[s]."[155] Although NERC, like RTOs, structures proposal development using a committee process and substantial delegation to "subordinate organizational structures"—namely, Regional Entities—these processes are generally more open than RTOs' processes. Most notably, NERC critically differs from most RTOs in allowing anyone, including non-members, to vote on reliability standards as part of the "ballot body."[156] While these votes are not binding on the board,[157] they are a critical input.

External governance also differs from RTOs. FERC can *sua sponte* order NERC to submit or revise reliability standards on a particular subject,[158] just as it can under Section 206 of the Federal Power Act for RTOs.[159] But unlike with RTOs,[160] the order to NERC is unencumbered by any shifting of the burden of proof to FERC to support the order. If anything, the burden is de facto shifted to NERC—review of reliability standards by FERC has tended to be less deferential than with RTOs.[161] This is despite the fact that the governing statute requires FERC to "give due weight to the technical expertise" of NERC.[162]

152. *Due Process Requirements for American National Standards*, AM. NAT'L STANDARDS INST., https://www.ansi.org/american-national-standards/ans-introduction/essential-requirements [https://perma.cc/2UJS-MVFR] (last updated Jan. 2022).

153. STANDARD PROCESSES MANUAL, *supra* note 151, at 11–12.

154. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); *see also* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69 (2022) (providing a general overview of how the Administrative Procedure Act has been interpreted to require public participation in general, and response to comments in particular).

155. 16 U.S.C. § 824o(c)(2)(A).

156. Hammond, *supra* note 11, at 1742–43; *see also* Macey, Welton, & Wiseman, *supra* note 16 (discussing how this is separate from elections for the Member Representatives Committee (MRC), which elects trustees, votes on bylaws and amendments, and budgets. For the MRC, only industry sectors and government members are allowed to vote).

157. Hammond, *supra* note 11, at 1743.

158. 16 U.S.C. § 824o(d)(5).

159. *Id.* § 824e.

160. *Federal Law Guides Changes in PJM Governing Documents*, PJM INTERCONNECTION (Jun. 28, 2022), https://www.pjm.com/~/media/about-pjm/newsroom/fact-sheets/federal-power-act-sections-205-and-206.ashx#:~:text=In%20an%20FPA%20Section%20206,same%20on%20its%20own%20motion [https://perma.cc/TC4E-HPKB] (noting "[i]n an FPA Section 206 filing or proceeding, the complainant (or the Commission) has the legal burden of demonstrating that the document (or any part thereof) currently on file is 'unjust and unreasonable . . . .").

161. John S. Moot, *When Should the FERC Defer to the NERC*, 31 ENERGY L.J. 317 (2010).

162. 16 U.S.C. § 824o(d)(2).

Perhaps part of the explanation for the drift away from this deferential standard has to do with a familiar phenomenon in administrative law, where opportunities for public participation provide fodder for greater review by overseers.[163]

These differences in NERC's structure and processes might be expected to lead NERC to a substantially less managerial place, and that does seem to be what happens in concrete cases where NERC develops reliability standards with a strong public interest overlay. We can see this clearly in how NERC—with some nudging from FERC—has addressed the strong public interest in updated winterization standards in the wake of the grid failure during Winter Storm Uri in February 2021. One of the root causes of this catastrophic failure was insufficient winterization for natural gas wells and gathering and processing facilities that were critical to operation of the natural gas power plants.[164] When those natural gas operations failed, all precisely at a moment when demand was peaking relative to normal winter loads, the grid operator, the Electric Reliability Council of Texas (ERCOT) had to shed load to keep the grid from falling into a doom spiral of blackouts. This was an entirely avoidable problem, provided that proper investments were made in winterization to protect against the kind of extreme weather that climate change will only make more common. A post-mortem on the crisis revealed that both NERC and FERC had been beating the drum on winterization for about ten years before the 2021 crisis, but fifteen percent of the generating units in the Southern Power Pool and seven percent in ERCOT did not have any winterization plans.[165]

These failures are being quickly addressed and in a forum that does justice to the public interest in the matter. First, NERC developed new cold weather reliability standards, and those standards were approved by FERC in August of 2021—a mere six months after the crisis that fomented them.[166] These standards require power plants to produce and implement cold weather preparedness

163. *See generally* Matthew C. Stephenson, *A Costly Signaling Theory of 'Hard Look' Judicial Review*, 58 ADMIN L. REV. 753 (2006) (discussing the ways that forcing agency justifications facilitates more meaningful judicial review of agencies despite courts' relative lack of information about the regulatory issues at hand).

