

HOLDING TIGHT TO THE REIGNS IN
HARNESSING INDUSTRY INFLUENCE:
A COMMENT ON PROFESSOR LAURENCE
TAI

WENDY E. WAGNER*

INTRODUCTION

What would our pollution control standards look like if industry were not allowed to participate? In *Harnessing Industry Influence*, Laurence Tai argues that we would be worse off because the standards might be designed in ways that bypass creative and publicly-preferable alternatives.¹ Smart regulations require the engagement of the regulated parties. Indeed, Tai suggests that rather than simply allowing industry to comment before rules are promulgated, industry should be active throughout the rulemaking process without any apparent limits to regulators in providing this information.²

Although staging a productive exchange between regulated parties and agencies may not be as easy as *Harnessing* implies, Tai is clearly right on the big point that there is likely a great deal of valuable information that regulated parties could more easily produce to inform regulatory decisions, and that this information will only be extracted with the right type of

* Joe A. Worsham Centennial Professor, University of Texas School of Law.

1. Laurence Tai, *Harnessing Industry Influence*, 68 ADMIN L. REV. 1, 4–6 (2016).
2. *Id.* at 5 (“Industry needs access to regulators in order to inform them, and the ability to influence regulation through various activities constitutes a benefit that incentivizes industry to generate costly information for and in these activities.”). Tai also suggests that insulation strategies, such as those that attempt to limit the opportunities for industry input outside of the comment process, should be supplanted instead with greater industry information that is catalyzed by a biased, anti-industry starting point. *Id.* at 14–15.

incentives.³ Among the important priorities of a regulatory system, then, is to devise the standards and processes in ways that will encourage the production and sharing of this information. The more we know, the better off we will be.

In *Harnessing*, Tai advances this important argument and provides a model on how this harnessing might be accomplished. Yet an equally or perhaps still more valuable contribution of his article is in drawing attention to the important intersection of information and regulation. One of the central purposes of regulation is to improve information available to the public to make wise choices in the political process and the market.⁴ However, despite this critical function—arguably becoming increasingly important in this new “information age”—there is surprisingly little work dedicated to how we should think about regulation and information. Perhaps lying beneath the surface of *Harnessing*, too, is the more subtle point that encouraging the production and sharing of information that bears on social problems is, in and of itself, a vital benefit of regulation. Regardless of where the ultimate regulatory standard rests, an important function of bureaucracy is to encourage greater public understanding of social problems.

Since Tai has done the hard work of coming up with the big idea, I take on the role of a practitioner eager to implement the harnessing proposal, while remaining wary of unexpected challenges and unintended consequences that could arise. This “ground-truthing” effort is offered in the hope that it will help advance Tai’s larger project. After devoting the bulk of my comment to this troubleshooting, the comment closes with preliminary thoughts about how Tai’s harnessing model could be extrapolated to other settings.

I. HARNESSING IN BRIEF

Although readers are encouraged to spend time with *Harnessing*, I offer a short overview here as a backdrop for the comments that follow. In his article, Tai underscores the vital role that the regulatory process can play in encouraging information sharing. More specifically, Tai spotlights the untapped, yet beneficial information that regulated parties could produce to inform regulation. Rather than “insulate” the agency from industry engagement, Tai argues that we are better off designing standards that not

3. *Id.* at 5 (observing that “industry produces more information if it can influence regulation.”).

4. STEPHEN BREYER, REGULATION AND ITS REFORM 26–28 (1982).

only solicit, but encourage industry's influence.⁵

To harness this industry information, regulatory processes need to be devised in ways that encourage regulated parties to divulge critical information.⁶ Tai proposes that regulators or Congress should select policy points that are biased against industry to encourage them to produce information that places us in a much more informed regulatory space.⁷ Like the penalty default approach, this position creates incentives for information sharing and analysis.⁸

Tai's article unpacks this central, harnessing model in three parts. The article begins by considering a number of current regulatory reforms that he argues ignore the information-production capabilities of industry.⁹ Although one could quibble with his characterization of this literature,¹⁰ his larger point—that the goal of information production is lost in these discussions—is well taken. Tai then constructs his own theoretical model, settling it against the literature and providing illustrations of the operation of the model in practice.¹¹

As Tai himself notes, he is not the only scholar to explore ways to better “harness” information in the design of regulation.¹² But in his article, he offers valuable new ways to think about this challenging goal and how it might be accomplished, particularly with respect to industry information.

