

# Evaluating the Performance and Accountability of Regulators

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## I. INTRODUCTION

The global financial crisis came in the wake of significant reforms to the structures, processes, powers, and rules of the regulatory regimes for financial markets in many of the countries adversely affected by the crash. It is striking that the reformed regulatory regimes lacked the capacity both to anticipate and prevent the crisis that engulfed the world. Furthermore, even after this experience, it remains unclear whether regulators account effectively for what they do. What we mean by “accountability” in this context depends on what we think accountability is for. If we think of accountability as an aspect of democratic governance, concerned with reassuring us that regulators uphold their public mandates, then we might envisage a formal type of accountability. However, a claimed virtue of much regulation, including in the financial sector, is that it is informed as much or more by technical rather than democratic concerns. Giving priority to the technical character of much regulation might lead us to downplay the formal mechanisms of democratic accountability, but we should do so only if we have in view mechanisms appropriate to the technical conception of regulatory roles. The issue is further complicated by the observation that much apparently technical regulation, whether carried out by public or private regulators, has capacity to profoundly affect interests and is therefore necessarily political, even though it may have technical dimensions.<sup>1</sup>

In this Article, I follow the logic of an argument that regulation necessarily has political dimensions, even where it may appear technical. I am asking questions about how we might best think about accountability processes that encompass both democratic and technical dimensions

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1. TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULES: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011).

of regulation and how their respective concerns might be combined within accountability regimes. Conceived of in this way, accountability needs to go beyond traditional public accountability forms, largely concerned with process, to include effective evaluation of performance in terms of better regulation, direct performance evaluation, and more sophisticated forms of regulatory audit.

I consider the appropriateness and robustness of these mechanisms in light of significant trends that point towards continuing fragmentation of regulatory relationships generally and within financial markets in particular. Elements of this fragmentation include the gradual move in the centering of international financial markets from North America and Europe to Asia, a change accelerated by the global financial crisis and which is liable to reduce not only the market significance of New York and London, but also their concentration of public regulatory power. Second, there is the continuing pressure to move the emphasis of regulation from the national level toward the supranational and even global level. While the ambition of such trends may be directed toward seeking to harmonize and create more uniform and robust regulation, imperfect globalization of regulation is likely to create opposite outcomes, leading to further fragmentation. Third, there is the increasing recognition of the centrality of transnational private regulation in setting norms and in monitoring compliance in financial markets. Taken together, these fragmenting effects require a significant reevaluation of what effective accountability for regulators should mean.

Conceiving of accountability as embracing both technical and political requirements draws us towards a parallel world in which the efficiency and effectiveness of regulation is a core part of oversight concerns, alongside the issue of democratic concern with procedures. Policies of deregulation, regulatory reform, better regulation, and smart regulation pursued in one form or another in most of the Organization of Economic Cooperation and Development (OECD) member states are centrally concerned with promoting proportionate responses to problems defined as regulatory, with varying degrees of effectiveness. Distinct from better regulation are strategies of public sector audit concerned with promoting efficiency, economy, and effectiveness in the expenditure of public monies, including on regulation. A further distinct set of concerns within regulatory policy are measures targeted at developing performance indicators and the evaluation of performance.

When we look at these concerns with process and effectiveness together, it is helpful to conceive of the overall oversight, or regulation, of regulation as a legitimate and distinct set of concerns and operational activities of government, addressed not only to public regulation but to

increasingly important regimes of private regulation. Thus, there is a discipline of regulating regulation, not fully recognized, and comprising a variety of different fields of activity and disciplines that should increasingly be concerned with promoting accountability based on both process and performance.

## II. THE GLOBAL FINANCIAL CRISIS

The global financial crisis struck major financial markets in 2008, following a period of quite extensive reform of structures and process of financial regulators across many of the leading national regimes.<sup>2</sup> There was a good deal of confidence amongst regulators that, armed with new powers, new knowledge, and new techniques, they were more than equal to the tasks of protecting the public interest in financial markets. This confidence was based not simply on what they knew about regulation, but also on what they thought they knew about efficient markets.<sup>3</sup> As Julia Black argues, it was not so much that the new tools of regulation were faulty but rather that they were applied poorly,<sup>4</sup> whether for reasons of lack of understanding, as some of the official reports discussed below suggest, or because of a combination of ideologies and interests that favored the key actors in financial markets.<sup>5</sup>

Many hypotheses have been advanced to explain the global financial crisis. A common thread running through many analyses is attribution of responsibility to weaknesses in the management of risk by market actors and poor understanding and implementation of oversight regimes by regulators. Clearly market actors did things, and were permitted to do so, that were against the interests both of their own organizations and of the states in which they were located. There was limited knowledge amongst banks and regulators of the systemic risks being created through extensive interdependence of transactions.

In subsequent inquiries, each jurisdiction has sought to identify the causes of the problems each faced from the financial crisis. In Ireland, a report from the Central Bank of Ireland concluded that major responsibility lay with bank directors but also with weaknesses in regulation. The report found that the Financial Regulator emphasized processes over outcomes and failed to develop independent evaluations of risks presented

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2. Julia Black, *Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis*, 75 *MODERN L. REV.* 1037 (2012).

3. Julie Froud et al., *Stories and Interests in Finance: Agendas of Governance Before and After the Financial Crisis*, 25 *GOVERNANCE* 35, 40 (2012).