164. FED. ENERGY REGUL. COMM'N & N. AM. ELEC. RELIABILITY CORP., FERC-NERC-REGIONAL ENTITY STAFF REPORT, THE FEBRUARY 2021 COLD WEATHER OUTAGES IN TEXAS AND THE SOUTH CENTRAL UNITED STATES 11–16 (2021), https://www.naesb.org/pdf4/ferc_nerc_regional_entity_staff_report_Feb2021_cold_weather_outages_111621.pdf [https://perma.cc/LAM5-MCJP] [hereinafter FERC-NERC STAFF REPORT] (noting that "generating units unprepared for cold weather failed in large numbers" and this was one of two causes of the crisis triggered by unprecedentedly cold weather). It bears repeating that, contrary to what some Texas Republican politicians suggested, there is no evidence that their crisis was due to an overabundance of wind farms. Analysis has shown that wind farms were actually overproducing relative to forecasts. *See* Erin Douglas & Ross Ramsey, *No, Frozen Wind Turbines Aren't the Main Culprit for Texas' Power Outages*, TEX. TRIB. (Feb. 16, 2021), https://www.texastribune.org/2021/02/16/texas-wind-turbines-frozen/ [https://perma.cc/MR5F-GM4T]; Erin Douglas, *Wind Power a Smaller Contributor to Texas Electricity Crisis Than Initially Estimated, ERCOT Analysis Shows*, TEX. TRIB. (Apr. 28, 2021), https://www.texastribune.org/2021/04/28/texas-power-outage-wind/ [https://perma.cc/2EWU-RT7T].

165. FERC-NERC STAFF REPORT, *supra* note 164, at 17.

166. Order Approving Cold Weather Reliability Standards, 176 FERC ¶ 61,119 (Aug. 24, 2021).

plans, and they require grid operators to share information about the ability of critical infrastructure to function during a cold weather event.[167] Second, FERC more recently proposed to order NERC to revise its transmission system reliability standards to address risks from extreme heat or cold weather events.[168] NERC responded by producing proposed standards for Extreme Weather Events,[169] and after receiving and responding to comments,[170] forwarded a package to FERC, which recently approved many of these new standards.[171] The flurry of activity around extreme weather planning is notable not just for its striking responsiveness,[172] but also for the way that the public has been able to shape NERC and FERC's efforts on this front against what could be a strong industry impulse to resist the imposition of costly winterization standards. To be sure, much remains to be seen about whether NERC will enthusiastically enforce implementation of these standards. Still, when much of the law's value is expressive,[173] NERC's strong statements about winterization will alone be important in shaping both industry responses and public efficacy in demanding changes to the electric power system.

There is room for improvement even on NERC's relatively pluralistic processes. Perhaps inevitably, issues that are raised before NERC—and ultimately at FERC—are technical and difficult to parse for the uninitiated. As a practical matter, this means that most of the standards development processes

167. *Id.* at 3.

168. Fed. Energy Regul. Comm'n, *Transmission System Planning Performance Requirements for Extreme Weather*, 87 Fed. Reg. 38020 (Jun. 27, 2022), https://www.federalregister.gov/documents/2022/06/27/2022-13471/transmission-system-planning-performance-requirements-for-extreme-weather#citation-40-p38024 [https://perma.cc/55NE-3KUZ].

169. *Extreme Cold Weather Preparedness and Operations*, N. AM. ELEC. RELIABILITY CORP. (Aug. 2022), https://www.nerc.com/pa/Stand/Project202107ExtremeColdWeatherDL/2021-07%20Second%20Ballot_EOP-012-1_082022_updated.pdf [https://perma.cc/47LJ-BHPV].

170. *Consideration of Comments, 2021-07 Extreme Cold Weather Grid Operations, Preparedness, and Coordination | Draft 2*, N. AM. ELEC. RELIABILITY CORP. (Sept. 2022), https://www.nerc.com/pa/Stand/Project202107ExtremeColdWeatherDL/2021-07%20Consideration%20of%20Comments_final%20ballot.pdf [https://perma.cc/VR3W-VVMN].