5. See Tai, *supra* note 1, at Section III.A.

6. See *id.*

7. See *id.* at 51–53.

8. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (explaining that “penalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties”).

9. See Tai, *supra* note 1, at 18 (arguing that “unambiguous proposals for using industry influence seem largely absent.”).

10. See *infra* note 42.

11. See Tai, *supra* note 1, at Section III.C.

12. Tai cites a number of important works in this area. See Tai, *supra* note 1, at 5 n.16; see also Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 346 (2001) (arguing that Proposition 65 and TRI provides firms with “an incentive to produce and disclose as much credible toxicity and exposure data as may be necessary to persuade state regulators to establish the ‘no significant risk’ regulatory thresholds for substances they emit.”); cf. J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899 (2015) (discussing how information-forcing rules could be used to encourage sophisticated sellers to provide consumers with information about the background law operating in contracts); see also Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1741–44 (2004) (proposing incentives to coax information from regulated parties regarding their impact on the environment).

II. REFINEMENTS

Tai's model, while grounded in some practical examples, is primarily conceptual. He sees an important gap in the design of administrative process with respect to encouraging the production and sharing of industry information and his main goal is to identify how we might address that gap. Given this conceptual orientation, I pick up the conversation where he leaves off; namely settling the model even more deeply into the practical realities of regulation.

My "ground-truthing" effort extracts three basic features or assumptions in the harnessing model for closer examination. First, the model seems to assume that added industry information generated by harnessing will generally be socially beneficial.¹³ As discussed in Part A, this assumption may require fine-tuning. Information, particularly asymmetrical information that is self-serving, can be so unreliable that the costs of screening it can exceed whatever benefits it might offer. A system that is calibrated to attract more of this unfiltered information is not necessarily an improvement over one that operates with much less, but more reliable information.

Second, the model assumes that a penalty default approach will generally be successful in drawing out additional, valuable information from industry.¹⁴ Yet while the overarching logic is tight, again the real world of regulation may not work so neatly. As discussed below, there are many ways for industry to influence rules that are unwanted or appear overly stringent within the existing administrative structure. While producing additional information is one way to influence regulation, it may not be industry's first line of attack in some, and perhaps the majority, of cases.

Third and finally, there is a running assumption in Tai's article that greater opportunities for influence will translate to a freer flow of information to regulators.¹⁵ To be sure, more fluid processes could encourage greater sharing. On the other hand, since only information entered during the comment period can be backed with the threat of litigation, it is not clear whether or what additional valuable information might be submitted to the agency by the industry outside this process. Moreover, a relatively permissive process of "influence" generates its own set of costs that need to be factored in and that may ultimately make the process, on net, more detrimental than valuable in producing socially

13. See Tai, *supra* note 1, at 21.

14. *Id.* at 37–38 (highlighting and acknowledging this assumption).

15. *Id.* at 22–23.

beneficial regulations.

A. Ensuring Information has Net Benefits

A first practical concern is whether the information that is loaded into regulatory design as a result of harnessing will be reliable and useful to the decision. Tai anticipates this concern, and he ultimately concludes that information quality is unlikely to be a significant problem because agencies can scrutinize the truth of industry claims, and have tactics to elicit truthful communication of information.¹⁶

Yet since industry's goal in participating in rulemakings is triggered primarily by its effort to reduce the cost of standards, not to provide public information to the process, ensuring that the information industry produces is reliable deserves greater attention. Even if outright fraud is caught, the reliability of the remaining information lies on a spectrum, with considerable gray space in-between the poles of information that is patently false on one end and information that is reliable on the other. Indeed, it is fair to surmise that much of the unpublished, internally generated information loaded into rulemaking dockets by industry falls in this middle gray area; unverified information produced and offered by parties that may have self-serving motives.

