

# ARTICLE

## BEST PRACTICES

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*In traditional administrative law, agencies pass rules and courts review them. But what if agencies stopped acting by rule and started leading by example? With best practices rulemaking—a theoretically voluntary way of coordinating administrative action both within and across agencies—leading by example is what agencies are increasingly doing. Although best practices rulemaking has been largely ignored by the legal literature, regulation through best practices has increased sevenfold in the past ten years in the federal government alone, touching every aspect of administrative law. This paper describes and evaluates best practices rulemaking, tracking its origins in business management, its adoption by the public sector, and analyzing how it works in that sector. It does so through a series of case studies, in particular a study of the use of best practices to regulate water pollution. An examination of best practices in practice shows that although they purport to be “best,” there is nothing particularly “best” about them. The rulemaking technique is a way of obtaining common practices, not ideal ones. Accordingly, best practices rulemaking is particularly useful for setting regulatory standards where the precise content of the standard is not particularly important. As best practices rulemaking (along with other forms of horizontal, informal agency action) continues to grow and grow apart from judicial supervision, Congress may want to ensure that this new technique of administrative law is adequately publicized and at least partially supervised through passage of a disclosure-oriented “Informal Administrative Procedure Act.”*

### I INTRODUCTION

In traditional administrative law, agencies pass rules and courts review them. But what if agencies stopped acting by rule and started leading by example?

Leading by—or at least, pointing to—example is, in fact, what agencies are increasingly doing. And they are doing it in lieu of the oft-vilified-but-never-replaced complex rulemakings that play a central role in administrative law.<sup>1</sup>

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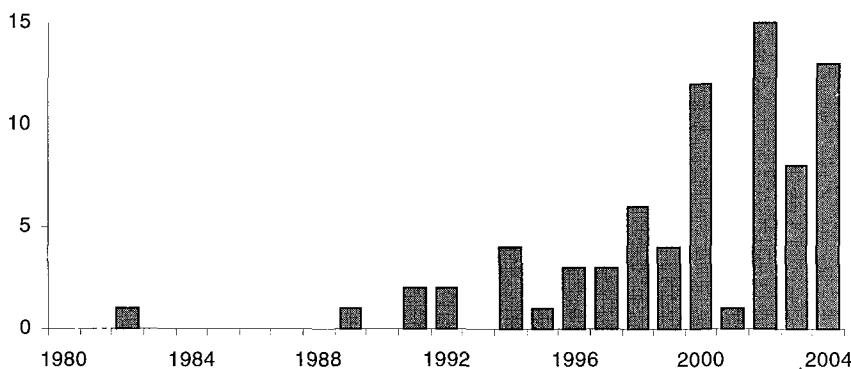
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<sup>1</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 701 (2000) (noting drawbacks of bureaucratic reliance on conventional wisdom); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV.

The vilification has produced a series of uneven efforts at rulemaking reform over the years. Agencies have sought consensus for new rules through negotiated regulation.<sup>2</sup> They have tried to implement programs through contract and privatization instead of rulemaking.<sup>3</sup> They have turned to the President to set their regulatory agendas.<sup>4</sup> And they have sought to handle the increasingly international aspects of their purviews through informal agreements with regulatory counterparts abroad.<sup>5</sup>

Perhaps more important, and more vibrant, than any of these new approaches to rulemaking is the recent turn to “best practices” instead of rules to ensure the success of regulatory programs. Although best-practice rulemaking has been largely ignored by the legal literature, regulation through best practices has increased seven-fold in the past ten years in the federal government alone, touching every aspect of administrative law.

FIGURE 1: ANNUAL NUMBER OF PUBLIC LAWS REFERENCING  
BEST PRACTICES<sup>6</sup>



1105, 1109 (1954) (discussing tendency of regulators to “rigidif[y]” in rulemaking context); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263–64 (2001) (discussing administrative ossification and citing ANTHONY DOWNS, *INSIDE BUREAUCRACY* 158 (1967)).

<sup>2</sup> See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997) (promoting negotiated regulation as collaborative process producing better outcomes than rulemaking).

<sup>3</sup> See generally Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) (noting trend toward privatization in recent decades).

<sup>4</sup> See, e.g., Kagan, *supra* note 1, at 2281–82 (describing President Clinton’s extensive influence over agency action).

<sup>5</sup> See, e.g., David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT’L L. 547, 549–50 (2005) (describing international regulatory cooperation in finance and other areas).

<sup>6</sup> This chart shows the results of a search for the term “best practice!” conducted in Westlaw’s Public Law database in January 2005.

In this article, I define and describe best practices rulemaking and explore the reasons for the phenomenon's growth. I also offer a prescription for when it should be used: when coordination is more important than any particular substantive outcome. But I begin with a sense of the breadth of this new method of rulemaking.

Best practices are the new means through which Congress and federal agencies are making administrative law. Congress has directed that best practices be observed in federal information policy<sup>7</sup> and for federal employee discipline.<sup>8</sup> Consideration of best practices is statutorily mandated for agricultural programs,<sup>9</sup> military programs,<sup>10</sup> education funding,<sup>11</sup> and national parks.<sup>12</sup> The term appears three times in the statute governing the new Department of Homeland Security<sup>13</sup> and in agreements outlining multilateral initiatives in the war on terror.<sup>14</sup> The list of statutes requiring agencies to act through best practices goes on, and has risen exponentially since 1980.

Among agencies, best practices are even more popular. In one summer week in 2004, for example, the Department of Defense created a task force that reviews best practices for protection and security of "high-value installations" such as airports, harbors, nuclear power

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<sup>7</sup> 44 U.S.C. § 3504(b)(4) (2000). This Act orders the Director of the Office of Management and Budget (OMB) to oversee the development and use of best practices in managing government information resources to improve training, simplify processes, and reduce paperwork.

<sup>8</sup> The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 requires the President to study best practices in disciplining employees, and to issue advisory guidelines with best practices for federal agencies. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, § 204(a)(3), Pub. L. No. 107-174, 116 Stat. 566, 570 (codified at 5 U.S.C. § 2301 note (Supp. II 2001–03)).

<sup>9</sup> 7 U.S.C. § 6711(c) (Supp. II 2001–03) (directing land grant universities researching global climate change to evaluate and identify agricultural best practices).

<sup>10</sup> 42 U.S.C. § 15382 (Supp. II 2001–03) (directing Secretary of Defense to help establish best practices to facilitate voting by military individuals stationed overseas).

<sup>11</sup> 42 U.S.C. § 9836a(a)(2)(B) (2000) (concerning establishment of standards for Head Start educational programs receiving discretionary funding).

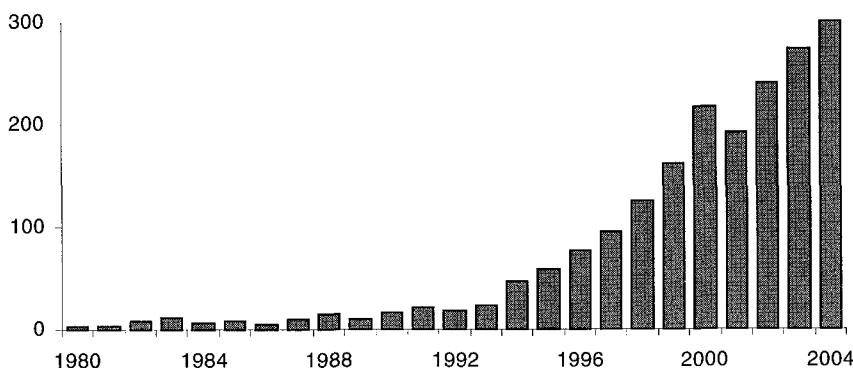
<sup>12</sup> Eastern Band of Cherokee Indians Land Exchange Act of 2003, Pub. L. No. 108-108 § 138, 117 Stat. 1271, 1273–74 (codified at 16 U.S.C.A. § 460a-5 note (West 2005)) (requiring best practices to be used in developing educational and support facilities on tribal lands).

<sup>13</sup> Congress has made the Department of Homeland Security responsible for "assisting in the development and promotion of private sector best practices to secure critical infrastructure," 6 U.S.C.S. § 112(f)(7) (LexisNexis Supp. 2005), and for identifying "best practices and technologies relating to homeland security." 6 U.S.C. § 459(a)(1) (Supp. II 2001–03). The agency also makes terrorism prevention grants available to local governments partly to establish best practices for coordinating local law enforcement agency intelligence. First Responders Assistance Act, Pub. L. No. 107-56 § 1005, 115 Stat. 393 (2001) (codified at 28 U.S.C. § 509 note (Supp. I 2001–02)).