171. *See* Ethan Howland, *FERC OKs Cold Weather Reliability Standards for US Generators but Orders NERC to Address Shortcomings*, UTIL. DIVE (Feb. 17, 2023), https://www.utilitydive.com/news/ferc-nerc-cold-weather-reliability-standards/643009/ [https://perma.cc/D9SN-UM9D] (noting the FERC "approved two extreme cold weather reliability standards for U.S. generators" but ordered NERC to address issues of 'undefined terms, broad limitations, exceptions and exemptions and prolonged compliance periods' within a year").

172. As Macey, Welton, and Wiseman note, in NERC's early years there were serious problems with delays in standard setting, *see* Macey, Welton, & Wiseman, *supra* note 16, at 40 (noting that, "as of 2010, it took around 21.7 months for a standard to work its way through NERC's process, creating a significant backlog of standards that FERC had identified as in need of revision"), but the post-Uri winterization episode belies that trend and suggests that NERC is highly responsive to public calls for more protective standards than utilities would generally prefer.

173. *See* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 Mich. L. Rev. 373, 407 (2009) ("Law has an important expressive character beyond its coercive one. Law creates a public set of meanings and shared understandings between the state and the public. It clarifies, and draws attention to, the behavior it prohibits.").

are heavily dominated by industry actors rather than government actors, public interest groups, or individuals. Yet the relevant baseline for comparison is not the ideal democratic process—it is the more unchecked managerialism and corporatism of most of the RTOs, save CAISO. Against that baseline, NERC's processes create far more room for contestatory pushback against runaway managerialism.

C. Institutionalizing Energy Democracy: FERC's Office of Public Participation

So far, the push for a less exclusively managerialist electric power sector has occurred from the bottom up as regulatory intermediaries respond to pressures from the public. Recently, however, we have begun to see the outlines of a more top-down form of pressure in the newly constituted Office of Public Participation (OPP). While it is only a fledgling office within FERC—and its portfolio of work has not been completely set in stone—already OPP is demonstrating the potential value of institutionalizing an overseer whose sole duty is to ensure that decision-making processes in the electric power sector are focused not merely on traditional industry goals, but on responsiveness to diverse perspectives about the future of the power grid as well. Several innovative ideas are worth highlighting.

First, pursuant to feedback about what OPP should focus on, the Office will focus attention on solving a perennial problem in the electric power sector: the impenetrable technical complexity of electric power operations and markets. Advocates have urged OPP to "[d]evelop new tools and practices for 'translating out' technocratic" topics, and to do so with an eye to energy justice by "[i]dentify[ing] proceedings where structurally marginalized groups have the most interest."[174] For instance, one set of scholars urged OPP to "consider hiring field staff trained in grassroots engagement who can build relationships with constituencies who have historically been underrepresented in FERC's proceedings."[175] And while many of these calls for OPP action have focused on FERC proceedings, OPP is also looking at similar possibilities in the regulatory intermediary space. Commenters in the OPP docket have encouraged the Office to devote energy in particular to "help[ing] stakeholders and the public better understand, and participate in, the processes and proceedings of . . . RTOs and ISOs."[176] That mandate could easily be extended to NERC as well.

Second, under its statutory mandate, OPP is supposed to manage an intervenor funding program that will subsidize participation in energy proceedings.[177] The idea of financially supporting intervenors in complex,

174. KLASS ET AL., *supra* note 110, at 5.

175. *Id.* at 24.

176. *Id.* at 21; *see also id.* at 24 ("OPP should explore available options for making RTOs and ISOs more inclusive of and responsive to members of the public. It should develop a comprehensive set of recommendations for achieving this goal and share them with relevant policymakers.").

177. 16 U.S.C. § 825q-1(b).

technocratic administrative proceedings has a long history in the energy sector at the state level.[178] However, OPP aims to bring this institutional practice to the national level, again with an eye to energy justice and the need to direct more resources to those who are most disadvantaged by the high barriers to entry.[179] While the statutory authorization for the intervenor program limits funding to "any proceeding before [FERC],"[180] what that phrase means is unclear. It is at least arguable that RTO decision-making processes are adjunct FERC proceedings because FERC must ultimately approve any decision made by RTOs.