4. Black, *supra* note 2, at 1038.

5. Froud et al., *supra* note 3, at 44.

by banks. Patrick Honohan, who led in authoring the report, noted that the undue deference shown to the banking sector constituted a form of regulatory capture:

Thus, it would have been known within the [Financial Regulator] that intrusive demands from line staff could be and were set aside after direct representations were made to senior regulators.<sup>6</sup>

The British Turner Report identified weaknesses in the capacity of financial markets that had not been understood by banks or regulators. National regulators were depending on regulators operating in the home jurisdictions of banks doing business transnationally, but home regulators were typically looking only at the national and not the global footprint. Key examples included the collapse of Lehman Brothers and the Icelandic Landsbanki.<sup>7</sup> The official European Union (EU) investigation, chaired by Jacques de Larosière, identified failures in risk assessment by banks and regulators but also in poor sharing of information by regulators and over-dependence on ratings agencies.<sup>8</sup>

The United States Financial Crisis Inquiry Commission concluded that the crisis was avoidable:

The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public.<sup>9</sup>

These now well documented regulatory failings occurred in part because of technical and cognitive weaknesses, but also because of the political factors of deference to banks and an ideology that believed in efficient markets.<sup>10</sup>

Independent regulation is, of course, supposed to be a *solution* to the problem of politicians favoring powerful industrial interests.<sup>11</sup> It is striking that this cataclysmic regulatory failure occurred at a time when

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6. PATRICK HONOHAN ET AL., CENT. BANK OF IR., THE IRISH BANKING CRISIS: REGULATORY AND FINANCIAL STABILITY POLICY 2003–2008, ¶ 1.13, at 9 (2009), available at [http://mpr.ub.uni-muenchen.de/24896/1/MPRA\\_paper\\_24896.pdf](http://mpr.ub.uni-muenchen.de/24896/1/MPRA_paper_24896.pdf).

7. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xvii (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

8. DE LAROSIÈRE GRP., HIGH LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU 8–11 (2009) (Belg.), available at [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosiere\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf).

9. FINANCIAL CRISIS INQUIRY REPORT, *supra* note 7.

10. Froud et al., *supra* note 3.

11. Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1 (2002).

the “rise of the regulatory state” had occurred, offering solutions to at least two sets of governance problems. The first of these problems is the risk that where the state regulates directly through government departments headed by elected politicians, decisions may be driven by consideration of short-term political gain. Such political short termism yields, at best, regulation that is incapable of supporting the mature development of regulated markets over time and, at worse, regulation the purpose of which is to support the interests of those who are friendly with elected politicians rather than the public.<sup>12</sup> The rise of the regulatory state has been about insulating regulatory decision making from both self-interested structures of self-regulation and self-interested structures of politics—across the financial industry, network industries, food and pharmaceuticals sectors, amongst others.<sup>13</sup>

The second problem is the limited technical capacity of elected government officials to undertake regulation in areas as complex as financial markets. The establishment of independent agencies, with a focus on particular tasks, is one of the key mechanisms for drawing in and developing expertise in particular regulatory policy areas. The establishment of regulation with its governance through rules, with arms-length regulators, is intended to support agencies in establishing a high degree of technical expertise—for example, through recruitment practices, which are somewhat distinct and perhaps on better terms than standard public sector recruitment activities, and with a clear orientation from the top towards purposive regulation rather than the wider array of political concerns that typically characterize departments and ministers.<sup>14</sup>

We tolerate the detachment of regulation from the normal mechanisms of control and accountability associated with the public service only because of an expectation that regulation will be apolitical and expert.<sup>15</sup> If neither claim for regulation can be delivered on, then this is a significant problem. The global financial crisis demonstrates a failure of regulation to achieve the very outcomes for which it is supposed to be

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12 . REGULATION, INSTITUTIONS, AND COMMITMENT: COMPARATIVE STUDIES OF TELECOMMUNICATIONS (Brian Levy & Pablo T. Spiller eds., 1996).

13. See, e.g., FABRIZIO GILARDI, DELEGATION IN THE REGULATORY STATE: INDEPENDENT REGULATORY AGENCIES IN WESTERN EUROPE (2008); Martin Loughlin & Colin Scott, *The Regulatory State*, in 5 DEVELOPMENTS IN BRITISH POLITICS 205 (Patrick Dunleavy et al. eds., 1997) (U.K.); John Braithwaite, *Accountability and Governance Under the New Regulatory State*, 58 AUSTRALIAN J. PUB. ADMIN. 90 (1999); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994); Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, 25 W. EUR. POL. 125 (2002).

14. Thatcher, *supra* note 13.

15. Thatcher & Sweet, *supra* note 11.

strong. Failures of regulation more generally have presented a significant challenge to trust in regulation to deliver on public interest objectives.<sup>16</sup>

So there is a significant challenge to trust in regulation. The financial crisis has resulted in calls for an end to self-regulation and in challenges to the legitimacy of national regulation, markets, and proposed solutions, which involve a larger role for EU agencies and even global regulators.<sup>17</sup> Other concerns apply across regulation more generally, which include anxieties about ineffectiveness, distance from government, and the relatively short relational distance between regulators and regulated firms.<sup>18</sup> In short, regulation is now a problem that requires addressing, as much as it is a solution.

What we might call the political focus of regulation is frequently on the rule making, which in many jurisdictions continues to be undertaken by legislative bodies even where implementation tasks have been assigned to specialist agencies. Although rule making does give rise to problems, partly because of risks of favoring particular interests and partly because of questions about the capacity to legislate effectively for technical areas of economic life, arguably key challenges to the legitimacy of regulation lie more with the manner in which regimes are implemented in terms of monitoring and enforcement.<sup>19</sup>

### III. FRAGMENTED REGULATION

There is a tendency to think of regulation by reference to the strong tradition of independent federal regulatory agencies in the United States. Within the rather similar tradition of Canadian regulatory institutions, the powerful independent regulators have been characterized as “governments in miniature” because of their tendency to take on powers to make rules, to monitor for compliance, and to apply enforcement sanctions

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16. See Black, *supra* note 2; see also Maciej Konrad Borowicz, *Financial Markets, Regulatory Failures and Transnational Regulatory Safety Nets: The Building of a Policy-Making Metaphor*, in *INFORMAL INTERNATIONAL LAWMAKING: CASE STUDIES 221* (Ayelet Berman et al. eds., 2012) (U.K.).

17. Colin Scott, *Regulating in Global Regimes*, in *HANDBOOK ON THE POLITICS OF REGULATION 563* (David Levi-Faur ed., 2012).

18. PETER GRABOSKY & JOHN BRAITHWAITE, *OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES* (Oxford Univ. Press 1986) (Austl.); RICHARD B. MACRORY, *REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE* (2006) (U.K.); Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *A READER ON REGULATION: OXFORD READINGS IN SOCIO-LEGAL STUDIES* (Robert Baldwin, Colin Scott & Christopher Hood eds., Oxford Univ. Press, 1998) (1987) (U.K.).