<sup>14</sup> E.g., U.S. Dept. of State, Text of U.S.-EU Declaration on Combating Terrorism (June 26, 2004), <http://www.state.gov/p/eur/rls/fs/36892.htm> (pledging sharing of best maritime transport security practices between United States and European Union).

facilities, and military bases;<sup>15</sup> the Department of Transportation offered grants to programs that identified best practices in getting Hispanics to wear seat belts,<sup>16</sup> and the Department of Labor offered similar grants to entities designing workplace policies that would allow disabled individuals to telecommute most effectively.<sup>17</sup> All told, the term “best practices” appeared 300 times in the 2004 *Federal Register*, up from three appearances in 1980.

FIGURE 2: ANNUAL NUMBER OF REGULATIONS REFERENCING  
BEST PRACTICES IN THE FEDERAL REGISTER<sup>18</sup>



What is this popular new form of administrative action? At their core, best practices are a method of regulation that works through horizontal modeling rather than hierarchical direction. In a classic best practices scheme, regulated entities themselves devise practices to comply with relatively unspecific regulatory requirements. These practices are selected and publicized as “best,” but not mandated by central administrators as they would be in regulation through a more traditional vertical command-and-control model. The idea is that these best practices will subsequently be adopted by other regulated entities.

Defined this way, best practices might seem like a benign form of localism or subsidiarity, a method of regulation in which central administrators provide advice and disseminate information, instead of mandating a one-size-fits-all regulatory scheme. Indeed, it might suggest a rather democratic form of regulatory experimentalism, in which

<sup>15</sup> Defense Science Board, 69 Fed. Reg. 42,135, 42,135 (July 14, 2004) (notice of Advisory Committee meetings).

<sup>16</sup> Discretionary Cooperative Agreement Program to Support Project to Increase Hispanic Safety Belt Use, 69 Fed. Reg. 42,080, 42,084 (July 13, 2004).

<sup>17</sup> Telework/Telecommuting Pilot Research, 69 Fed. Reg. 41,282, 41,283–84 (July 8, 2004).

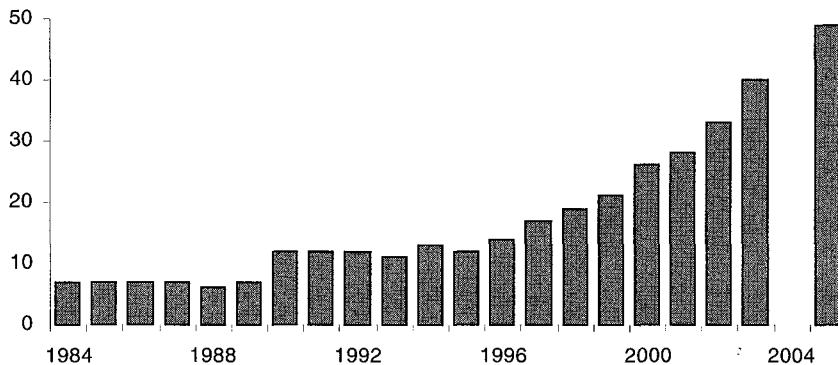
<sup>18</sup> This chart shows the results of a search for the term “best practice!” conducted in Westlaw’s Federal Register database in January 2005.

regulated entities experiment with best practices as a way of vindicating the broad principles of various regulatory programs, while the regulators keep track of their progress and help to celebrate and publicize particularly successful local initiatives.<sup>19</sup>

But best practices usually fall short of this ideal. They are not a panacea, not always horizontal, and often, at least in effect, not really voluntary. In short, although best practices purport to be “best,” there is nothing particularly “best” about them. The rulemaking technique is a way of obtaining *common* practices, not ideal ones. There are, accordingly, some contexts in which best practices may be appropriate and effective forms of regulation, and other contexts where they are not.

In this article, I show how agencies lead by example, why they have started doing so now, and when we might prefer regulation by best practices to other forms of government action.

FIGURE 3: ANNUAL NUMBER OF REGULATIONS REFERENCING BEST PRACTICES IN THE CODE OF FEDERAL REGULATIONS<sup>20</sup>



First: How do they work? I answer the question doctrinally and through case studies. Because almost all of the horizontal modeling done through best practices is done voluntarily,<sup>21</sup> traditional administrative law doctrine offers almost no restraints on agencies inclined to

<sup>19</sup> See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 354 (1998). In Dorf and Sabel's view, regulators might even require participation in such programs. *Id.* at 349 ("[T]he administrative agency . . . would treat obstruction of benchmarking as a violation of the obligation to exchange information accepted as a condition for obtaining national funds for experimental purposes.").

<sup>20</sup> This chart shows the results of a search for the term "best practice!" conducted in Westlaw's Code of Federal Regulations database in January 2005.

<sup>21</sup> Or at least voluntarily as a formal matter. I problematize the voluntariness of best practices in Part III, *infra*.

regulate through best practices. Moreover, best practices regulations are generally unreviewable by courts.

Doctrinally, then, best practices schemes are radically different from traditional administrative law. They proceed without judicial supervision and they operate outside the familiar framework of the Administrative Procedure Act (APA). I give content to the way best practices work in practice through case studies. One regulatory program I consider—the Environmental Protection Agency's (EPA) best management practices scheme to control run-off water pollution—has turned to best practices, not just to solve a particularly intractable environmental problem, but also to strike a new balance between federal and state environmental regulation.<sup>22</sup>

Second: Why now? Best practices stem from a popular new model for bureaucracies, premised on the idea that they ought to be run like businesses. While their corporate origins make this big-government-fearing time a particularly opportune one for best practices, there is more to the best practices moment. A crucial part of their popularity stems from globalization—their horizontality in an increasingly horizontal and multilateral world. Horizontal harmonization has had particular valence in the international arena, where domestic regulators have sought to coordinate their approaches with their international counterparts. Best practices are the tools used to enact this coordination.

From these corporate origins and international currency, best practices have spread to more traditional areas of domestic administrative action. I characterize the process as the move of a regulatory tool from anarchic arenas—markets and global politics—to domestic ones, which are subject to legislative and regulatory control.

Third: When should they be used? The question requires a balancing of the costs and benefits of best practices, which in turn calls for an accurate descriptive—that is, social scientific—sense of what best practices actually do.

The chief advantages of best practices lie in their low administrative cost and their surprising effectiveness as a tool of harmonization. Regulators can avoid the burdens of APA-style rulemaking, with

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<sup>22</sup> Scholars have argued about whether state-driven or federal-driven environmental protection is more desirable. Compare Scott R. Saleska & Kirsten H. Engel, "Facts Are Stubborn Things": An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 CORNELL J.L. & PUB. POL'Y 55, 60–61 (1998) (finding that "some states engage in a race-to-the-bottom [and] relax their standards in order to attract industry"), with Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 556 n.2, 583 (2001) (arguing that state environmental regulation is effective—perhaps more effective than federal regulation).

notice, comment, and judicial review, through best practices rulemaking.<sup>23</sup> At the same time, although voluntary, best practices offer a strong compliance pull.<sup>24</sup> They help regulators and regulated entities make sense of technical areas of regulation by circumventing some of the challenges of Fessian-style reasoned deliberation with more straightforward cut-and-paste policy dissemination.<sup>25</sup>

However, because best practices depend on copying, regulators in best practices regimes are susceptible to cascades and other network effects.<sup>26</sup> The paradigm is to keep up with the Joneses, instead of doing the Joneses one better.

Accordingly, best practices may work best when thought of as *second-best* practices. Rather than achieving ideals, the process of copying that marks best practices makes them well-suited for achieving sameness. But sameness—even sameness with suboptimal standards—has its own attractions. Best practices might be appropriate for areas where a standard administrative scheme across jurisdictions is particularly desirable, either for the usual reasons of

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<sup>23</sup> Sometimes courts are involved with the development of best practices, but often in only a tangential way; some regulated actors may develop best practices in part to avoid litigation—although, as Susan Sturm notes (and she is otherwise sympathetic to best practices), “lawyers counsel clients not to collect data that could reveal racial or gender problems or to engage in self-evaluation, because that information could be used to establish a plaintiff’s case.” Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 476 (2001). And sometimes private parties may take best practices data and try to use it in litigation. See Brandon L. Garret & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261, 316 (2004) (noting incorporation of best practices into corporate consent decrees resulting from employee litigation).

<sup>24</sup> As James Surowiecki has observed, “aggregation”—through, say, best practices—is . . . paradoxically important to the success of decentralization. . . . It’s possible . . . to have collective decisions made by decentralized agents once practices are aggregated.” JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 75 (2004).