These two initiatives are just the tip of what could be a very large iceberg. The genius of the OPP is that it promises to hardwire systematic focus on the public interest, in part by complicating the simple managerialist story that what is good for business is good for the public. By forcing regulators, regulatory intermediaries, and industry actors to acknowledge the ways that their decision-making processes fail to include or respond to the values and interests of all possible publics, OPP promises to ensure that a robust debate about what the public interest is will ensue. Of course, whether the Office lives up to this promise will depend on many variables, including whether it is able to maintain its independence from FERC.[181]

IV

SCALING THE SUCCESSFUL STRATEGIES OF THE ELECTRIC POWER SECTOR

As Shelley Welton presciently observed, much can be learned from an analysis of how "[p]ublic utility . . . has been undone from within in energy law by blind faith in market constructs, with insufficient attention to institutional theory and design."[182] On Welton's account, examining the institutional roots of this gradual cooptation of the public interest can help guide efforts to "apply the normative potential of utility in other sectors."[183] In this concluding Part, I build on what this account also implies: that successful strategies to promote decision-making with proper regard for public values in the otherwise highly managerial electric power sector ought to be scaled and experimented with, both outside of that sector and with respect to private regulatory intermediation in general.

178. KLASS ET AL., *supra* note 110, at 25.

179. *Id.*

180. 16 U.S.C. § 825q-1(b)(2).

181. There is some uncertainty about whether the Director of OPP will be independent of the FERC Chair or if they will be removable at will. The statute as originally passed provided that the Director would be removable only for "inefficiency, neglect of duty, or malfeasance." *See* Fed. Energy Regul. Comm'n, *Comment of the Harvard Electricity Law Initiative, Docket No. AD21-9 The Office of Public Participation*, http://eelp.law.harvard.edu/wp-content/uploads/Harvard-Electricity-Law-Initiative-OPP.pdf [https://perma.cc/4NYF-UBMT] (citing 16 U.S.C. § 825q-1(a)(2)(A)). That language appears to have been amended to eliminate the removal restriction.

182. Welton, *supra* note 112, at 217.

183. *Id*.

When it comes to strategies to curb managerialism in private regulatory intermediation, if we can do it in the electric power sector, we can do it anywhere.

I identify two such approaches: (1) instituting a general requirement that all private regulatory intermediation in standard-setting activities be subject to a Private Administrative Procedure Act (PAPA) prescribing a robust public commenting process that has proven to be reasonably effective in curbing managerialism and other pathologies in CAISO and NERC;[184] and (2) creating a trans-substantive government agency—the Office of the Public Interest (OPI)—with authority to develop recommendations for best practices for public participation, much as FERC's OPP is currently doing, but also with authority to develop standards, definitions, and metrics in concordance with key statutory terms like "just and reasonable" or the "public interest." These activities could provide substantive guidance about the normative goals that should animate private—and public—regulatory initiatives. These reforms would not completely eradicate managerialism in private regulatory intermediation, but they would make it more difficult for managerial tendencies to take root, as I show below.

A. Towards a Private Administrative Procedure Act

Although it is hardly a panacea for all that ails the administrative state,[185] the Administrative Procedure Act (APA) has stood the test of time as a kind of quasi-constitution for the administrative state.[186] As Justice Jackson famously said in *Wong Yang Sung v. McGrath*, "[the] Act thus represents a long period of study and strife; it settles long continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[187] A key part of the formula—what Kenneth Culp Davis called one of the "greatest inventions of modern government"[188]—is its provision for a dose of public

184. The idea of importing concepts from the APA into a Private Administrative Procedure Act governing "private delegations" of public power has been raised before by Paul Verkuil, but with much more of an emphasis on due process norms in private adjudications. *See* Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963 (2005). As will be clear in Part III.A., my focus is on rulemaking procedures in private standard setting. I do not address arguments for requiring procedural due process, or anything looking like that, in self-regulatory enforcement. In fact, I believe that this step would probably not be constructive in reducing managerialism except perhaps in some areas, such as content moderation, where self-regulated entities affect consumers through their "adjudications."