Further, for the bulk of the information that falls in this gray zone, under the harnessing model it is left to the agency to determine the veracity of the information. This is a tall order.¹⁷ Agencies already struggle with assessing the veracity of industry-produced information, and their effort is quite resource-intensive and sometimes fails. Exacerbating worries that agencies will not succeed in screening this information are existing administrative law procedures that may encourage regulators to take the information on face value in order to survive judicial review.¹⁸ One seasoned environmental attorney has observed that “the Agency is generally receptive to well-reasoned technical comments . . . not only because they want to appear to be reasonable and responsive to public comments, but also because their willingness to refine a regulatory program—to address identified flaws in the program—should help that program withstand

16. *Id.* at 20.

17. *See, e.g.,* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 594–609 (1984) (discussing the importance of verification costs for information production requirements).

18. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2012); *see also* *Arteva Specialties S.A.R.L. v. EPA*, 323 F.3d 1088, 1089, 1091–92 (D.C. Cir. 2003) (ruling in industry's favor that the EPA's rules were arbitrary because the EPA did not adequately respond to industry's costs concerns).

judicial review.”¹⁹ Given these practical impediments to agency oversight over the quality of information, in fact, industry may ultimately perceive more gains than losses in submitting marginally reliable information.

The possibility of junky information being loaded into the regulatory system is not merely a hypothetical concern. There are numerous examples of parties commissioning ends-oriented research to inform regulation, and it is only later discovered that the information is not only unreliable but sometimes patently misleading.²⁰ Retrospective studies have also revealed how industry estimates of cost of compliance are consistently inflated, typically by a factor of two.²¹ In all of these cases, the information used by regulators was of poor quality and the mistakes were not discovered until much later.

Along these same lines, if the goal is to persuade the regulator to weaken an overly strong standard under the shadow of judicial review, industry may use other information techniques—again, techniques that are not necessarily publicly beneficial—to urge the regulator to loosen the standard. Beyond providing unverifiable inside information that makes their case, industry could also bombard the agency with volumes of related undigested data and information to support their self-serving positions.²² Scarce agency resources must then be expended to process this additional data-bombing, or again the agency may simply accept industry summaries of the underlying evidence in order to keep on schedule and limit the risks

19. Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NAT. RES. & ENV'T, Summer 1990, at 50.

20. See, e.g., THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* 60–96 (2008) (documenting this problem of ends-oriented research).

21. See, e.g., Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2042 (citing a study that examined twelve regulatory initiatives and found that in eleven of the initiatives, “the initial estimates were at least double the actual costs”) (quoting Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, THE AMERICAN PROJECT (Nov.–Dec. 1997), <http://prospect.org/article/behind-numbers-polluted-data>). Professors McGarity and Ruttenberg report that another study conducted in 1995 by the Congressional Office of Technology Assessment found that “[t]he *ex ante* cost estimates for OSHA’s 1974 vinyl chloride standard exceeded \$1 billion”; however, a survey subsequently found that “compliance costs were in the \$228–278 million range.” *Id.* at 2031.

22. See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1331–34 (2010) (describing how administrative law’s structural premise that “more information is better” allows industry to bury the agencies in filings and information that is not always useful or reliable) (quoting HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* 242–43 (4th ed. 1997)).

of litigation down the road.²³ The costs that must be expended by the agency to make sense of large volumes of additional information is a second cost that could be significant if a great deal of added information enters the already bulging regulatory system.²⁴

Finally, and perhaps a consideration that, albeit important, is too far afield from the spirit and focus of the harnessing model—a number of prominent commenters have argued that additional information, or at least scientific information, is the last thing that environmental regulation needs.²⁵ Given changing scientific understandings and substantial uncertainties and variability in the limited available data, a great deal of information relevant to regulation ultimately may not be terribly useful in resolving these disputes that are, at base, social problems. Instead this information serves only to drag down the decisionmaking and distract from the real issues. While I tend to agree with Tai that information can often serve to illuminate and narrow the issues in dispute, there is a compelling literature that raises doubts about whether information—in the aggregate—adds much value to these public decisions.

More information, in other words, is not always better. At least in settings where the information is hard to verify and where industry has strong self-interest in what that information reveals, the information may not have a net social benefit. Regardless of the ultimate quality of the information, however, the costs of assessing its veracity is a potentially

23. *See id.* at 1333–34.