19. GRABOSKY & BRAITHWAITE, *supra* note 18; MACRORY, *supra* note 18.

without the intervention of courts.<sup>20</sup> The U.S. experience of powerful independent regulators is somewhat atypical, by international standards.<sup>21</sup> Elsewhere it has been more common to find regulatory powers divided between different public bodies with, for example, rule-making powers reserved to legislatures or ministers exercising delegated powers to make regulations or issue decrees, and the powers to apply formal sanctions reserved to courts or specialist tribunals. Within such regimes, regulatory agencies tend to exercise restricted powers focused on monitoring and initiating enforcement actions, with advisory roles in respect of rule making.

If it is correct to suggest that regulatory power, even in the context of domestic public regulation, is somewhat fragmented, the tendency towards fragmentation is amplified considerably by the roles of supranational and international governmental bodies such as the EU institutions, the World Trade, and various U.N. organizations like the International Labor Organization and the Codex Alimentarius Commission.<sup>22</sup> Further fragmentation is attributable to the growing significance of private organizations such as standard setting bodies—for example, the International Organization for Standardization (ISO), the Institute of Electrical and Electronics Engineers (IEEE), the European Committee for Standardization (CEN), and other private regulators that have proliferated across a wide range of fields in recent years, including financial markets, environmental protection, fair trade, accounting standards, advertising, and so on.<sup>23</sup>

Accounts of the global financial crisis identified fragmentation both of markets and of regulation as a key cause of the problems, notably because financial markets actors operating across many jurisdictions seemed to be subject to inadequate controls in circumstances where the regulator in one's home jurisdiction lacked power and capacity to monitor across all jurisdictions.<sup>24</sup> Equally, the vagaries of private regulation,

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20. See, e.g., G. Bruce Doern & Richard J. Schultz, *No Longer 'Governments Miniature': Canadian Sectoral Regulatory Institutions*, in *CHANGING REGULATORY INSTITUTIONS IN BRITAIN AND NORTH AMERICAN* 108 (G. Bruce Doern & Steven Wilks eds., 1998) (noting the retreat in Canada from assigning all regulatory powers to powerful regulatory agencies); John Willis, *Administrative Decision and the Law: The Views of a Lawyer*, 24 *CAN. J. ECON. & POL. SCI.* 502 (1958).

21. Colin Scott, *Agencification, Regulation and Judicialization: American Exceptionalism and Other Ways of Life*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 38 (Tom Ginsburg & Albert H. Y. Chen eds., Routledge 2008) (U.K.).

22. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000) (U.K.).

23. Kenneth W. Abbot & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadown of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44 (Walter Mattli & Ngaire Woods eds., 2009).

24. See generally *FINANCIAL CRISIS INQUIRY REPORT*, *supra* note 7.

notably by credit ratings agencies and through the standardization and extension of credit default swaps effectively setting the terms for complex financial instruments, were also identified as key sources for failure to know about and to understand sufficiently the risks associated with complex financial products traded across jurisdictions.<sup>25</sup> It is unsurprising that one of the responses to the financial crisis was to seek to harmonize regulation at a global level to a greater extent. It is equally unremarkable that the pressures, which have caused the emergence of fragmented regulation, have equally inhibited moves toward harmonization. The challenges associated with accountability for regulation are as complex as the regimes to which accountability relates.

#### IV. ACCOUNTABILITY

Thinking about regulators generally, where they are national public agencies, they are typically designed in such a fashion that they have a degree of independence from elected politicians, accompanied by mechanisms of oversight or accountability.<sup>26</sup> The value attributed to independence derives from arguments that regulators should be oriented towards expert decision making, insulated from day-to-day political concerns, and that if decision making is more political in character, then it should be retained by elected politicians rather than delegated.<sup>27</sup> The fact of delegation makes accountability important, but also problematic.<sup>28</sup>

Addressing a crisis of trust in regulation is not straightforward. We might be concerned to target the fidelity of regulators to their mandate, which would suggest addressing procedural weaknesses in their activities, or alternatively we might be more interested in the outcomes of their activities, which would suggest a different form of evaluation altogether. We can think of both sets of concerns as being rooted in accountability for regulation.

I have elsewhere argued that we can conceive of accountability upwards (notably to courts, legislature, and ministers), horizontally (notably to other agencies such as ombudsman, supreme audit institutions, and information regulators), and downwards (notably to regulatees and to intended beneficiaries of a regime).<sup>29</sup> These three modes of accountabil-

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25. DE LAROSIÈRE GRP., *supra* note 8, at 9.

26. GILARDI, *supra* note 13; MARTINO MAGGETTI, REGULATION IN PRACTICE: THE DE FACTO INDEPENDENCE OF REGULATORY AGENCIES (2012) (U.K.).

27. MAGGETTI *supra* note 26; Thatcher, *supra* note 13.

28. GILARDI, *supra* note 13.

29. Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC'Y 38 (2000).

ity map on to three forms of governance based, respectively, on hierarchy, community, and market.<sup>30</sup>

Mark Bovens has suggested that accountability is best conceived of as a relationship in which the organization being held to account has an obligation to explain its activities to another organization that may pose questions, make judgments, and (possibly) deliver consequences for failings.<sup>31</sup> But what is the content of these varied forms of relationship? Notwithstanding their different characteristics, I suggest that the dominant strand of even a broadly based conception of accountability is compliance with rules. Thus, we might ask, did a regulator follow the prescribed procedures? Did he or she spend the money and hire staff in accordance with public sector norms? Did he or she exceed his powers or neglect to do something he was mandated to do? This is about public mandates and providing reassurance that they are complied with. In this context, accountability is fundamentally about democratic governance, tolerant of delegation of powers, but ensuring that those to whom power is delegated do only that which is authorized in the form that is required.

Holding regulators to account for the substance of their actions in making rules, or in monitoring and enforcing them, is less common and more challenging. It requires us to ask more difficult questions about how effective the regulator is and how they can demonstrate the quality and effectiveness of what they do. The challenge for accountability is simultaneously to address technical weaknesses (substantive outcomes) and the fragile democratic legitimacy of regulation. These twin concerns are significant problems for public regulation. Both problems—technical credibility and democratic legitimacy—are even more significant for private regulators.