185. *See* Walters, *supra* note 13, at 36–41, 75–79 (collecting critiques of the APA's key institution—notice-and-comment rulemaking—as ineffectual and biased); Bremer, *supra* note 154, at 9 (noting that the APA's notice-and-comment procedures are based on a theory of democracy, but that "[a]s the regime has matured . . . serious doubts have arisen whether the APA can fulfill its democratic promises"); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN L. REV. 629 (2017) (arguing generally that the APA needs to be "modernized").

186. *See* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 733 (2021).

187. 339 U.S. 33, 40 (1950).

188. Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 324 (2005) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (1st ed. Supp. 1970)).

participation in the development of regulations in the form of informal, notice-and-comment rulemaking.[189] This procedure entails notice of proposed regulatory action, a fair opportunity for open public comment, and, most critically, a duty of the decisionmaker to explain the basis of their decision in light of that paper hearing.[190] Often, these barebones steps are supplemented with additional ones that provide space for publics to help form agendas at regulatory agencies.[191] And, of course, these mechanisms often result in a record that can serve as the basis for a meaningful court challenge of regulatory actions.[192]

Turn now from government, where this dialogic and often contestatory process is a normative baseline,[193] to the private regulatory intermediatory space, where it is not. As the RTO examples from Part III showed, the absence of a similar and standardized process in private regulatory intermediation lets managerialism run wild. Managerial decisionmakers are permitted to pursue organizational goals that affect the public without any expectation that they engage publicly with those effects or reconcile managerial values with public values. Worse, because of the asymmetry—substantial, and sometimes ossifying, procedural requirements for *public* regulatory decision-making, but a relative dearth of such costly procedures in private regulatory intermediation—there is arguably an incentive for public regulators to rely more on private regulatory intermediation than they otherwise would were the process of intermediation subject to public procedures. To the extent that procedures have costs,[194] dominant ideologies, like managerialism, will inevitably find ways to channel more decision-making down paths of least resistance, which will generally be the procedurally unregulated private regulatory intermediation space instead of direct public regulation, with its attendant democratic features.

For these reasons, I suggest that a simple measure that could be taken to address managerialism would be to eliminate the disparity between public

189. 5 U.S.C. § 553. The bare-bones text of § 553 does not seem to anticipate all of the contours of the modern notice-and-comment rulemaking process. For an overview of how rulemaking was "democratized" by courts, at least relatively speaking, see Bremer, *supra* note 154.

190. Bremer, *supra* note 154, at 12.

191. *See generally* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021) (providing a framework for democratized rule development that facilitates meaningful participation from typically absent stakeholders).

192. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 34 (2018) (noting that agency's creation of a record containing reasons facilitates more robust judicial review of the rationality of agency policies).

193. BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019) (arguing that democratic deliberation was central to the progressive era vision of the administrative state); Walters, *supra* note 13 (arguing that democratic practice in the administrative state often takes on more of a contestatory than deliberative tone, and that this is key to the administrative state's democratic legitimacy); Mashaw, *supra* note 192 (highlighting the deliberative and dialogic benefits of reason giving norms in agency processes).

194. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360 (2019) ("As a general matter, any legally mandated procedure raises the costs of agency action.").

regulatory processes and private ones by passing a Private Administrative Procedure Act (PAPA). This Act would at least impose the full slate of existing procedural requirements on private regulatory intermediaries; it might even go beyond this to impose the extra-public procedures that the Administrative Conference of the United States has encouraged agencies to adopt voluntarily.[195] Of course, the limits of this proposal must be acknowledged. Having to go through APA processes does not ensure any particular substantive result—after all, one longstanding critique of notice-and-comment in the federal rulemaking process is that it amounts to a kind of Kabuki theater.[196] Notice-and-comment would not necessarily guarantee the demise of managerialism in private regulatory intermediation, just as it has of course not eradicated managerialism in federal agency decision-making. But it would make managerialism harder and more costly for private regulatory intermediaries to embrace. We can see this marginal effect in the experiences in CAISO and NERC in Part II, where in both cases more APA-like processes of public engagement and contestation led to a relaxation of the kind of undiluted managerialism that prevails in most RTOs, where processes are far from the APA paradigm. It also might force more regulatory responsibility into public institutions subject to more robust expectations of public engagement since the asymmetry between public and private processes in terms of procedural cost would be eliminated.