<sup>25</sup> For a celebration of reasoned deliberation as a mode of lawgiving designed to elucidate public values and as a particularly important feature of judging, see Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11–12 (1979). See also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984). However, it is by no means clear that judges so act. See David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1060–61 (2004) (recounting occasions where judges simply adopted orders of other judges, or agreed to orders by parties without written deliberation).

<sup>26</sup> Networks and information cascades are related phenomena that, in this context, depend upon some regulators standardizing their conduct to that of other regulators. Cascades can result when regulators choose to follow the practices of other regulators independent of their own information. See *infra* notes 122–24 and accompanying text. Networks traditionally involve standardization around some technology that has the chief advantage of being popular, regardless of its utility, such as VHS VCRs, QWERTY keyboards, or the heating or cooling services offered by the local power company. Here I use it, as do many global administrative law scholars, to describe the semi-formal links that exist between regulators. See *infra* notes 39, 109, 119.

predictability and avoiding regulatory arbitrage, or, less obviously, in areas of regulation that are complex, resource-intensive, and open to a wide range of approaches. Here best practices can lessen the burden on local regulators by providing them with regulatory recipes, as opposed to leaving them in the lurch with broad regulatory authority and taxing regulatory problems.

Congress and the agencies themselves can help to make the use of best practices a little better, too. Congress can provide regular oversight over important best practices initiatives. And agencies can be sure that their more obscure resorts to best practices rulemaking are done publicly, if not necessarily through the familiar publicization procedures of the APA.<sup>27</sup> As best practices rulemaking, along with other forms of horizontal, informal agency action, continues to grow, and grow apart from judicial supervision, Congress may ultimately wish to point the way to appropriate publicity and forms of consultation through an "Informal Administrative Procedure Act."

In Part II of this article, I situate best practices in the legal literature on innovations in administrative law. In Part III, the crux of the article, I discuss the doctrine, history, and costs and benefits of best practices. In Part IV, I illustrate how best practices work with a detailed study of the Clean Water Act's nonpoint-source-pollution regime; in Part V, I analyze other examples of best practices in action, ranging from welfare reform to homeland security.

In Part VI, I consider some of the implications of best practices and make a recommendation about where they might be most effective. Although I problematize best practices in this article, I conclude that they should be cautiously tolerated so long as Congress provides some supervision or regulators take care to ensure that best practices are publicized, and, when necessary, subject to informal comment by interested parties. A disclosure-oriented approach to best practices rulemaking is likely to achieve this sort of supervision.

Leading by example rather than by rule is an increasingly pervasive form of administration, a new solution to an old problem of administrative law, and one that extends across the federal bureaucracy.<sup>28</sup> Best practices are no doubt strange beasts. As nonmandatory rules capable of securing widespread compliance, their effectiveness

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<sup>27</sup> The Internet is a particularly useful vehicle for the dissemination and publicization of best practices.

<sup>28</sup> And, indeed, internationally as well. For examples of this sort of informal cooperation in the international financial regulation sector, see generally Zaring, *supra* note 5, and David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

calls sharp distinctions between hard and soft law<sup>29</sup>—let alone public and private law<sup>30</sup>—into question. Nonetheless, they are part of a larger trend of informal, disaggregated rulemaking that appears not just in agencies, but in courts, and between nations. I close with some general observations about this new way of rulemaking.

## II

### THE NEW RULEMAKING SCHOLARSHIP: AWAY FROM THE AGENCY

A theoretical consideration of the spread of best practices into administrative law (or, indeed, any other sort of law) is, with one exception, surprisingly absent from legal scholarship. In this Part, I address where such a consideration might fit in the skein of writing on administrative law. While some scholars patrol the limits of *Chevron* deference,<sup>31</sup> and others try to reconceptualize congressional control of

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<sup>29</sup> In international legal scholarship, “soft law” has traditionally denoted law that falls short of the classical definition of international law. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 587 (2005). Andrew Guzman has cautioned that some use the term to describe rules that meet the classical definition but that are imprecise or weak. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1879 n.197 (2003); see also Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 414 n.7 (1983) (“It would seem better to reserve the term ‘soft law’ for rules that are imprecise and not really compelling, since sublegal obligations are neither ‘soft law’ nor ‘hard law’: they are simply not law at all.”). But Guzman has criticized the term, see Guzman, *supra*, at 1881–82, and Kal Raustiala has proposed abandoning it as a concept in international law (he instead would characterize it as a pledge—as distinct from a treaty-type contract). See Raustiala, *supra*, at 587.

<sup>30</sup> Although best practices are issued by public entities, they often are devised through observation of the work of private entities, or the counsel of experts. Best practices make distinctions between public and private forms of law increasingly difficult to draw.

<sup>31</sup> See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1997) (arguing that courts should only permit agency interpretations of their own regulations to be authoritative after examining “thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control” (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944))). As Manning says, “the Court should presume that a delegation of lawmaking authority to agencies does not include the power to interpret regulatory texts authoritatively.” Manning, *supra*, at 681. Thomas Merrill and Kathryn Watts, on the other hand, think that the Court’s recent limitation of *Chevron*—it only applies if “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law,” *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)—usefully circumscribed *Chevron* deference and was consistent with congressional practice. In ascertaining the boundaries of *Chevron*, Merrill and Watts argued that the crucial question was whether Congress authorized sanctions for noncompliers. Only “rulemaking grants coupled with a statutory provision imposing sanctions on those who violate the rules were understood to authorize rules with the force of law; rulemaking grants not coupled with any provision for sanctions were understood to authorize only interpretive and procedural rules.” Thomas

bureaucratic action with reference to the political science literature,<sup>32</sup> I situate this paper in a new wave of scholarship that explores new methods of agency action.

This new scholarship is about alternatives to APA rulemaking: mechanisms such as administration through public-private partnerships, through international agreement, or via executive branch coordination through the White House.

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W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 469 (2003). Matthew Stephenson, by contrast, has recently suggested an expansion of the boundaries of *Chevron*. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 168 (2005) (advocating giving agencies deference “to make a specific, explicit decision as to whether a private enforcement action is appropriate and what form that action ought to take”—thereby permitting them, through notice and comment rulemaking, to expand boundaries of court jurisdiction). Thus, the debate over the limits of deference to agency interpretations of statutes is far from over.

<sup>32</sup> Positive political theorists, for example, have conceptualized the chief ways that Congress might supervise agencies in two ways: through “police patrol” and “fire alarm” oversight. Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43 (1994) (“Positive political theory describes regulatory policymaking as a part of a world in which political actors function within institutions rationally and strategically in order to accomplish certain goals.”). As Arthur Lupia and Matthew McCubbins have explained:

Police-patrol oversight is the centralized and direct approach to uncovering hidden knowledge and is what most people think about when they discuss the oversight function of legislatures. An example of police-patrol oversight is a legislator who personally conducts an audit of agency activity. Fire-alarm oversight, on the other hand, is relatively passive, indirect, and decentralized. Legislators who conduct fire-alarm oversight establish a system of rules, procedures, and informal practices that enable [interested third parties] to examine administrative decisions . . . [and] to seek remedies from agencies, courts, and [the legislature] itself.

Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96, 97 (1994) (citations and internal quotation marks omitted). The catchy terms come from Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). For an overview by an administrative scholar, see generally Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994). McCubbins and his co-authors, as well as those who have followed them, have tended to conclude that congressional supervision of agencies is relatively effective. Indeed, they have argued that administrative procedure, by requiring a certain level of disclosure of agencies, was enacted by a rational Congress concerned with ensuring the efficacy of fire-alarm-style oversight:

Fire alarm oversight also requires that elected officials, once the fire alarm has sounded, investigate conflicting claims among constituent groups and an agency. To undertake this function, elected officials must have ready access to relevant information . . . The APA helps to ensure that this information is provided through the openness provisions and the requirement that agencies allow affected parties to participate.

McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 199 (1990).

This Article departs from the new administrative law literature by looking within the bureaucracy itself rather than looking to rulemaking innovations outside of agencies. I show that agencies are doing rulemaking differently, rather than abandoning the process to presidential initiative, private contract, or the international arena.

This new frontier of scholarship is not concerned with classical APA-style administrative law, pursuant to which agencies are delegated authority by Congress, which they use to either make rules or adjudicate disputes,<sup>33</sup> subject to deferential judicial review.<sup>34</sup> Other, more traditional writers have devoted their attention to critiquing the current state of this familiar process.<sup>35</sup>

Instead, the new scholarship focuses on the portion of the administrative state that exists outside the APA. Some of these writers highlight the importance of the President in coordinating and kick-starting administrative action.<sup>36</sup> Indeed, recent empirical work has concluded that the White House is and, it is argued, should be a principle source of bureaucratic initiative.<sup>37</sup>

Other scholars, in contrast, look to the private sector for assistance with rule generation. Some have considered the potential of

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<sup>33</sup> JERRY L. MASHAW & RICHARD A. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 48–49 (2d ed. 1985).