24. *See, e.g.*, HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* 242 (4th ed. 1997) (criticizing organizations' information systems as generally not being designed "to conserve the critical scarce resource—the attention of managers"). The mere fact that a preamble is three times longer after industry has had more opportunities to influence the agency is not necessarily an indication that the rule is better informed or socially more beneficial. *See Tai, supra* note 1, at 41–44 (discussing the longer rule preamble and repeated reference to industry comments that occurred for the U.S. Securities and Exchange Commission's 2014 money market fund rule, which adopted an initial anti-industry starting point). One might in fact draw the opposite correlation between bloated complex preambles and the public interest. *See, e.g.*, Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 *GEO. WASH. L. REV.* 1358, 1365 (2015) (making this argument).

25. *See generally*, Daniel Sarewitz, *How Science Makes Environmental Controversies Worse*, 7 *ENVTL. SCI. & POL'Y* 385 (2004); *EARTHLY POLITICS: LOCAL AND GLOBAL IN ENVIRONMENTAL GOVERNANCE* (Sheila Jasanoff & Marybeth L. Martello eds., 2004); *HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES* (Sheila Jasanoff et al. eds., 1995); John S. Applegate, *Bridging the Data Gap: Balancing the Supply and Demand for Chemical Information*, 86 *TEX. L. REV.* 1365 (2008); WILLIAM ASCHER, TODDI STEELMAN & ROBERT HEALY, *KNOWLEDGE AND ENVIRONMENTAL POLICY: RE-IMAGINING THE BOUNDARIES OF SCIENCE AND POLITICS* (2010).

significant expense that should be factored into the model.

B. Incentives that Lead to the Generation of Useful Information

In encouraging industry to share and produce information that is beneficial, there is also the matter of constructing meaningful incentives that will dislodge this additional information, a conceptual feature that also seems likely to encounter some practical challenges. In Tai's harnessing model, there appears to be two essential components to this incentive system. First, the standard needs to be biased or unattractive enough to the industry to make it worth their while to divulge the information and engage in the process.²⁶ This is where Tai's variation on the penalty default rule comes in, implemented either through "biased" agency personnel or "biased" policy starting points.²⁷ Second, Tai recommends easy, low cost access to the agency to divulge this information—what he calls "influence."²⁸ This second feature is taken up in the next section.²⁹

In arguing for a type of penalty default rule—accomplished by biased policy starting points or by enlisting biased agency administrators—Tai suggests that a regulation that is biased against industry will induce industry to engage seriously in the decision process by sharing and producing valuable information.³⁰ When industry has a lot to lose, it will produce information to rebut unrealistically high standards, just as any rational participant would do.³¹ At a conceptual level, this feature of the model is eminently sensible.

However, in regulatory practice, there are other venues for altering regulatory outcomes; informing the agency is only one of them. Rather than persuade a biased agency, industry might instead dedicate most of its efforts and resources to fighting the standard in the larger political process.³² For example, industry could lobby Congress or the President to intervene in ways that make the provision of added information wholly

26. See Tai, *supra* note 1, at 4.

27. See *id.* at Section III.C.

28. See *id.* at Section III.A.

29. See *infra* Section II.C.

30. See Tai, *supra* note 1, at 4.

31. See *id.* at 58 fig.2.

32. In fact, there are some relatively loaded political issues associated with a regulatory strategy that selects a biased position against industry in order to force industry to generate more information that may prove useful to locating an ideal standard or rule. Statutes like the Paperwork Reduction Act, 44 U.S.C. §§ 3501–21 (2012), already signal some intolerance to harnessing efforts that lead to unsubsidized information generation costs that are imposed on industry. Harnessing would seemingly lead to still more of these concerns.

unnecessary.³³ In these settings, moreover, nuanced technical arguments are probably not going to offer the best means of persuading elected officials to intervene on industry's behalf.