Private regulation, as opposed to government-based independent regulation, remains central for financial regulation. Key examples of private regulators include the monitoring activities of credit rating agencies, used to assess the financial position of both banks and sovereign governments, and the International Accounting Standards Board that determines the International Financial Reporting Standards, which provide the central reporting and auditing requirements for financial performance of both private and public actors in most jurisdictions. Other important re-

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30. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael W. Dowdle ed., 2006) (U.K.).

31. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J.: REV. EUR. L. IN CONTEXT 447 (2007).

gimes include those for setting and interpreting the terms of derivatives transactions, largely determined by the private activities of the International Swaps and Dealers Association (ISDA), not to mention self-regulatory oversight of the conduction of accounting and legal professionals who are so central to implementing both market and regulatory actions.<sup>32</sup> Any accountability solution must address public and private regulation.<sup>33</sup>

#### V. BEYOND ACCOUNTABILITY TO PERFORMANCE

I now come at this problem from a different perspective. If it is correct to argue, as I do, that democratic modes of accountability are at best incomplete, what are the best available alternatives or complements, and what is their capacity to capture aspects of performance? To what extent has the art of accountability taken in a concern to evaluate or require regulators to evaluate their performance? A fully external performance evaluation is, of course, different from oversight of self-evaluation. The core question, and one of intense interest to market and governmental actors, is how do we know whether regulators are doing a good job or not?

This starting point is not immediately looking for solutions to the problem of trust in regulation but rather observing an important trend in regulatory oversight towards performance evaluation and accountability. Turning to the performance evaluation of regulators, I note that although a number of national bodies (for example, the Australian Productivity Commission) and supranational organizations (notably the OECD) have begun to pursue the question of how to evaluate regulatory performance, the topic has had, at best, a marginal role in contemporary regulatory science. There is, for example, no discussion of performance indicators and performance evaluation in two leading handbooks of regulation published in 2010 and 2012.<sup>34</sup>

Performance evaluation provides a mechanism to address claims to technical expertise of regulators and thus the potential to evaluate regulators on their own terms. The OECD's work on the assessment of regulatory performance has found that there are few functioning examples of

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32. Yves Dezalay, *Between the State, Law and the Market: The Social and Professional States in the Construction and Definition of a Regulatory Arena*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 59 (William W. Bratton et al. eds., 1996) (U.K.).

33. Colin Scott, Fabrizio Cafaggi & Linda Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J.L. & SOC'Y 1 (2011).

34. See THE OXFORD HANDBOOK OF REGULATION (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010) (U.K.); HANDBOOK ON THE POLITICS OF REGULATION (David Levi-Faur ed., 2012) (U.K.).

regimes available and that the task of evaluating regulatory performance is extremely challenging.<sup>35</sup>

Demands for performance evaluation are increasingly prominent from market actors, governments, and civil society organizations. Regulatory agencies are frequently established to create a form of discipline on governments themselves, preventing them from acting on short-term political concerns, and to demonstrate credibility in the capacity for long-term policy stability and effectiveness. For national governments, there is a concern for principals to know better whether regulators to whom they delegate power are up to the tasks they have been set, whether in financial markets or in other sectors such as food, communications, pharmaceuticals, and prisons. For supranational bodies, not only the OECD but also the EU and Asia-Pacific Economic Cooperation (APEC), there are concerns to ensure that regulation operating across jurisdictions is effective at securing its permitted outcomes and that it is not pursuing non-legitimate (e.g., protective) purposes. With private regulation, the very purpose of the regime is to achieve some effect, such as enhancing the sustainability of forestry or ensuring fair prices are paid to growers of commodities such as chocolate and coffee. Buyers of the products, both retailers and consumers, need to be confident that the promised conditions for production or purchase have been met or else there is no point in paying extra to have the protections of the regime.<sup>36</sup> For some areas of private regulation such as technical standards, market take-up and market discipline may be sufficient. Effectiveness as judged by market actors is key to legitimacy. For any regime, evidence of ineffectiveness (e.g., in monitoring and enforcement) may damage credibility of an entire regime, leading to withdrawal of support from market or governmental actors.

What mechanisms exist that offer at least some basis of accounting for regulatory performance? Since the early 1980s, governments amongst the OECD member states have been seeking to apply a braking mechanism of sorts to their own urges to regulate policy problems.<sup>37</sup> There

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35. See CARY COGLIANESE, ORG. FOR ECON. CO-OPERATION & DEV., *MEASURING REGULATORY PERFORMANCE: EVALUATING THE IMPACT OF REGULATION AND REGULATORY POLICY* (2012) (Fr.), available at [http://www.oecd.org/gov/regulatory-policy/1\\_coglianesse%20web.pdf](http://www.oecd.org/gov/regulatory-policy/1_coglianesse%20web.pdf).

36. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004).

37. ORG. FOR ECON. CO-OPERATION & DEV., *REGULATORY IMPACT ANALYSIS: BEST PRACTICES IN OECD COUNTRIES* (1997) (Fr.) [hereinafter *REGULATORY IMPACT ANALYSIS*], available at <http://www.oecd.org/gov/regulatory-policy/35258828.pdf>; ORG. FOR ECON. CO-OPERATION & DEV., *THE OECD REPORT ON REGULATORY REFORM* (1997) (Fr.), available at <http://www.oecd.org/gov/regulatory-policy/2391768.pdf>.

would be a desire to ratchet regulatory requirements on businesses and others without evaluation of costs and benefits, without mechanisms originally referred to as deregulation but now more commonly thought of as processes of better regulation. Better regulation policies provide an example of regulation over government itself where some cross-departmental unit is typically concerned with setting and overseeing requirements on departments and others are responsible for setting regulatory rules to ensure that they properly evaluate them at the outset via review of both existing and new rules. The OECD has been a key proponent of such initiatives, providing its member states with the challenge of building institutional capacity and political commitment for oversight of regulation.<sup>38</sup> Such regimes are now widely found in OECD member states, with aspirations to regulate performance of policy makers and rule-setters but with rather patchy effects on the ground.