The only real justifications for not imposing this relatively simple democratizing procedure in private regulatory intermediation are (1) an illusory distinction between public and private regulation, (2) a naked preference for managerialism, and (3) the additional cost of standardized public procedures in private regulatory intermediation. Briefly, none of these justifications are compelling. Private regulatory intermediation cannot be said to be a purely private concern—there is public interest in good private regulatory intermediation—and it entails values choices that cannot be reduced to efficiency, technocracy, or any other value of managerialism.[197] And while procedures surely impose costs that may sometimes be unjustified by the epistemic benefit that they provide,[198] there is no serious danger, yet, that imposing some costs where there are essentially none will ruin private regulatory intermediaries or the industries that they interact with. That is not to say that there are no concerns to keep an eye on. The domain of private regulatory

195. *Administrative Conference Recommendation 2018-7: Public Engagement in Rulemaking*, ADMIN. CONF. OF THE U.S. (Dec. 14, 2018), https://www.acus.gov/sites/default/files/documents/Recommendation%202018-7%20%28Public%20Engagement%20in%20Rulemaking%29.pdf [https://perma.cc/7MWC-3A8Z] (encouraging agencies to voluntarily adopt certain best practices to enhance the meaningfulness of public engagement on regulatory proposals).

196. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

197. *See supra* notes 18–21 and accompanying text (maintaining that regulatory intermediation should be considered a public good rather than a private one).

198. Bagley, *supra* note 194, at 352.

intermediation might be construed so broadly that a PAPA requirement for notice-and-comment rulemaking would end up being applicable even for individual firms or circumscribed industries with little direct connection to matters of public interest—for example, self-regulation of the florist industry, or some such. Exemptions from the public commenting process for these special cases might be important to think carefully about. These exemptions need not even be highly formalized: we might, for instance, simply calibrate the level of deference that private regulatory intermediaries get from their oversight agencies to whether or not a conforming opportunity for public comment was provided.[199] Yet the need for exemptions does not defeat the need for a default that recognizes the public interest in standard-setting decisions that are made through private regulatory intermediation. And while the cost of commenting is sometimes criticized by those who are concerned about ossification or tactical abuse,[200] these costs could be addressed by the kind of entity I propose in the next subsection: an agency dedicated to promoting democratic, non-managerial interests in regulatory decision-making at both the public and private level.

B. An Office of the Public Interest

As discussed above, the slippage of private regulatory intermediation away from public values, and toward narrowly managerial values, is facilitated by weak oversight structures. These oversight structures give intermediaries a great deal of discretion undisciplined by public accountability,[201] as well as by the dangers of cooptation of both agency and delegee.[202] A natural response to these vulnerabilities is to develop a stronger and more unified institutional core for the regulation of a common subject of the public interest. That is precisely why Elizabeth Warren proposed what became the Consumer Financial Protection Bureau to consolidate scattered, and therefore weak and easily coopted, regulatory authorities over consumer financial matters.[203] It is why Saule Omarova proposed a National Investment Authority to coordinate public spending on public projects and infrastructure that will be critical to the economy of the future.[204] It is also why Margaret Kwoka, in this symposium, proposes an

199. David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81 (2005) (proposing such a design in administrative law to encourage the use of public engagement).

200. Bagley, *supra* note 194; Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

201. *See* Hammond, *supra* note 11.

202. Abbot, Levi-Faur & Snidal, *supra* note 2.

203. Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 356–64 (2020) (detailing the history of the CFPB, including Elizabeth Warren's goals of focusing the agency "solely on consumer financial protection," a cross-cutting, trans-substantive goal, "rather than having multiple missions" that led to divergence from the overall goal of protecting the public interest in fair consumer finance).

204. Saule T. Omarova, *Why We Need a National Investment Authority* (Cornell Legal Stud. Rsch. Paper No. 20-34, 2020).

Information Commission to coordinate implementation of the Freedom of Information Act across the government.[205] When an issue cuts across many domains, there is great power in creating a discrete institutional space for addressing that issue.