In parallel fashion, industry could also dedicate some or perhaps the bulk of its resources to litigation.³⁴ Again, this litigation need not be based on advancing factual differences with the agency; industry could argue against the constitutionality or legality of the standard or both. In his detailed study of interest group activity in an Occupational Safety and Health Administration (OSHA) standard, Professor Schmidt describes this very tactic, which not only delays the rule, but gains negotiating leverage over the agency, particularly in situations where industry has not made a strong factual case for its position in the record.³⁵

Whether or when an industry will choose the direct administrative law path and divulge new information in order to persuade the agency of a lower standard thus seems possible, but is not certain. As a result, the infusion of new information from the harnessing model might be more disappointing than the theory might otherwise suppose.

Incentives to produce information will only work, too, if producing and sharing the information does not occasion other costs to industry that offset the gains. If divulging regulatory relevant information increases liability risks, impairs market reputation, or alarms investors or creditors, then industry still will not produce it.³⁶ Consider, for example, that internally held evidence suggests a chemical is mildly associated with endocrine disruption. In a regulatory setting, this evidence could help convince regulators that the chemical is not as toxic as supposed. However, in a

33. See, e.g., Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014) (discussing the important role of the president intervening in regulations); see also Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

34. Similarly, if the agency's decision is not subject to a deadline, then information may be produced or shared that is not intended to necessarily alter the substantive standard but rather to delay its implementation. Delay might be accomplished not only by inundating the agency with information, but by arguing that additional studies should be done at the agency's expense, arguing that added time is needed to learn more about the relevant facts, and so forth.

35. See Patrick Schmidt, *Pursuing Regulatory Relief: Strategic Participation and Litigation in U.S. OSHA Rulemaking*, 4 BUS. & POL. 71, 83–86 (2002).

36. See, e.g., Mary L. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795, 1799, 1836–37 (1989) (recommending that “public research costs” of testing hazardous chemicals should be linked to their “private economic origins”); John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261, 298–99 (1991) (noting that safety information regarding chemicals “is a public good . . . which reduces to practically nil any return to these persons on investment in research”).

toxic tort case this same evidence could be used to develop a case against the company by one or more alleged victims.³⁷

Finally, to work as an incentive, the rebuttal information needs to be reasonably available, but in some cases the missing information might in fact be unobtainable. While some gaps in knowledge are the result of information that is asymmetrically held (imperfect information), some gaps in knowledge are uncertain, or unknowable at present.³⁸ It follows, then, that if the biased starting point or biased administrator is not sensitive to the possibility that some of the needed rebuttal information is in fact beyond reach, then industry's burden could be, effectively, unable to be met. For example, if it simply is not possible to determine with any reliability whether a particular chemical is a neurotoxin in children, then imposing the burden on industry to identify a safe level might lead to costly over-regulation.

C. Increased Influence Improves Information Flow

In order to access valuable information, the harnessing model also advocates for more elaborate or fluid mechanisms for industry to influence the agency in developing its rule.³⁹ Ease of influence presumably increases the information flow by driving the industry's costs of communicating with the agency still lower. Tai contrasts the relatively unrestricted opportunities for access proposed in his harnessing model with some recent proposals that seek to limit industry's engagement at points in the process and to counterbalance industry influence with diverse input from other affected groups.⁴⁰ Rather than "mitigate" or "insulate" the agency with respect to industry information, Tai argues that industry's influence in the regulatory process should proceed full throttle.⁴¹

Tai is not very specific about what this "influence" feature of the model

37. In similar ways, the disclosure of information may help persuade regulators to lower standards, but that disclosure might carry significant costs to the market reputation or good will of the industry. An industry that establishes that very few (although some) workers experience some type of workplace injury, like asthma from assembly line conditions, could help inform workplace standards but would also be conceding that its processes are harming employees and that it is fully aware of that fact and in fact operates knowing it.

38. See, e.g., JACK HIRSHLEIFER & JOHN G. RILEY, *THE ANALYTICS OF UNCERTAINTY AND INFORMATION* 2–3 (1992) (explaining the difference between the economics of uncertainty (or uncertain information) and the economics of information, which includes asymmetrical or imperfect information).