Regimes of better regulation focus primarily on decisions around regulatory responses to policy problems with an evaluation process referred to generically (though it differs across jurisdictions) as a regulatory impact analysis (RIA).<sup>39</sup> In the process of completing an RIA, officials concerned with introducing regulation consider alternatives and then evaluate potential costs, benefits, and impacts of rules or other actions.<sup>40</sup>

While RIA processes command wide support as a mechanism for requiring evaluation during the policy process for new regulation, they are also subject to widespread criticism. First, though most regimes require an evaluation of alternatives to regulation, such as doing nothing or promoting self-regulation, many policy makers appear to commence RIAs only when there is already an administrative or political commitment to making rules (thus ruling out the less costly alternatives).<sup>41</sup> Second, RIAs are open to similar objections to cost benefit analyses where costs are often easier to pin down than benefits.<sup>42</sup> In the case of RIAs, this is

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38. ORG. FOR ECON. CO-OPERATION & DEV., RECOMMENDATION OF THE COUNCIL ON REGULATORY POLICY AND GOVERNANCE (2012) (Fr.), available at <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>.

39. REGULATORY IMPACT ANALYSIS, *supra* note 37, at 7–9.

40. Scott H. Jacobs, *Current Trends in the Process and Methods of Regulatory Impact Assessment: Mainstreaming RIA into Policy Processes*, in REGULATORY IMPACT ASSESSMENT: TOWARDS BETTER REGULATION? 17 (Colin Kirkpatrick & David Parker eds., 2007) (U.K.); Claudio M. Radaelli, *The Diffusion of Regulatory Impact Analysis—Best Practice or Lesson-Drawing?*, 43 EUR. J. POL. RES. 723 (2004).

41. Robert Baldwin, *Better Regulation: Tensions Aboard the Enterprise*, in BETTER REGULATION 27 (Steve Weatherill ed., 2007) (U.K.).

42. JULIE FROUD, REBECCA BODEN, ANTHONY OGUS & PETER STUBBS, CONTROLLING THE REGULATOR (1998) (U.K.).

particularly significant as business consultees are often in a better position to argue about costs than is true for beneficiaries and benefits. Therefore, there is an undue bias against regulation. A third concern is the scope of better regulation regimes. While the Australian Office of Best Practice Regulation seeks to apply better regulation principles to self- and private-regulation as well as public regulation, most regimes focus narrowly on government-made rules. This thereby excludes from consideration those regimes that may be important with the potential for both costs and benefits but in which rules are not made by state bodies.<sup>43</sup> It is significant for my argument to note that better regulation regimes have been rather poorly applied to processes of implementation. Obvious issues concerning the costs and benefits of enforcing regulation in different ways are rarely subject to the scrutiny of better regulation, though separate processes for reviewing the efficiency and effectiveness of enforcement have been undertaken in some countries, for example the United Kingdom and Australia.<sup>44</sup>

The ambition to set and evaluate regulators' performance against indicators moves us considerably beyond the territory of better regulation and into processes of implementation and effects of regimes on the ground. Performance evaluation is a key part of many government public management systems. For example, in the United Kingdom, reforms during the early 1990s led to the separation of policy and operational tasks within government departments. The latter were assigned to "next steps" or executive agencies and were accompanied by ambitions to adopt a new rigor in setting performance indicators as part of the mechanisms of control over public sector performance. An early review of the setting and oversight of performance indicators for the Department of Social Security agencies revealed an emphasis on process and quantitative efficiency in setting the indicators and a reluctance to tackle the more demanding quantitative effectiveness indicators.<sup>45</sup> Since then, the ambition to oversee and evaluate performance of public sector bodies generally and regulatory agencies in particular has remained high on the public management agenda.<sup>46</sup>

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43. Ciara Brown & Colin Scott, *Reflexive Governance in Better Regulation: Evidence from Three Countries* (Centre for Philosophy of Law, Working Paper No. 9, 2009) (Belg.).

44. Australian Law Reform Commission, Discussion Paper 65, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* (2002); MACRORY, *supra* note 18.

45. Neil Carter & Patricia Greer, *Evaluating Agencies: Next Steps and Performance Indicators*, 71 PUB. ADMIN. 407 (1993).

46. Gwyn Bevan & Christopher Hood, *What's Measured Is What Matters: Targets and Gaming in the English Health Care System*, 84 PUB. ADMIN. 517 (2006).

Some better regulation units have examined aspects of how to understand regulatory performance in a more sophisticated manner. Following an inquiry into Victoria's Regulatory Framework in 2011, the Victorian Competition and Efficiency Commission concluded there were a number of enhancements that could be made to the efficiency and effectiveness of regulation in the state. Their recommendations included the setting of clear regulatory objectives and the adoption of procedures for all regulators in terms of monitoring and reporting on outcomes.<sup>47</sup> At the federal level, the Australian government has sought to benchmark regulatory performance as part of the policy on reducing regulatory burdens. More specifically, the Australian government wants this from state and territory regulation through national coordination. The studies published by the Productivity Commission as part of this process are substantially targeted at assessing efficiency of regulation rather than its outcomes and effectiveness. The Productivity Commission distinguished regulatory design from administration and enforcement in its initial report. Its proposed indicators on regulatory administration were chiefly focused on processes such as frequency of reporting, a provision for online contact, and appeals.<sup>48</sup> Similarly, the main focus with enforcement was on such procedural matters and whether there was a provision for enforcement and whether the relevant agencies published enforcement strategies.<sup>49</sup>

The OECD has developed a program to consider more fully how to evaluate regulatory performance by examining outcomes and effects, as well matters of process and efficiency, by recognizing clear interest amongst its member states for a better understanding of when regulators are doing a good job. The OECD's own guidelines on regulatory policy recommend that member states measure the effects of regulatory policy against intended outcomes.<sup>50</sup> In the OECD's 2009 report, *Indicators of Regulatory Management Systems*, the primary focus was on regulatory design. One chapter addresses measures to improve the quality of existing regulations, and only two pages examined ex post regulatory review and evaluation, with no direct focus on evaluating the performance of

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47. *Annual Report 2011–12*, VICTORIAN COMPETITION & EFFICIENCY COMM'N, 1 (Sept. 6, 2012), [http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VCECAAnnualReport2011-12/\\$File/VCEC%20Annual%20Report%202011-12.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VCECAAnnualReport2011-12/$File/VCEC%20Annual%20Report%202011-12.pdf) (Austl.).