The public interest is such a trans-substantive issue. Every agency, and for that matter every private regulatory intermediary, has an independent duty to the public. But as it currently exists, the substantive and normative content of the public interest is left to a slow death by a thousand cuts in each siloed context it arises in. Rather than adhere to this model, which has failed to develop the idea of the public interest anywhere close to its normative potential,[206] we should create an agency—the Office of the Public Interest (OPI)—focused on that task and empowered to provide guidance to all actors in the regulatory ecosystem. I see two key roles that such an OPI could play: one of which builds on the experience so far with FERC's OPP and the other of which goes a bit farther in the same logical direction.

First, OPI could be charged with developing more robust process-based approaches to realizing the public interest in both public agencies and private regulatory intermediaries. In other words, one way to operationalize broad statutory mandates to pursue the public interest is to design processes that will channel decisionmakers towards the realization of that substantive goal. This goal could include exploring ways to make existing processes such as notice-and-comment function better, bringing in more voices in the commenting periods by soliciting commentators from underrepresented groups.[207] OPI's mandate could also include authority to propose, or even require, best practices for procedural processes that are likely to result in substantive decisions that are in the public's interest under operative organic statutes—such as enforcing President Biden's memorandum calling for regulators to "take into account the distributional consequences of regulations" as part of any regulatory analysis, and encouraging agencies to "explore, promote, and undertake regulatory initiatives that are likely to yield significant benefits."[208] It could also include more ambitious goals: for example, bolstering underenforced norms in the APA—and a hypothetical

205. Margaret B. Kwoka, *Scoping an Information Commission*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 197, 197, 204–05.

206. Short, *supra* note 38.

207. *See, e.g.*, Walters, *supra* note 13, at 75–79; Nancy Chi Cantalupo, Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment: Part II*, L. & POL. ECON. BLOG (Aug. 2, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment-part-ii/ [https://perma.cc/MH53-AWAA]; Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1 (2022).

208. *Memorandum for the Heads of Executive Departments and Agencies*: *Modernizing Regulatory Review*, THE WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/ [https://perma.cc/M92K-2ZQ6]. While this memorandum charges OIRA with the task of implementing the memorandum, the memorandum's goals are in significant tension with OIRA's historical focus, so it would be better to lodge these responsibilities in a separate institution like OPI.

PAPA—such as demands for public input into regulatory agendas and constraints on regulatory inaction.[209] Arguably, these gaps in implementation of the APA have led to a lopsided regulatory process that favors regulated entities over regulatory beneficiaries.[210] While the Administrative Conference of the United States (ACUS) already does some of this gap-filling work, it is less tied to the substantive, or normative, goal of directing agency decision-making toward public ends than it could be. A single-focus mission would give its work in this area more potency. Another limitation of ACUS's current role is that recommendations are also just that: recommendations. To be more effective, OPI would need to have authority to not only offer best practices, but also mandate them and enforce noncompliance.

Second, and more ambitiously, OPI might be charged with defining the public interest in a cross-cutting way. As Jodi Short shows with her review of how agency implementation of statutory public interest standards in a variety of regulatory domains slipped into supporting more managerialist ideology,[211] leaving the public interest as an empty vessel not only potentially robs it of its normative potential, but may actually be actively dangerous insofar as it may be co-opted. Agencies, though, rarely attempt further articulation of their understanding of what the public interest entails, no doubt because there is no agreement about what is in the public interest. It is doubtful that there is such a thing as a single public interest that can objectively represent all of the interests, values, and perspectives implicated by regulatory governance.[212] Instead, the public interest inheres in an ongoing process of contestation among all interests—and especially marginalized ones—to determine, re-evaluate, and re-imagine policy. By its very nature, this conception of the public interest makes it difficult to state in the abstract what criteria determine the public interest—its substance can, and should, be up for debate. But this difficulty should not prevent us from convening fora where this debate can occur. OPI could be such a forum.

Under this more substantive approach to the problem, OPI could, to the extent possible, promulgate standards for standards—perhaps developing criteria for determining when particular decisions are likely contrary to the general public interest standards that many agencies and private regulatory intermediaries are charged with implementing. To name just a few areas where OPI could develop guidelines, one could imagine standards for the maximum level of distributive impacts that an agency or private regulatory intermediary is permitted to impose, or for the maximum level of anti-competitive effects that agency actions or private regulatory intermediatory strategies might be predicted to have, and the like. The Office of Information and Regulatory Affairs (OIRA)

209. Sant'Ambrogio & Staszewski, *supra* note 191.

210. Daniel P. Carpenter et al., Inequality in American Democracy: Methods and Evidence from Financial Rulemaking 3 (Aug. 1, 2022) (unpublished manuscript) (on file with author).