39. See Tai, *supra* note 1, at Section III.A.

40. See *id.* at Section I.

41. See *id.* at 14–15, 19.

entails or how it compares to current administrative process.⁴² It seems, however, that his conception of influence is at least consistent with the status quo, if not more permissive than existing administrative process in some ways.⁴³ Tai's recommendations, then, would seem at least to advocate for the ability of industry to work closely with agencies in developing proposed rules.⁴⁴ Consistent with the APA, moreover, Tai would presumably not insist on new requirements that expect agencies to record or docket these pre-Notice of Proposed Rulemaking (pre-NPRM) contacts.⁴⁵

Yet even if influence produces information (an assumption taken up next), in assessing whether this influence is a net benefit, one must also factor in the offsetting costs of extracting information in this way. One concern is that if the influence is not counterbalanced by some sort of adversarial oversight, then industry's perspective might dominate the framing, issues, and facts available to the agency. Even a standard that begins at a point that is biased against industry can swing quite far in the opposite, industry-favoring direction if there is only one set of parties at the negotiating table with the agency. In this cozy setting, the agency staff may operate more as trusting collaborators than vigorous skeptics. By contrast, a process that requires the active presence of watchdogs throughout may actually prove more effective at harnessing "beneficial" information than a pure open access or influence model. Diverse engagement from a range of parties keeps both agency staff and industry on their toes.

A second related cost that may offset these information gains achieved by harnessing occurs with respect to the legitimacy of the process itself. Under

42. Tai's characterization of the literature advocating "insulation" in Section I is also somewhat unclear. Yet to the extent he is suggesting that a number of authors advocate blocking industry from communicating with the agency—at several discrete points in the process (e.g., at the very start of a rulemaking or limiting pre-Notice of Proposed Rulemaking (pre-NPRM) communications)—it diverges from my own understanding of this administrative process reform literature. Since Tai's characterization of this literature is not relevant to the merits of his harnessing proposal, however, these differences need not be resolved here.

43. See Tai, *supra* note 1, at 12–14 (listing various insulation proposals that should be rejected, which would seem to return the process at least to the status quo); see also *id.* at 5 ("Industry needs access to regulators in order to inform them, and the ability to influence regulation through various activities constitutes a benefit that incentivizes industry to generate costly information for and in these activities." (emphasis added)).

44. See *id.* at 21–22. This unlimited pre-NPRM engagement is not regulated under the APA. See, e.g., William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004) (arguing that the pre-NPRM period provides rich opportunities for informal contacts and engagement by agencies with stakeholders).

45. See *supra* note 44 and accompanying text.

an open-ended influence approach, there may be effectively no way for those outside the process to ensure that a shift in outcome is the result of reliable information rather than outright capture.⁴⁶ The black-boxed nature of influence itself thus imposes costs on the quality of the outcome. Moreover, since the standards are not simple math exercises—where the mean or best approach is evident in hindsight—there are also no output measures to be sure that the final decision rests in the right place.

These practical concerns may be easily sidestepped, however, if it turns out that the concept of expanded or generous influence ultimately is not doing much work in the harnessing model after all. Most of the incentives for information in harnessing appear to stem primarily from biased policy positions.⁴⁷ The added benefits of greater influence are also unclear since industry already enjoys considerable access to the agency. For example, even in a reformed world where industry contacts with the agency during the pre-NPRM period are docketed or even restricted, or where industry influence is balanced by more diverse interest group engagement, industry access to the agency would still be relatively open. Moreover, since industry will likely opt to record the most significant information as formal comments so they can be backed by litigation,⁴⁸ it is not clear how this added, more informal influence will lead to significantly more information production and sharing.

Limited empirical snapshots of the regulatory process raise further doubts about whether there will ultimately be practical payoffs as a result of this influence. In at least some EPA rulemakings, the amount of information that industry submits to inform those rulemakings is already so voluminous that it is difficult to imagine that the underlying problem is a shortage—rather than a surplus—of industry-supplied information.⁴⁹ Perhaps this apparent abundance of industry-supplied information occurs because in most rules, the agency already starts with a biased policy starting point. Or perhaps industry inundates the agency with reasonably available

46. See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 12–16 (1996) (expanding on the value of rigorous and deliberative agency processes). Tai’s proposal for biased appointments should largely avoid this problem to the extent they can control their staffs. The use of biased legislative or policy starting points, however, are more susceptible to pathologies that emerge from incomplete or unbalanced processes.