48. *Performance Benchmarking of Australian Business Regulation*, PRODUCTIVITY COMM'N, 127 (Feb. 19, 2007), [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0016/37141/regulationbenchmarking.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0016/37141/regulationbenchmarking.pdf) (Austl.).

49. *Id.* at 127–28.

50. RECOMMENDATION OF THE COUNCIL ON REGULATORY POLICY AND GOVERNANCE, *supra* note 38, ¶ 1.6, at 7.

regulators.<sup>51</sup> This provides some evidence of the difficulty in moving beyond the traditional concerns for improving regulation policy, focusing on rule making and regulatory design. The main impetus for offering a more challenging view of the potential for evaluating regulatory performance is found in three research papers by academics commissioned by the OECD.<sup>52</sup>

Cary Coglianese sets down an ambitious agenda for regulatory policy evaluation in his OECD paper, which requires robust indicators and a research design capable of supporting inferences on the extent to which regulatory action caused changes in the identified performance indicators. Coglianese divides the types of relevant performance indicators into those relating to impact on the targeted problem, cost effectiveness (how much is spent for any level of impact), and the net benefits (a calculation of the positive outcomes less the costs attributable to negative impacts), indicating a preference for this last kind of indicator as best encompassing both the intent and the costs of regulation.<sup>53</sup> Two things stand out from Coglianese's propositions. First, measuring regulatory impact is extremely challenging. Second, efforts to assess performance by reference to process indicators such as timeliness of processing, availability of appeals, etc., may be important for assessing legitimacy of regulatory actors, but it contributes little to performance evaluation in the sense that it is described by Coglianese.

The selection of performance indicators raises a number of challenges. As "calculative practices" are increasingly recognized as tools of government, it is acknowledged that the very act of measuring may affect behavior, diverting attention of actors to the targeted numbers and away from other important aspects of their activities.<sup>54</sup> More generally, the setting of targets creates risks that key actors will game the figures, prioritizing the demonstration of a satisfactory outcome over the delivery of the outcome.<sup>55</sup> The use of indicators to then evaluate the nature of outcomes and effects deriving from regulation raises a range of methodolog-

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51. ORG. FOR ECON. CO-OPERATION & DEV., INDICATORS OF REGULATORY MANAGEMENT SYSTEMS (2009) (Fr.), available at <http://www.oecd.org/gov/regulatory-policy/44294427.pdf>.

52. COGLIANESE, *supra* note 35; DAVID PARKER & COLIN KIRKPATRICK, ORG. FOR ECON. CO-OPERATION & DEV., THE ECONOMIC IMPACT OF REGULATORY POLICY: A LITERATURE REVIEW OF QUANTITATIVE EVIDENCE (2012) (Fr.), available at [http://www.oecd.org/gov/regulatory-policy/3\\_Kirkpatrick%20Parker%20web.pdf](http://www.oecd.org/gov/regulatory-policy/3_Kirkpatrick%20Parker%20web.pdf); CLAUDIO RADAELLI & OLIVER FRITSCH, ORG. FOR ECON. CO-OPERATION & DEV., EVALUATING REGULATORY MANAGEMENT TOOLS AND PROGRAMMES (2012) (Fr.), available at [http://www.oecd.org/gov/regulatory-policy/2\\_Radaelli%20web.pdf](http://www.oecd.org/gov/regulatory-policy/2_Radaelli%20web.pdf).

53. COGLIANESE, *supra* note 35, at 7.

54. Peter Miller, *Governing by Numbers: Why Calculative Practices Matter*, 68 SOC. RES.: INT'L Q. 379 (2001).

55. Bevan & Hood, *supra* note 46.

ical challenges. Coglianesi highlights the difficulties of separating desired outcomes from other outcomes by reference to the indicators and, more critically, working out what caused the relevant observed changes in behavior and relevant outcomes.<sup>56</sup> He describes the evaluation of regulatory performance in this way as a key aspect of evidence-based policy, showing a preference for quantitative methods, where possible using randomized trials, to offer the best possibility of distinguishing the effects of regulation from other causes for observed outcomes.

While better regulation policies have substantially neglected the evaluation of regulatory performance, the development of public sector audit has gradually evolved from its concerns with financial probity to address performance of public sector organizations.<sup>57</sup> The principal concern of performance auditing in the public sector has been financial (the three *Es* of value for money—efficiency, effectiveness, and economy). There has been some movement beyond financial performance to wider performance evaluation in some jurisdictions.<sup>58</sup> For Mike Power, the “audit explosion” has been one of the key characteristics of public sector management reforms.<sup>59</sup> The application of performance auditing methods to regulatory regimes has been most developed in the United Kingdom. “Regulatory audit” was initially tied to better regulation and rule making in the United Kingdom. The National Audit Office (NAO) was asked to conduct performance audits in respect of a number of regimes.<sup>60</sup>

Regulatory audit in the United Kingdom has become more generally concerned with enhancing the effectiveness of the regulatory state, using the substantially soft power of the public sector audit function. Regulatory audit processes have moved beyond assessment of RIA to addressing existing regulations and relations between regulators and regulated firms. The U.K. NAO has been centrally involved with implementing the major review of regulatory burdens initiated in Philip Hampton’s Treasury report.<sup>61</sup> This has involved a cross sectoral program to

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56. COGLIANESE, *supra* note 35.

57. PERFORMANCE AUDITING: CONTRIBUTING TO ACCOUNTABILITY IN DEMOCRATIC GOVERNMENT (Jeremy Lonsdale, Peter Wilkin & Tom Ling eds., 2011).

58. Colin Scott, *Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit*, 25 LAW & POL’Y 203 (2003).

59. Michael Power, *Evaluating the Audit Explosion*, 25 LAW & POL’Y 185 (2003).

60. Ed Humpherson, *Auditing Regulatory Impact Assessment: UK Experience*, in REGULATORY IMPACT ASSESSMENT: TOWARDS BETTER REGULATION? 132 (Colin Kirkpatrick & David Parker eds., 2007).