<sup>34</sup> As most lawyers know, the APA provides for judicial review of agency rulemakings or adjudications that have the force of law. See 5 U.S.C. §§ 701–06 (2000); see also *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (“The theoretical justification for judicial review of agency action is grounded in concerns about constraining the exercise of discretionary power by administrative agencies.”). Judicial review concerns itself with agency decisions that are arbitrary, capricious, or otherwise inconsistent with the law. However, under the leading rulemaking case *Chevron v. NRDC*, “[i]f the intent of Congress is clear,” a court “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). On the other hand, if “Congress has not directly addressed the precise question at issue,” and the agency has acted pursuant to an express or implied delegation of authority, the agency’s statutory interpretation is entitled to deference, as long as it is reasonable. *Id.* at 843–44.

<sup>35</sup> For example, a number of scholars have criticized the *Chevron* presumption. To list just a couple of the greatest hits of *Chevron*-was-wrongly-decided-style criticism, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986), criticizing some courts for applying *Chevron* too liberally, and Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), arguing that *Chevron* fundamentally alters conceptions of separation of powers and legitimacy.

<sup>36</sup> Kagan, *supra* note 1, at 2246 (“[A]t different times, one [governmental entity] or another has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency. We live today in an era of presidential administration.”).

<sup>37</sup> Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) (“[T]he White House clearly has used rulemaking review to put its own mark on particular agency rules increasingly often over the course of the past two decades, and at an accelerated pace during the Clinton administration.”).

negotiated rulemaking.<sup>38</sup> Others have turned to the contracting out of government services as a new source of norm generation.<sup>39</sup>

Finally, many writers have turned their attention to the growing importance of international regulation, which imposes new requirements on domestic rulemaking.<sup>40</sup> The interest in international regulation is understandable. After international agreement, the domestic rulemaking that follows is the train that follows the engine: Although it may look like any other form of administrative action, its outcome is preordained by what has already happened abroad.<sup>41</sup>

These scholars, whether presidentialists, privatists, or internationalists, are part of a distinctive new approach to administrative law scholarship because of their focus on alternatives to APA rulemaking.<sup>42</sup> However, in turning away from the APA, these scholars risk giving short shrift to the resources of the agency. Agencies are still fertile ground for new, if different, forms of rulemaking. Best practices are not negotiated with the private sector. They require neither compliance with contracting rules, nor White House initiative or supervision. They are used domestically and internationally. In fact, rather than representing an innovation of rulemaking from outside the administrative state, best practices are a bid for flexibility and informality by the agencies themselves.<sup>43</sup>

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<sup>38</sup> See, e.g., Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1457 (1997) (“In my view, reg neg is by far the most innovative and revolutionary aspect of [administrative law] ADR.”). Jody Freeman, *supra* note 2, at 7, was another recent exponent of “reg-neg,” although Richard Stewart long ago considered the promise of the concept. See, e.g., Richard B. Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1341 (1981).

<sup>39</sup> Freeman, for example, has since explored the promises and pitfalls of administration through privatization. Freeman, *supra* note 3.

<sup>40</sup> Richard Stewart, along with Benedict Kingsbury and Nico Krisch, has examined and provided a typology of means of controlling international regulation, a vast and developing subject. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* 7–10 (IILJ Working Paper No. 2004/1, 2004), available at <http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf>. He and his co-authors have asked what procedural safeguards we might imagine applying to these new sources of administrative rules—and have approached the new international collaboration with caution. *Id.* at 6, 36–37.

<sup>41</sup> Anne-Marie Slaughter has done the most interesting work on elucidating the promise, and potential supervision, of the networks that increasingly characterize this form of regulation. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 28 (2004).

<sup>42</sup> See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345 (2004) (noting that under new thinking in administrative law, “[s]caling up, facilitating innovation, standardizing good practices, and encouraging the replication of success stories from local or private levels become central goals of government”).

<sup>43</sup> One member of the Federal Reserve Board notes that “best practices is a dynamic, not a static concept” that “must get better over time.” Laurence H. Meyer, *Increasing*

As such, they are a particularly interesting innovation. But, in examining best practices, this article is almost alone in the legal academy. Only Charles Sabel and Michael Dorf have spent any time considering the phenomenon, which they see as a way to implement their “democratic experimentalism,” a felicitous phrase meant to celebrate the governance of government institutions by small-scale public-private partnerships.<sup>44</sup> In Dorf and Sabel’s scheme, one role played by national agencies is to “set rolling best-practice rules,” or regularly updated guidelines for regulated entities.<sup>45</sup> Central administrators then have the choice to adopt the practices as hard rules or to leave the best practices as informal guidelines.<sup>46</sup>

Best practices, to Dorf and Sabel, are a tool in this rather informal administrative scheme—one that emphasizes devolution, public-private partnerships, and an ethic of constant jawboning and cooperative relationships. To them, best practices are part of a scheme that, all told, suggests the corporatist sort of supervision more associated with Europe than the United States.<sup>47</sup>

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*Global Financial Integrity: The Roles of Market Discipline, Regulation, and Supervision*, 18 CATO J. 345, 345 (1999).

<sup>44</sup> Dorf & Sabel, *supra* note 19, at 354. Bradley Karkkainen has also surveyed the use of best practices in environmental law. See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?* 89 GEO. L.J. 257, 305–06 (2001) (noting failure of best practices program in chemical industry); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 946–47 (2001) (proposing that agencies “be required to submit a periodic report (perhaps annually or biennially) identifying and characterizing ‘best practices’ in environmental impact assessment and monitoring. These best practices would establish benchmarks against which to gauge agency performance and to encourage widespread diffusion of successful approaches.”); see also Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 829, 833–34 (2000) (drawing parallels between drug treatment courts and other forms of experimentalist government).

<sup>45</sup> Dorf & Sabel, *supra* note 19, at 350. In doing so, “[a]gency staff, observing (or more properly, participating in the activity of) the regulated entities first-hand, develop a strong sense of emerging processes, and by pooling knowledge of these processes with staff at other locations, agencies can identify emerging best practices.” *Id.* at 354. Dorf and Sabel think that best practices can be technology forcing if they are endorsed through hard rules. Accordingly, to set nationwide standards, “rules require regulated entities to use processes that are at least as effective in achieving the regulatory objective as the best practice identified by the agency at any given time.” *Id.* at 350.

<sup>46</sup> *Id.* at 350. Otherwise, regulated entities or localities are left to their own devices to come up with solutions to regulatory problems, ideally through collaboration with the stakeholders to any problem themselves. I do not think that this sort of rulemaking, by making the best practice the standard, is common.

<sup>47</sup> Corporatism is capable of a number of definitions: To put it slightly sociologically, it represents a Mitteleuropean structure of government that collects stakeholders in a single decisionmaking structure, in which each of them has a voice, and all of them together have a monopoly. Philippe Schmitter defines “corporatism” as:

But it isn't clear that Dorf and Sabel's model accurately describes how best practices really work. The problem in reconciling an ideal of democratic experimentalism and a methodology of best practices is that it is never clear how much experimentalism is actually occurring in a best practices regime. Dorf and Sabel suggest that best practices will constantly be revisited and improved, but it is not clear where the impetus for such constant improvement will come from in an unorganized, disaggregated system.<sup>48</sup> Once an agency has identified a best practice, how many feel capable of departing from it? And, in light of what we know about network effects and information cascades, how often do grassroots bureaucrats really depart from nationwide norms to pursue their own forms of experimentalism?

As we shall see, in the technical areas in which best practices are most often used, the answer is rarely. Instead, best practices are better understood as a method of coordinating and harmonizing regulatory practice, rather than as a way of disaggregating and roiling it.

### III BEST PRACTICES: WHAT THEY MEAN, HOW WE GOT THEM, AND WHY THEY WORK

Although agencies increasingly operate through best practices, the term has never been defined with precision. Congress has not weighed in on its exact meaning.<sup>49</sup> The Supreme Court has not either,

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a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and support.

Philippe C. Schmitter, *Still the Century of Corporatism?*, in TRENDS TOWARD CORPORATIST INTERMEDIATION 7, 13 (Philippe C. Schmitter & Gerhard Lehmbruch eds., 1979) (citations omitted). The model might be a German manufacturing concern, in which the unions and the banks have seats on the board of directors—suggesting strong interests that have been in place for some time. Corporatism has a bad reputation in the United States, in part because it doesn't provide for exit. See also Freeman, *supra* note 2, at 84–85 (discussing drawbacks of corporatism).