47. See Tai, *supra* note 1, at 5 (arguing that a biased, anti-industry starting position can help generate useful information and ultimately lead to unbiased regulation).

48. See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (holding that a commenter cannot merely assert that a general mistake was made, but must provide specific evidence and argumentation as to the nature of that mistake and its implications).

49. See, e.g., Wagner, *supra* note 22, at 1342–51.

information for a whole host of reasons that go beyond simply informing the agency (e.g., market pressures, political benefits, reputational advantages). In response to these questions, Tai might respond that still more information could and should be produced that is lacking. Yet all of these possibilities raise empirical questions, and answering them or at least addressing them would seem important to ensure that greater industry influence is needed and ultimately beneficial.

III. HARNESSING IN BROADER CONTEXT

Tai's model focuses scholars on the importance of designing regulations to encourage the production of illuminating and important information, and in doing so highlights the possibility that harnessing strategies could have broader utility. Thus, while his article concentrates on the discrete topic of industry influence in rulemaking, it is worth considering whether this same harnessing model might have value in other regulatory settings.

This final section offers preliminary suggestions for how harnessing could be employed outside the rulemaking setting. In order to do this extrapolatory work, it is important first to identify the circumstances under which harnessing is likely to do its best work. Based on Tai's discussion, supplemented with some of the practical realities identified above, the following conditions appear important in ensuring that harnessing will ultimately succeed: (1) The industry must enjoy superior access to information—both within their control or capable of being produced by them—that is relevant to the decision on the table; (2) there will be important benefits to this additional information, both from the perspective of industry and society; (3) the information must not be likely to enter the process without added industry incentives; (4) sharing otherwise undisclosed information would provide industry with its best line of attack to reduce the costs of unwanted regulatory intervention; and finally (5) there must be some low-cost and effective mechanisms in place to assess the veracity of the information within the system.

These factors help to narrow, however crudely, when and how the model may lead to significant gains in beneficial information for the regulatory process. In some settings, perhaps like the environmental rulemakings just discussed, industry may already be pulling out the stops in informing the agency of relevant information without the need for added incentives like a biased starting point.⁵⁰ Conversely, in other areas of

50. It is possible that in some rulemaking settings, industry is not monolithic but can be at least bimodal, breaking into a set of industry advocates that seek more stringent environmental standards and those that opt instead to resist regulation. To the extent that

regulation the benefits of harnessing strategies might be supremely effective because of the strong, rational incentives otherwise in place for industry to withhold information.

Enforcement disputes—rather than rulemaking decisions—may in fact be a particularly promising area for more harnessing research and experimentation. In enforcement cases the government typically has the burden of proof to establish a violation.⁵¹ Accordingly, industry-supplied information is only offered in settings where the government has amassed a sufficient body of incriminating evidence against an industry. Yet this state of affairs incentivizes industry to withhold information and engage in strategic noncompliance. The challenges that result from this rational behavior are approached in a variety of different ways in existing environmental enforcement programs, but none are wholly satisfactory.⁵²

Harnessing offers a fresh way to approach these enforcement challenges by setting up rules that encourage the productive exchange of information when industry may otherwise be strongly inclined to withhold that information. In fact, there are several pockets of environmental enforcement that appear to already adopt a type of harnessing approach. Under a Clean Air Act program governing emissions from utilities,⁵³ for example, when a facility’s self-monitoring equipment breaks down, EPA makes near-worst case assumptions about the facility’s pollutant levels over the period the equipment is not working.⁵⁴ This type of “biased” assumption helps draw out information in settings where industry otherwise will perversely benefit from the lack of information about compliance; indeed, breakdowns and under-maintenance of self-monitoring equipment will lead to industry windfalls without this type of harnessing strategy.⁵⁵

With Tai’s model in place, one could imagine many more enforcement approaches that encourage industry to contribute valuable information to the process as a result of harnessing. OSHA enforcement, for example, is notoriously weak not only in sanctions, but in the probability of catching

this occurs, some of the information promised by the harnessing model might already be submitted to rulemakings as a result of this inter-industry competition.