61. PHILIP HAMPTON, HM TREASURY, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT (2005) (U.K.), available at [http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/bud05hampton\\_150305\\_640.pdf](http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf).

reduce regulatory burdens and includes oversight by the NAO of processes engagement, risk analysis, and evaluation.<sup>62</sup>

One further form of scrutiny over regulatory performance has emerged through the development of forms of network governance at both the national and international levels. Network governance is a non-hierarchical mode for organizing and steering behavior through such mechanisms as mutual surveillance, reporting, benchmarking, and peer review.<sup>63</sup> Key examples include the OECD itself, which regularly reports on the performance of its member states in matters such as regulatory reform and regulatory performance, the development of European networks of regulators in areas such as energy, communications, and competition, and thirdly, the development of national networks of regulators which, at least informally, compare performance of regulatory regimes across sectors.<sup>64</sup> The OECD has clear concerns to use its offices and soft networking authority to learn about, enhance, and disseminate tools for regulating more effectively.<sup>65</sup>

This discussion of the development of mechanisms for evaluating regulatory performance should not be limited to the initiatives of governmental and inter-governmental organizations. Private actors have played a key role in developing evaluative mechanisms. Private tools for ranking the performance of regulators in league tables provide key examples. Between 2004 and 2010, the European Competitive Telecommunications Association (ECTA) produced a “Regulatory Scorecard,” which compared European regulators on a number of key aspects of regulatory performance.<sup>66</sup> This scorecard combined evaluations of procedural matters with regulatory outcomes in terms of market liberalization across key market segments. This tool was developed to put pressure both on EU authorities and national governments to sustain and develop

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62. Ed Humpherson, *Auditing Regulatory Reform*, in *THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS* 267 (Dawn Oliver, Tony Prosser & Richard Rawlings eds., 2010).

63. R.A.W. RHODES, *UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY* (1997); GRAHAME F. THOMPSON, *BETWEEN HIERARCHIES AND MARKETS: THE LOGIC AND LIMITS OF NETWORK FORMS OF ORGANIZATION* (2003).

64. Joseph Corkin, *Constitutionalism in 3D: Mapping and Legitimizing Our Lawmaking Underworld*, 19 *EUR. L.J.: REV. EUR. L. IN CONTEXT* 636 (2013); Burkard Eberlein & Edgar Grande, *Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State*, 12 *J. EUR. PUB. POL’Y* 89 (2005); David Levi-Faur, *Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space*, 18 *J. EUR. PUB. POL’Y* 810 (2011); Armin Schäfer, *A New Form of Governance? Comparing the Open Method of Coordination to Multilateral Surveillance by the IMF and the OECD*, 13 *J. EUR. PUB. POL’Y* 70 (2006).

65. Radaelli, *supra* note 40.

66. *Regulatory Scorecard*, *EUR. COMPETITIVE TELECOMM. ASS’N*, <http://www.ectaportal.com/en/REPORTS/Regulatory-Scorecards/Regulatory-Scorecard-Overview/> (last updated June 1, 2010).

policies as well as implement instruments to support access for new entrants to communications markets. The private journal, *Global Competition Review* (GCR), produced a similar private league table to evaluate international performance of competition regulators.<sup>67</sup>

The ECTA and GCR rankings of regulators are developed external to the evaluated regimes. An equally significant development concerns the attempt to develop mechanisms for evaluating regulatory performance *within* private regulatory regimes. There are a number of market-led private regulatory regimes for which credibility with market actors is vital to their continuing success.<sup>68</sup> The *raison-d'être* for Fair Trade and Forest Stewardship regimes, for example, is that their activities make a difference in enhancing the income to small producers and enhancing the sustainability of forestry.<sup>69</sup> If their outcomes against these objectives were negligible, confidence that their processes were good would not defend them from complete collapse since they are dependent on consumers and retailers choosing to buy products to which their labels have been attached.<sup>70</sup> The umbrella organization for these private labeling regimes, originally The International Social and Environmental Accreditation and Labeling Alliance, now just ISEAL Alliance, was established in 1999 to coordinate representations to governments and to develop common sustainability standards for a group of private regulators. Today, this includes a wide range of label-based regulatory regimes.<sup>71</sup> ISEAL has turned its attention to the development of macro-standards for its members, which are concerned with differentiating its members from others and promoting their credibility.<sup>72</sup> Of central interest is the work ISEAL has undertaken on credibility standards with respect to the influence of regulation. The ISEAL Impacts Code, adopted in 2011, requires the es-

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67. *Australia's Competition and Consumer Commission*, GLOBAL COMPETITION REV., <http://globalcompetitionreview.com/surveys/article/33562/australias-competition-consumer-commission/> (last visited Nov. 6, 2013).

68. Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002).

69. BENJAMIN CASHORE, GRAEME AULD & DEANNA NEWSOM, GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY (2004); Peter Leigh Taylor, *In the Market but Not of It: Fair Trade Coffee and Forest Stewardship Council Certification As Market-Based Social Change*, 33 WORLD DEV. 129 (2005).

70. Kysar, *supra* note 36.

71. ISEAL ALLIANCE, <http://www.isealliance.org/our-members/full-members> (last visited Nov. 6, 2013); see also Allison Loconoto & Eve Fouilleux, *Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance*, REG. & GOVERNANCE (forthcoming) (manuscript at 7) (on file with author).

72. Loconoto & Fouilleux, *supra* note 71 (manuscript at 7).

establishment of monitoring and evaluation programs; the definition of the intended change; establishment of appropriate indicators; data collection and evaluation; evaluation reports; and learning and improvement. Thus, it is reflexive in character, drawing on the learning capacity not only of the particular private regulatory regimes but also on the experiences of other ISEAL members.<sup>73</sup> Together, the combination of detailed requirements around performance and both external evaluation and oversight by ISEAL makes the Impacts Code considerably more advanced than any equivalent regime of substantive performance evaluation for public regulators. What is particularly intriguing is that the push for this private regime of performance evaluation provides evidence for the suggestion that effective meta-regulation may be driven by a combination of market and community pressures, rather than from government and hierarchy.<sup>74</sup>

#### VI. REGULATION AND POST-REPRESENTATIVE DEMOCRACY

Contemporary regulatory practices continue to raise acute problems of both democratic legitimacy and performance. These practices combine public and private action and operate at national, transnational, and international levels. In the wake of the financial crisis, the question of how can we know whether regulators are being effective remains one of central importance. The concerns with democracy and performance are sometimes presented as being mutually exclusive, and the history of delegation to independent regulators reflects a concern to loosen democratic control in order to promote technical capacity, insulated to a degree from political concerns.