211. Short, *supra* note 38.

212. Walters, *supra* note 13, at 36.

already performs this kind of meta-regulation, but in a highly myopic way that largely feeds managerialist frameworks such as cost-benefit analysis.[213] Indeed, OIRA has long resisted incorporating distributional considerations into its cost-benefit reviews of agency action,[214] and it has struggled to incorporate non-quantifiable benefits of regulations.[215] And, of course, OIRA has no involvement in private regulatory decision-making at all. All of this suggests a need for an institution with a more inclusive mandate to meta-regulate the regulatory ecosystem and ensure that regulatory decisionmakers of all kinds have some guidance about what is and is not likely to accord with fair pursuit of the public interest in regulatory decision-making.

To be sure, as is the case with any agency, OPI's structure and resources would likely be determinative for its success in fulfilling these tasks, especially because of the nebulousness of the agency's charge. While agency independence is very much in question with the courts right now,[216] features of independence—including partisan balance requirements and for-cause removal protections—would be advisable to ensure that OPI would not be too subject to pressure from powerful political interests. Again, the analogy to OIRA is instructive: one reason OIRA has myopically focused on cost-benefit analysis is probably because of its relationship with the White House, which has strong electoral incentives to pursue narrow notions of the public interest that serve re-election purposes.[217] It would also be advisable to impose heightened restrictions on OPI and staffers from availing themselves of the revolving door between government service and the private sector—including both private regulatory intermediaries and private firms.[218] Finally, given these kinds of independence-promoting features, which tend to make it more difficult to recruit and retain excellent people, an OPI would need to receive substantial budgetary and resource support so that it could bring in leading thinkers from government, academia, and, yes, the private for-profit and non-profit sector.[219] This article lacks the space to go into more depth on the

213. *See* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T. L. REV. 325 (2014) (arguing that the OIRA regulatory review process largely fails to adhere to the procedures prescribed by its executive mandate).

214. Caroline Cecot & Robert W. Hahn, *Incorporating Equity and Justice Concerns in Regulation*, REG. & GOV. 1, 16 (2022).

215. Arden Rowell, *Partial Valuation in Cost-Benefit Analysis*, 64 ADMIN. L. REV. 723, 723–24 (2012) (discussing the many quandaries about how to accurately account for benefits in the rear-view camera rulemaking).

216. *See* Sitaraman, *supra* note 203, at 353 (discussing Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (holding that the president must have unfettered removal power over officers of the United States except in two situations)).

217. Heinzerling, *supra* note 213.

218. Michael P. Vandenbergh, Jonathan M. Gilligan & Haley Feuerman, *The New Revolving Door*, 70 CASE W. RES. L. REV. 1121, 1121 (2020). As the authors of this article note, the revolving door may not be all bad, but it does create risks. *Id.*

219. *See* VERKUIL, *supra* note 8, at 117–18 (discussing the ways that the civil service system makes hiring difficult).

specific institutional features that would promote the necessary culture and capabilities for a successful OPI, but, clearly, any attempt to operationalize this proposal would need to grapple with many questions of institutional design.

V

CONCLUSION

This article has argued that it is time to reclaim private regulatory intermediation for the public. The public interest in private regulatory governance is often just as strong as it is in public regulatory governance, yet the standard approach, with limited exceptions, has been to allow private regulatory governance to define itself in managerialist terms. A simple step toward a less managerialist future is one that takes private regulatory intermediaries—who are not going anywhere in an increasingly complex world—and redirects them toward public values beyond managerialism. I have argued that this process is already occurring, slowly but surely, in private regulatory governance of the electric power sector, and that it ought to happen more generally with some concerted efforts to standardize public participation and define the public interest. A short article like this one cannot begin to complete the task, but in identifying the task and suggesting some initial steps we might take, I hope to have started an important conversation in our efforts to grapple with managerialism's reach and impact in our society.