<sup>48</sup> Dorf and Sabel believe that the impetus for updated best practices will come from the agency itself, which will promulgate “rolling best-practice rules. . . [that] require regulated entities to use processes that are at least as effective in achieving the regulatory objective as the best practice identified by the agency at any given time.” Dorf & Sabel, *supra* note 19, at 350 (emphasis removed). Although it is not clear to me that regulatory initiative to engage in this updating process will be enough to ensure continuous benchmarking, it is enough to note here that I look to the term as a choice for regulators—they may act through hard rules or best practices—while Dorf and Sabel see best practices as an aspect of an alternative regulatory system with sanctions for failure to adopt them.

<sup>49</sup> I am not aware of any statute in which Congress has defined what it means when it uses “best practices.”

though it has heard cases that turned in part on the meaning of best practices.<sup>50</sup> Nor does the term have a standard definition in the business management context where it originated; nor do agencies themselves, in most cases,<sup>51</sup> define how to identify a best practice.<sup>52</sup>

It is a curiosity. Best practices have an important future as a mechanism of administrative procedure, but remain imprecise, moving targets for lawyers (and not just because the term is meant to be a malleable and adaptable one).

To agencies, I think, best practices do mean something in particular, although it is something that the agencies themselves rarely express. What they don't say is that best practices represent a new type of organization of regulation—an organization that occurs without much centralized direction, but rather through shared learning. At their core, best practices are accordingly a form of *regulation through horizontal modeling*.

Thus in a classic best practices scheme, regulated entities, be they local governments or industries, devise practices to comply with relatively unspecific regulatory requirements. These practices are selected and publicized, but are not mandated, by central administrators. They may be subsequently adopted by other regulated entities.

Consider the example of the EPA's best practices program under the Clean Water Act. Congress has instructed the Agency to oversee a process whereby states devise "best management practices" to deal with run-off from fields and cities that finds its way into navigable waters.<sup>53</sup> These best management practices are left undefined by the authorizing statute and the agency.<sup>54</sup> Moreover, states are not required to adopt *any* best management practices under the Act. For those that do, states, rather than the EPA, are charged with identifying the practices. The EPA's role is simply to serve as a receptacle for reports that identify the practices and to share these practices with other states.<sup>55</sup>

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<sup>50</sup> See *infra* notes 57–61 and accompanying text.

<sup>51</sup> The Department of Housing and Urban Development (HUD) is one of the few federal agencies that has defined best practices. See *infra* notes 187–95 and accompanying text.

<sup>52</sup> But see *infra* Part V.A (discussing HUD's somewhat unusual definition of best practices). I asked a number of legal and other academics who used the term if they had a view of what it meant. Their answers varied. One emphasized that best practices were not matters of logic, but rather of experience. Another thought it was important to note that they were not meant to constrain a regulator charged with finding them.

<sup>53</sup> 33 U.S.C. § 1329(b)(2)(A) (2000).

<sup>54</sup> *Id.*

<sup>55</sup> It also encourages the adoption of the practices, sometimes through funding, as I discuss in Part IV, *infra*.

As I show, best practices are not subject to review by courts and are only sometimes reviewed by Congress. They accordingly represent a disaggregated form of regulation managed very much by the regulators themselves. The concept is inspired by practice in business management and experience with efforts to harmonize regulations internationally.

As such, best practices may be considered a low-cost method of standardizing administrative practice. Due to network effects and the rational ignorance of regulators, the method is often surprisingly effective.

#### A. *(Non)Supervision of Best Practices by Courts and Congress*

Traditional administrative law offers almost no restraints on agencies inclined to promulgate best practices instead of rules, making the tool an appealing one for administrators concerned about the prospect of judicial review.<sup>56</sup> Nor has Congress, the other branch of government that oversees agencies, provided complete supervision of best practices—by, for example, defining what they are, when it thinks they should be used, or what remedies, if any, exist for parties aggrieved by best practices rulemaking. Nonetheless, some evidence suggests that as agencies increasingly turn to informal rulemaking that is beyond judicial review, Congress has required them to report on the fruits of their informal approaches. In the Conclusion to this Article, I will eventually argue that a blend of congressional supervision, together with self-regulation by agencies, offers a reasonable, if not perfect, approach to the use of best practices. Here, I describe the forms that such supervision currently takes.

Best practices may be understood as the first, generally unregulated step in a two-step regulatory process. First, agencies develop the practices informally, largely by copying one another. Second, they implement the practices more formally, as something of a *fait accompli*.

Because best practices are not issued as mandatory rules, they are generally unreviewable by courts. The APA exempts “interpretative rules” and “general statements of policy” from its notice and comment

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<sup>56</sup> Instead of promulgating hard regulations, OSHA issues a metalworking fluid “Best Practices Guide . . . [that] is non-binding and unenforceable.” *Int’l Union v. Chao*, 361 F.3d 249, 252 (3d Cir. 2004) (permitting Agency to regulate through guide); *see also* *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (“When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.”).

requirements.<sup>57</sup> Federal courts have found that best practices are “non-binding and unenforceable,” and should therefore be treated differently from binding administrative rules.<sup>58</sup> I know of no case where a court has sanctioned an agency for failing to issue best practices through notice and comment, and no case where a court has reviewed agency statements of best practice for arbitrariness or capriciousness.

Nor have federal courts used the mere existence of a statement of best practices as a baseline of conduct that an agency must follow. Thus the failure of officials to follow best practices does not, without more, establish violations of substantive norms, such as when prison officials fail to follow already articulated best practices in their treatment of prisoners. The courts have not found that such failure raises constitutional concerns.<sup>59</sup> Nor have digressions from employee hand-

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<sup>57</sup> 5 U.S.C. § 553(b)(3)(A) (2000); *see also* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, J.) (finding that Labor Department’s “Enforcement Policy and Guidelines for Independent Contractors” announced agency’s tentative intentions for future, not present binding norm) (quoting Pac. Gas & Elec. Co. v. Fed. Power Comm’n, 506 F.2d 33, 38 (D.C. Cir. 1974)); Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975) (holding that INS policy was only guideline, as it did not change existing rights). For an overview analyzing nonlegislative rules that interpret existing legislation, see Robert A. Anthony, ‘*Interpretive*’ Rules, ‘*Legislative*’ Rules and ‘*Spurious*’ Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 6–8 (1994).

<sup>58</sup> Chao, 361 F.3d at 252.

<sup>59</sup> One court in particular has addressed the issue. The First Circuit has concluded that best practices are better than the bare minimum required by the Constitution, and therefore, the failure to follow best practices does not raise constitutional concerns. *See* Whiting v. United States, 231 F.3d 70, 76 (1st Cir. 2000) (“If the question were solely one of best practices, the right answer would likely be for the government to” follow a particular policy. “However, there is daylight between desirable policy and the bare minimum required by the Constitution.”); O’Neill v. Baker, 210 F.3d 41, 49 n.10 (1st Cir. 2000) (“[T]he Constitution requires only an initial check against erroneous decisions, not that the state follow best practices.”); Hennessy v. City of Melrose, 194 F.3d 237, 252 n.5 (1st Cir. 1999) (“Our concern, however, is with constitutional imperatives, not with best practices.”); *see also* Brief Amicus Curiae of the American Bar Association in Support of Petitioner at 2, Fellers v. United States, 540 U.S. 519 (2004) (No. 02-6320) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 5.1 cmt (1st ed. 1971)) (“Standards do not purport to set forth the ABA’s views on the requirements of the Constitution, including the Sixth Amendment right to counsel. However, they do represent a considered collection of ‘best practices’ for the criminal justice system, aspirational targets that an experienced group of prosecutors, defenders and judges have agreed upon.”). *But see* Olsen v. Layton Hills Mall, 312 F.3d 1304, 1328 (10th Cir. 2002) (Hartz, J., concurring in part and dissenting in part) (speculating that evidence of “‘best practices’ in other prisons” might constitute evidence of deliberate indifference (thus establishing violation of Eighth Amendment prohibition against cruel and unusual punishment) in particular prison that did not adopt comparable policies).

books that set forth best practices been held to be a possible basis for a showing of unequal treatment.<sup>60</sup>

Courts have accordingly been excised from administrative practice involving best practices,<sup>61</sup> and the lack of supervision means, at least theoretically, that agencies that use best practices may do so without fear of reversal by the judicial branch.<sup>62</sup>

If judicial supervision is unlikely for administration by best practices, one place to look for supervision would be from Congress. And while political scientists and legal scholars have found a new appreciation for the mechanisms of congressional supervision of agency action, best practices present some different problems.<sup>63</sup> Best practices schemes, for example, are often quite technical, while Congress and its staffers are generalists, interested in public relations as well as governance.