51. For an excellent, accessible summary of the challenges in the government’s burden, including proving violations and providing both sticks and carrots to encourage compliance despite the low probability of being caught, see the enforcement overview treatment in ROBERT PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 1011–29 (6th ed. 2009).

52. *Id.*

53. See 42 U.S.C. §§ 7412(d), 7651k(d).

54. See PERCIVAL ET AL., *supra* note 51, at 1014 (providing an accessible summary of EPA regulations governing worst case presumptions that operate when utility emission-monitors break down that dovetails with the harnessing proposal).

55. *Id.*

violations.⁵⁶ Some type of biased starting point that assumes substantial violations—triggered when various monitors or records are not kept—might provide added incentives for compliance even when the chance of OSHA inspections are rare. Similarly, few consumer products are tested for hazardous ingredients that could lead to long-term harms.⁵⁷ For purposes of regulation or even tort law, worst case assumptions as defaults might lead to more vigorous public testing.⁵⁸ There are likely many other ways that the harnessing model could work to produce beneficial incentives in regulatory compliance.

Additionally, perhaps harnessing could be accomplished not only by sticks, but by carrots. Rather than starting with biased standards, those best able to produce information could also be drawn out with positive rewards. Industries that volunteer accurate accounts of their toxic emissions or greenhouse gases may be relieved of added compliance obligations for some period of time. In this way, too, the additional information is treated more as a positive good than a negative externality that industry should bear the costs of producing.⁵⁹

Finally, Tai's *Harnessing* could catalyze thinking about harnessing influence more broadly, including from non-industry groups. For example, case studies highlight the important information that communities can share with regulators in the decision process, but this sharing is impeded by the high costs associated with organizing the diffuse public and assessing the veracity of the information they produce.⁶⁰ While the solution here is not biased policy positions, Tai's project highlights the inattention given to encouraging valuable private information in a variety of policy processes. Bounties or other positive rewards, mentioned above, may work just like

56. See, e.g., THOMAS O. MCGARITY ET AL., WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA 16 (2010), http://www.progressivereform.org/articles/osha_1003.pdf (discussing the problems with OSHA's enforcement, both in catching violations and in the administration of penalties).

57. See Lyndon, *supra* note 36, at 1796.

58. California's Proposition 65 works partly in this fashion to create incentives for testing to rebut the mandatory label. See, e.g., David Roe, *Toxic Chemical Control Policy: Three Unabsorbed Facts*, 32 ENVTL. L. REP. 10,232, 10,232–34 (Feb. 2002).

59. Cf. Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather Than a Corporate Bad*, 46 WAKE FOREST L. REV. 561, 577 (2011) (discussing the fuzzy line between public goods and negative externalities with respect to identifying responsibilities for providing new information).

60. See, e.g., Christine Overdeest & Brian Mayer, *Harnessing the Power of Information Through Community Monitoring: Insights from Social Science*, 86 TEX. L. REV. 1493 (2008) (discussing these and other obstacles in the formation of voluntary citizen groups that monitor industrial pollution and supplement governmental enforcement).

the “sticks” of biased policy starting points to draw out this information.⁶¹ And, at the very least, acknowledging that current regulatory processes might be capable of doing better with respect to this information is a contribution in and of itself.

CONCLUSION

In sum, while the mechanics of harnessing seem robust as a conceptual matter, once the model is slipped into the world of regulatory practice, various questions emerge about how and whether the model will ultimately produce beneficial information. More information is not necessarily always better in regulatory decisionmaking. Industry may decide to fight biased standards in ways that sidestep the substantive issues and hence do not lead to an increase in information sharing, despite strategic efforts to induce it. And lowering access costs between industry to the agency may, or may not, produce more information, but these gains may well be offset by process concerns that could well be much higher than the benefits of the added information arising from the transaction.

Since *Harnessing* is still at the debut stage, only just emerging as an important new idea for regulatory studies, it is not fair to expect Tai to anticipate and resolve every conceivable, practical challenge. Indeed, given the underlying importance of the inquiry into how regulation can encourage more and better information, the work for *Harnessing* (and Tai) is only beginning.

61. See, e.g., PERCIVAL ET AL., *supra* note 51, at 1013–14 (discussing the use of bounties).