Evidence of performance is increasingly important but raises significant challenges. How can we achieve greater transparency in performance and tie that transparency to capacity to use the knowledge for a substantive form of accountability but perhaps also participation? As I come to theorize the multiple mechanisms for overseeing regulatory performance in this Part of the Article, I argue that democratic and technical concerns about regulation can be located within democratic theory in such a way that they are mutually reinforcing rather than inconsistent. A starting point is to note that the plausibility of representative democracy models is already called into question since many citizens feel alienated from regimes where executive power is more central than the power of directly elected legislative institutions, and national governmental auton-

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73. *Id.* (manuscript at 8).

74. Colin Scott, *Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The 'Heineken Effect,'* in PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY 170 (Nina Boeger, Rachel Murray & Charlotte Villiers eds., 2008)

omy is comprised by both inter-governmental and private decision making and action on key issues. Traditional accountability narratives emphasize parliamentary accountability, judicial review, and financial probity and still struggle to address the challenges of public, private, and supranational regulation.<sup>75</sup> This concern does not require us to abandon ideals around representative democracy, but it suggests that the model is incomplete. This is because of the distance between key nodes of power such as regulatory agencies, intergovernmental organizations, major firms, as well as elected institutions. Put another way, this approach does not discard traditional concerns of accountability and democracy; rather, it focuses on inputs and throughputs. It also supplements them with a focus on outputs and outcomes. Observations of this kind lie behind the work of John Keane in seeking to elaborate a theory that better embraces the diffusing governance practice to which we are subject.<sup>76</sup>

Keane notes that there has been a significant level of institutional response to a challenge he characterizes as one of “post-representative democracy.” As Keane himself notes, the innovations date back a considerable period. He observes the very wide range of structures that have emerged for soliciting and making transparent information about governance activities (both public and private) and processes for inclusion and participation. Examples include advisory bodies; town hall meetings; think tanks; advocacy services; networks; democratic audits; official inquiries; integrity commissions; reports and score cards; blogging, Twitter, and other social media; judicial activism; workplace tribunals; public interest litigation; and international forums and summits.<sup>77</sup> I would also add the development of value for money audit, public and private sector ombudsman schemes, and international bodies that have become increasingly inclusive of civil society and business organizations such as the International Labor Organization.<sup>78</sup> I include regulatory agencies as key mechanisms in this list as well. Regulatory agencies create sources of knowledge and authority that are partially independent of elected government and have the capacity to challenge and hold elected governments to account in key areas of decision making, sometimes through serial powers (in which either can veto) or sometimes through parallel powers (in which either can act without the other).<sup>79</sup>

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75. Corkin, *supra* note 64, at 657–58.

76. JOHN KEANE, *THE LIFE AND DEATH OF DEMOCRACY* (Simon & Schuster, London 2009).

77. *Id.* at 692; Corkin, *supra* note 64, at 655.

78. Abbott & Snidal, *supra* note 23.

79. Colin Scott, *Independent Regulators As Accountability Mechanisms*, in *OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY* (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., Oxford Univ. Press, Oxford 2014).

Taken together, these developments underpin what Keane refers to as “monitory democracy” comprising a wide variety of new “power monitoring inventions.”<sup>80</sup>

Monitoring institutions play various roles. They are committed to providing publics with extra viewpoints and better information about the operations and performance of various governmental and non-governmental bodies. . . . Monitory mechanisms are geared as well to the definition, scrutiny[,] and enforcement of public standards and ethical rules for preventing corruption, or the improper behaviour [sic] of those responsible for making decisions, not only in the field of elected government, but in a wide variety of non-governmental settings. The new institutions of monitory democracy are further defined by their overall commitment to strengthening the diversity and influence of their citizens’ voices and choices in decisions that affect their lives—regardless of the outcomes of elections.<sup>81</sup>

Keane ties these mechanisms of oversight and participation into democratic theory, arguing that the significance of democracy is to prevent rule by the few to ensure that “the matter of who gets what, when[,] and how should be permanently an open question.”<sup>82</sup> This reminds us that nearly all regulatory decisions have political consequences.

## VII. CONCLUSION

In this Article, I have raised significant technical and theoretical challenges for the development of performance accountability over regulation. The technical challenges include finding ways to set performance indicators for regulatory bodies and to better understand how the actions of regulators affect outcomes, not just for financial regulation but more generally, and not just for public regulators but also for private bodies. There is some evidence that private regulators driven by market concerns are in a better position to resolve some of these issues.

Broader questions are pertinent to those who may have the interest and capacity to use information about regulator performance to monitor and hold to account. Again the track record of governments has not been strong, but governmental activity when accompanied by the activities of others, including inter-governmental bodies, regulatees, investors, and non-governmental organizations, constitutes a stronger overall regime for monitoring regulatory activity.

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80. KEANE, *supra* note 76, at 691.

81. *Id.* at 693.

82. *Id.*

The dispersed model of monitory democracy, discussed in the last Part of this Article, has the virtue of matching the fragmented models found in contemporary regulatory governance. It offers the potential for oversight, which is at least as diverse as the regulatory practices being scrutinized, with the potential to conceive of oversight matching the activities being overseen in range and scope. But if we can make a virtue of this diffused monitoring democracy, then this raises the question of how much is enough? How many of these forms of scrutiny are required to be able to credibly defend a regime overall as giving rise to appropriate accountability for performance, and at what point do the costs of diffused accountability become too great to be justified? A different but equally significant challenge is asking how regimes of scrutiny can be developed so as to incorporate feedback-learning into the activities being overseen so that they go beyond accountability to promote development along appropriate lines shaped by the participation of the scrutiny actors.

I do not underestimate the technical and theoretical challenges of casting accountability for regulatory performance as comprising the aggregate activities of diverse actors deploying diverse methods. A starting point is to seek to understand particular regimes in these terms with the potential for interventions by public or private actors to address weaknesses that are addressed, both in terms of targeting and understanding performance and the effects of regulation on outcomes and the broader range of constitutional questions about participation and learning.<sup>83</sup>

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83. Corkin, *supra* note 64.