It is accordingly somewhat rare, though not unprecedented, for Congress to exercise much supervision over agency best practices work. Sometimes, Congress does supervise the creation of best practices, or rulemaking methods like them. For example, Congress has exercised some supervision over the nonbinding standards that domestic regulators agree to implement in conjunction with their international counterparts. In the area of international financial regulation, Congress passed a 1996 statute<sup>64</sup> that required the SEC to report to the Congress “on progress in the development of international accounting standards,” a project of the International Organization of Securities Commissions (IOSCO), an informal global collection of securities regulators.<sup>65</sup> IOSCO’s harmonization stan-

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<sup>60</sup> See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (holding that court may not impose remedy upon employer requiring it to adopt “best” practices available for enhancement of minority employment opportunities, because courts are “generally less competent than employers to restructure business practices”); *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002) (rejecting Title VII plaintiff’s claim that best practices were strictly enforced against plaintiff and not against other employees).

<sup>61</sup> Indeed, when courts do consider best practices, they frequently do so in the context of their own administrative responsibilities, such as in the oversight of institutional reform consent decrees. For example, the FBI has been encouraged to examine the “best practices” in promotional systems of other law enforcement agencies in other countries in the process of meeting its own obligations under a consent decree. See Laura Sullivan, *FBI Stagnant Under Freeze in Promotions*, BALT. SUN, June 11, 2004, at 1A.

<sup>62</sup> The lack of court involvement in best practices schemes may help to explain why administrative law scholars, who can be court-obsessed, have neglected the phenomenon.

<sup>63</sup> See *supra* note 32 and accompanying text.

<sup>64</sup> National Securities Markets Improvement Act of 1996 § 509(5), Pub. L. No. 104-290, 110 Stat. 3416, 3450 (codified as amended in scattered sections of 15 U.S.C. & 29 U.S.C.).

<sup>65</sup> SEC, REPORT ON PROMOTING GLOBAL PREEMINENCE OF AMERICAN SECURITIES MARKETS (1997), <http://www.sec.gov/news/studies/acctgsp.htm> (report pursuant to § 509). Congress asked for “the outlook for successful completion of a set of international stan-

dards include its Principles and Objectives of Securities Regulation, which are introduced through “some examples of *current practices*”—and IOSCO urges best practices on its members all the time.<sup>66</sup>

Congress has also considered (but not yet enacted) a similar sort of supervision for IOSCO’s counterpart in banking regulation standardization, the Basel Committee on Banking Supervision.<sup>67</sup>

I have written elsewhere that these sorts of steps, along with the sort of fire alarm and police patrol supervision<sup>68</sup> that Congress has always provided, suggest that best practices and other forms of horizontal regulation by agencies may offer reasonable alternatives to judicial supervision of agency rulemaking.<sup>69</sup> But although congressional oversight is one way to ensure some form of public imprimatur over best practices regulation, there is no guarantee that its supervision will always be exercised, for reasons of politics, distractions, and the usual problems of legislative supervision. In Part VI of this Article, I will suggest that Congress should consider exercising a more general form of supervision over best practices rulemaking.

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dards that would be acceptable to the Commission for offerings and listings by foreign corporations in United States markets.” For more on IOSCO generally, see Zaring, *supra* note 5, at 561–69.

<sup>66</sup> INT’L ORG. OF SEC. COMM’NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (1998), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf> (emphasis added). IOSCO has publicized various sorts of best practices fifty-one times since 1988. It has, for example, surveyed its members to find principles and best practice standards on infrastructure for decisionmaking for collective investment scheme operators, INT’L ORG. OF SEC. COMM’NS, SUMMARY OF RESPONSES TO THE QUESTIONNAIRE ON PRINCIPLES AND BEST PRACTICE STANDARDS ON INFRASTRUCTURE FOR DECISION MAKING FOR CIS OPERATORS (2000), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD107.pdf>, and urged them to adopt best practices based on the survey, INT’L ORG. OF SEC. COMM’NS, PERFORMANCE PRESENTATION STANDARDS FOR COLLECTIVE INVESTMENT SCHEMES: BEST PRACTICE STANDARDS (2004), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD169.pdf>. It has urged developing markets to adopt a set of best practices for financial risk management, INT’L ORG. OF SEC. COMM’NS, FINANCIAL RISK MANAGEMENT IN EMERGING MARKETS (1997), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD73.pdf> (Note section six where ten best practices are listed. These best practices are somewhat vague, containing statements like “[r]egulators should work together with market participants to establish and enforce risk management rules.”), and concluded, regarding insider trading, that “[b]est practice is that all the persons trading on inside information should be subject to sanctions.” INT’L ORG. OF SEC. COMM’NS, INSIDER TRADING: HOW JURISDICTIONS REGULATE IT 9 (2003), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf>.

<sup>67</sup> The proposed statute reads, in part: “No . . . banking agency . . . may agree to any proposed recommendation of the Basel Committee on Banking Supervision before the agency submits a report on the proposed recommendation to the Congress.” H.R. 2043, 108th Cong. (2003).

<sup>68</sup> See *supra* note 32 for an explanation of these now familiar terms of positive political theory.

<sup>69</sup> See generally Zaring, *supra* note 5.

### B. The Soft Rulemaking Zeitgeist

Why are legislators and regulators pursuing their administrative goals through best practices now, when New Deal and Cold War regulators did not? The term, after all, is not a new one. It was first used by Congress in a Depression-era statute creating a thrift regulator, after which the concept spent four decades in obscurity.<sup>70</sup>

The current popularity enjoyed by best practices in domestic administration may arise from its prominence in two other areas: (1) business management, and (2) international cooperation. In both cases the widespread use of the concept has led to harmonization in competitive, non-harmonious environments. In fact, international regulation and business management could hardly be less centralized. Thus, the sources of best practices also provide insights about their function—they create standardized approaches to regulatory projects, just not centralized ones.

Best practices are also consistent with a deregulatory agenda increasingly in vogue in both major political parties. Best practices thus are different from traditional administrative action not only in the form they take—outside the review requirements of the APA, and so on—but also because they are a novel procedural technique couched in the language of the private sector.<sup>71</sup>

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<sup>70</sup> The Home Owners' Loan Act of 1933 (HOLA) authorized the Office of Thrift Supervision to regulate savings and loans, "giving primary consideration of the best practices of thrift institutions in the United States." 12 U.S.C. § 1464(a) (2000). The Office of Thrift Supervision sums up the purpose of the statute as follows:

[I]nstead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, federal thrifts are free to originate loans under a single set of uniform federal laws and regulations. This furthers both the 'best practices' and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden.

Lending and Investment, 61 Fed. Reg. 50,951, 50,965 (Sept. 30, 1996) (to be codified at 12 C.F.R. pt. 560). I am indebted to Michael Malloy for help in understanding this point. See also *United States v. Gaubert*, 499 U.S. 315, 331 (1991) (concluding that statutory term indicated that regulators had discretion to supervise thrifts "through informal means"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 162 (1982) (interpreting term to give authority for federal regulations preempting state thrift rules). But see John P.C. Duncan, *The Course of Federal Pre-emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 318–19 (1999) (questioning validity of using "national uniformity" or "best practices" as rationale for preemption of state banking laws); James G. Kreissman, Note, *Administrative Preemption in Consumer Banking Law*, 73 VA. L. REV. 911, 941 (1987) (criticizing *de la Cuesta* and arguing that one may read HOLA as not allowing agency to preempt state authority).

<sup>71</sup> See, e.g., Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579, 1623 & n.123 (2002) (arguing that those who pushed for "boards to adopt and observe 'best practices,'" instead of hard judicial rules, subscribed to "social norms critique within academic corpo-

## 1. From Business to Government

In this Section I discuss the historical reasons why best practices have become conceptually available to regulators now. The question calls for an intellectual history of the term, which, as it turns out, did not originate in the bureaucracy. It was business managers who began to adopt best practices as a method of keeping up with their competitors in the late 1970s. The term was subsequently embraced and then urged on the government by management gurus in the 1990s.

The story of the modern vogue for best practices begins with a particularly difficult era for the Xerox Corporation. In the late 1970s, Xerox was rapidly losing market share<sup>72</sup> in the photocopier field that it had both created and long dominated. The problem was one of pricing. In 1979, Xerox found that its Japanese competitors "were selling machines for what it cost Xerox to make them," as one of its executives, Robert Camp, put it.<sup>73</sup>

This new reality spurred the company to examine systematically how its competitors were producing machines, which it called "quality and feature comparisons."<sup>74</sup> It then tried to match those quality and feature offerings that it deemed to be the "best" of its competitors.<sup>75</sup> Xerox called this process "benchmarking," which Camp defined as "the search for industry *best practices* that lead to superior performance."<sup>76</sup>

Xerox became one of America's corporate success stories in the 1980s, as it regained much of the market share that it had lost to its Japanese competitors.<sup>77</sup> As Xerox did better, management analysts began to study the reasons for its success, with an eye to advising their

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rate law more generally, [which] has been used as a rationale and justification for reduced legal enforcement—a position consistent with the 1990s enthusiasm for deregulation").

<sup>72</sup> At the time, "Xerox had lost 50 percent of its worldwide copier sales and revenues to Japanese copier manufacturers." William B. Slowey, *Benchmarking: Boon or Buzzword?*, ANTITRUST, Summer 1993, at 30, 30.

<sup>73</sup> ROBERT C. CAMP, *BENCHMARKING: THE SEARCH FOR INDUSTRY BEST PRACTICES THAT LEAD TO SUPERIOR PERFORMANCE* 7 (1989).

<sup>74</sup> *Id.* at 6; see also GARY JACOBSON & JOHN HILLKIRK, *XEROX: AMERICAN SAMURAI* 172 (1986) (describing these changes).

<sup>75</sup> Sometimes this would require the company to match its competitors in price, sometimes in the quality of the photocopiers offered. See CAMP, *supra* note 73, at 55–72 (describing process of identifying comparative companies for benchmarking comparisons).

<sup>76</sup> *Id.* at 12 (emphasis added); see also Joe Flower, *The Source*, HEALTHCARE FORUM J., Jan.–Feb. 1993, at 30, 32. (interview with Robert Camp). Camp traced the origins of the concept to "the Japanese word *dantotsu*, meaning striving to be the 'best of the best.'" CAMP, *supra* note 73, at 3.

<sup>77</sup> JACOBSON & HILLKIRK, *supra* note 74, at 3–4. Xerox CEO David T. Kearns then claimed that Xerox was "the first American company to regain market share against the Japanese." Marilyn A. Harris, *A You-Are-There History of Xerox's Comeback*, Bus. Wk., June 30, 1986, at 13 (reviewing JACOBSON & HILLKIRK, *supra* note 74).

clients on how they could improve their standing in competitive markets by matching the best practices of their competitors.

Central to this new way of looking to the practices of competitors for insights about how to reform one's own practices was the 1982 publication of Tom Peters and Robert H. Waterman, Jr.'s *In Search of Excellence*.<sup>78</sup> The book has been called "the first book to popularize the notion of best practice on a mass scale"<sup>79</sup> and "largely responsible for the development of best business practices research."<sup>80</sup>

Peters and Waterman took the benchmarking method developed by Xerox and applied it to a sample of sixty-two particularly successful companies in an effort to determine the most effective means of corporate management.<sup>81</sup> They distilled the practices they saw into "eight attributes" that they believed were followed by the best-run American companies.<sup>82</sup>

Peters and Waterman encouraged all managers to adopt these principles, which focused on flexibility, entrepreneurship, and a lean, nonbureaucratic management style.<sup>83</sup> While these principles were, like many management lists, open to a wide variety of interpretations (*In Search of Excellence* urges, among other things, a "bias for action,"<sup>84</sup> "[s]imple form, lean staff,"<sup>85</sup> and "simultaneous loose-tight properties"<sup>86</sup>), they, as a whole, tended to value the entrepreneurial and disaggregated over the more organized and rationalized model of American corporate governance at the time.

Peters and Waterman's book was a watershed in popular business management studies and is generally credited with popularizing the

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<sup>78</sup> THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982).

<sup>79</sup> Sarah Kaplan, Commentary on Taking Strategy Seriously: The Seduction of Best Practice, (Feb. 7, 2003) (unpublished manuscript), available at <http://www-management.wharton.upenn.edu/kaplan/documents/kaplan-jmi-seduction%20of%20best%20practice-020703.pdf>. The search for ideal practice, of course, was not unfamiliar to earlier generations of management scholars. Consider Frederick Taylor's work on scientific management of factory production, which was concerned with identifying successful operations and the elements that made them successful. See generally FREDERICK WINSLOW TAYLOR, *The Principles of Scientific Management*, in SCIENTIFIC MANAGEMENT 5, 7 (1911). Taylor believed that practices proven most efficient should be standardized, while any inefficient aspects should be identified and eliminated. See *id.*

<sup>80</sup> Basu Sharma, *Distinguishing the Best from the Rest*, 2 J. COMP. INT'L MGMT. (1999), available at [http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol2\\_1/&filename=Sharma.html](http://www.lib.unb.ca/Texts/JCIM/bin/get.cgi?directory=vol2_1/&filename=Sharma.html).

<sup>81</sup> PETERS & WATERMAN, *supra* note 78, at 19–26 (describing methodology).

<sup>82</sup> *Id.* at 13–16.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 13, 119.

<sup>85</sup> *Id.* at 14, 306.

<sup>86</sup> *Id.* at 14, 318.

"best practices" approach to management reform by comparison.<sup>87</sup> Peters still lectures on best practices, as do lots of other business advice-givers.<sup>88</sup>

The popularity of best practices in business, and their purpose—the emulation of the competition—is not without its detractors.<sup>89</sup> After all, if all market participants follow the same best practices, then their products and processes will not look very different. It has accordingly been argued that best practices lead to a stifling of innovation—to copying among industry segments rather than competition.<sup>90</sup>

Nevertheless, some industries very explicitly use best practices to ensure that they are doing things the same way.<sup>91</sup> Bankers, for example, have attempted to harmonize the practices they use on international letters of credit.<sup>92</sup> Information technology professionals frequently use the term to establish common approaches as well.<sup>93</sup> In fact, best practices regulation of industry can usefully be thought of not just as an imitation of industry procedures, but as an adaptation of regulation that addresses a new and popular form of business organization.

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<sup>87</sup> See *supra* notes 79–80 and accompanying text.

<sup>88</sup> One speaker's bureau has assembled approximately forty CEOs and presidents of "best practices corporations" to talk to their peers about their successes. See Big Speak, Best Practices Speakers, <http://www.bigspeak.com/topics/best-practices.html> (last visited Oct. 23, 2005) (listing best practices speakers). One popular business magazine editor has described his product as "about the best practices and most useful knowledge and understanding" for business managers. Dan Fost, *Editors of Fast Company, Business 2.0 Take Pot Shots at Each Other*, S.F. CHRON., Dec. 26, 2001, at B1 (quoting then Business 2.0 President and Editor Ned Desmond).

<sup>89</sup> See, e.g., H. GEORGE FREDERICKSON, EASY INNOVATION AND THE IRON CAGE: BEST PRACTICE, BENCHMARKING, RANKING, AND THE MANAGEMENT OF ORGANIZATIONAL CREATIVITY 2, 29 (Ilse Tebbetts ed., 2003); H. George Frederickson, *Review Essay: Some Policy Implications of the Federal Reinventing Government Report*, POL'Y CURRENTS, Feb. 1994 [hereinafter Frederickson, *Review Essay*], [http://www.fsu.edu/~spap/orgs/old%20files/apsa/vol4\\_no1/freder.html](http://www.fsu.edu/~spap/orgs/old%20files/apsa/vol4_no1/freder.html).

<sup>90</sup> In fact, a number of lawyers have expressed concern that businesses that follow best practices may be vulnerable to antitrust claims. See, e.g., Slowey, *supra* note 72, at 31.

<sup>91</sup> See Boris Kozolchyck, *The 'Best Practices' Approach to the Uniformity of International Commercial Law: The UCP 500 and the NAFTA Implementation Experience*, 13 ARIZ. J. INT'L & COMP. L. 443, 444 (1996) (examining letter of credit practice in banking industry).

<sup>92</sup> *Id.* at 446–48. Best practices "help[ ] banks stay away from courts and unlike other sources of the law, the mechanism does not tolerate desuetude. Once its provisions are dead letter (and this may happen quickly, at times within years of their selection) they are unceremoniously disposed of and, if necessary, replaced." *Id.* at 461.

<sup>93</sup> The General Accounting Office has recognized this. See, e.g., GEN. ACCOUNTING OFFICE, INFORMATION TECHNOLOGY: GREATER USE OF BEST PRACTICES CAN REDUCE RISKS IN ACQUIRING DEFENSE HEALTH CARE SYSTEM 3 (2002) (finding that Department of Defense has made progress in acquiring information technology systems "due in part to its attention and commitment to adopting certain acquisition management best practices").

Keeping up with the competition is not something that federal officials would seem to need to worry about. Nonetheless, despite the real differences between public agencies and private firms, scholars and reformers devised theories of public management in the 1990s that sought to structure public agencies more like private firms.<sup>94</sup>

Accordingly, efforts in the 1990s to reform government practice relied heavily on these private management-inspired theories.<sup>95</sup> David Osborne and Ted Gaeblер's influential book *Reinventing Government*—a title used by Vice President Al Gore to brand his efforts at bureaucratic reform<sup>96</sup>—for example, praised Peters and Waterman's work.<sup>97</sup> Adopting the latter pair's private sector recommendations for the public sector, Osborne and Gaeblér argued for a

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<sup>94</sup> One such model is the "New Public Management," an approach popularized in the 1990s. The "Clinton Administration adopted the rhetoric and conceptual approach of the 'New Public Management,' which proposes to organize public bureaucracies more like private firms." Freeman, *supra* note 3, at 1293. As Graeme Hodge explains:

The central tenets of this new doctrine . . . emphasize management skills, quantified performance targets, devolution, the separation of policy, commercial and noncommercial functions, the use of private sector practices . . . , monetary incentives, and cost cutting. Importantly, the new public management also emphasizes a preference for private ownership, and the use of contracting out and contestability in the provision of public services.

GRAEME A. HODGE, *PRIVATIZATION: AN INTERNATIONAL REVIEW OF PERFORMANCE* 40 (1999). The World Bank's Nick Manning offers an overview of New Public Management, with an emphasis on its effect on civil service reform in developing countries. Nick Manning, *The Legacy of the New Public Management in Developing Countries*, INT'L REV. ADMIN. SCI. 297 (2001); see also E.S. Savas, *Privatization and the New Public Management*, 28 FORDHAM URB. L.J. 1731, 1736 (2001) (focusing on domestic versions of New Public Management). Business strategists themselves also recommended that the public sector adopt best practices-style benchmarking. CHRISTOPHER E. BOGAN & MICHAEL J. ENGLISH, *BENCHMARKING FOR BEST PRACTICES: WINNING THROUGH INNOVATIVE ADAPTATION* 233–40 (1994) (surveying "Benchmarking in the Public Sector," including "Desert Express," which was Air Force division that shipped spare parts to forces during first Gulf War using logistics models of Federal Express, and City of Dallas's regular evaluation of practices of twelve comparable municipal governments in effort to emulate their most successful works and projects).

<sup>95</sup> DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 11–12, 131–35 (1992).

<sup>96</sup> As George Frederickson has observed, "*Reinventing Government* has become virtually a handbook for candidates for both legislative and executive offices at the state and local levels." Frederickson, *Review Essay*, *supra* note 89, at 1–3; see also Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96, 99 & n.16 (2003) (citing OSBORNE & GAEBLER, *supra* note 95, as example of recent argument for bureaucratic reform). Moreover, Osborne was a staff member on the National Performance Review that was chaired by Gore. Nancy J. Knauer, *Reinventing Government: The Promise of Institutional Choice and Government Created Charitable Organizations*, 41 N.Y.L. SCH. L. REV. 945, 952 n.41 (1997).

<sup>97</sup> OSBORNE & GAEBLER, *supra* note 95, at 132–33.

decentralized and entrepreneurial form of government.<sup>98</sup> Osborne and Gaebler even adopted the same sort of aphorisms and anecdotal evidence that characterize Peters and Waterman's methodology. By identifying successful public management innovators, they hoped to reinvent government and "turn bureaucratic institutions into entrepreneurial institutions."<sup>99</sup> As George Frederickson has observed of Osborne and Gaebler, "these doctrines are argued . . . on the observation of so-called best practices."<sup>100</sup>

The concept has remained popular in public administration ever since, among regulators at both the federal<sup>101</sup> and state<sup>102</sup> level. In the past four years, Congress has required agencies to identify such practices in numerous statutes, and agencies have done so of their own accord in numerous regulations.<sup>103</sup>

## 2. *Best Practices as a Tool of International Harmonization*

Another reason why best practices have become an increasingly common form of administrative action lies in their prevalence, or the prevalence of their cognates, in international regulation.<sup>104</sup> "Agencies like the Securities and Exchange Commission . . . and the Federal Reserve Board now play roles as international lawmakers," and, in turn, are familiar with the informal, horizontal process used by domestic regulators to establish international standards.<sup>105</sup>

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<sup>98</sup> Osborne and Gaebler, for example, urge that government should be "catalytic," meaning that it identifies problems and collects resources to be used in solving problems, but does not issue orders or directly act to solve the problems. OSBORNE & GAEBLER, *supra* note 95, at 25–37. They also urge it to be reorganized toward the profit motive, and their profits should be tied, therefore, to the earnings of their employees; this is called "enterprising government" that is earning rather than spending. *Id.* at 209–18 ("[W]e need incentives that encourage them to make money as well as to spend it.").

<sup>99</sup> OSBORNE & GAEBLER, *supra* note 95, at 23.

<sup>100</sup> H. GEORGE FREDERICKSON & KEVIN B. SMITH, THE PUBLIC ADMINISTRATION THEORY PRIMER 113 (2003).

<sup>101</sup> See *supra* notes 7–17 and accompanying text.

<sup>102</sup> Consider, for example, the National Governors Association, which has founded a Center for Best Practices that helps state executives "quickly learn about what works, what doesn't, and what lessons can be learned from other governors grappling with the same problems" and "learn about emerging national trends." NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, SERVICES FOR GOVERNORS AND THEIR STAFF 1, <http://www.nga.org/cda/files/cbpbrochure.pdf> (last visited Jan. 20, 2006).

<sup>103</sup> See *supra* notes 7–17 and accompanying text.

<sup>104</sup> See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 455 (2003) (discussing "international aspects of regulation," including "horizontal arrangements [which] involve informal cooperation among national regulatory officials to coordinate policies and enforcement practices" and "vertical arrangements [which] consist of treaty regimes that establish international regulatory rules and international organizations to secure their implementation through domestic measures").

<sup>105</sup> See generally Zaring, *supra* note 5, at 549.

Indeed, it may be fair to claim that most federal agencies liaise with their counterparts in other countries most of the time.<sup>106</sup> And international organizations of regulators use best practices explicitly and frequently in recommendations to their members.

In fact, one member of the Federal Reserve Board has suggested that best practices comprise an important part of the global project on the harmonization of banking regulation: “The central challenge of promoting the stability of the global banking system is sometimes viewed as bringing banking systems around the world up to best practice standards.”<sup>107</sup>

Rarely are such practices far from the minds of regulators in the international arena. As one observer has said of the Basel II Capital Accord (perhaps the crowning achievement of informal financial regulatory cooperation), “the proposed capital accord is about best practices.”<sup>108</sup>

As for high politics, we see best practices there as well—even in the war against terrorism. The United States and the European Union have committed to “shar[e] . . . best practices” to ensure their “maritime transport security requirements.”<sup>109</sup>

Informal regulatory collaboration, and common agreement on nonbinding standards is an explosively popular form of international agreement; it engages regulators in a number of different issue areas. Similar regulatory cooperation in antitrust,<sup>110</sup> food and drug regula-

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<sup>106</sup> *Pace* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979) (“[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”).

<sup>107</sup> Meyer, *supra* note 43, at 345.

<sup>108</sup> Jean Haggerty, *Banks Test Operational Risk Tools*, INT’L FIN. REV., July 26, 2003, at 43, <http://www.zyen.com/Press/Press%20Coverage/IFR%20Article%20on%20PropheZy%20-%20Banks%20Test%20Operational%20Risk%20Tools%20-%202026.07.03.htm>.

<sup>109</sup> U.S. Dept of State, Text of U.S.-E.U. Declaration on Combating Terrorism (June 26, 2004), <http://www.state.gov/p/eur/rsl/fs/36892.htm>.

<sup>110</sup> In 2002, the U.S.-E.U. Merger Working Group announced a set of best practices for coordinating merger investigations. U.S.-E.U. MERGER WORKING GROUP, U.S. DEPT. OF JUSTICE, BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS (2002), <http://www.usdoj.gov/atr/public/international/docs/200405.pdf>. The best practices were developed by a joint working group of staff lawyers and economists from the U.S. Department of Justice, the Federal Trade Commission, and the E.U. Competition Commission. See Press Release, United States Mission to the European Union, U.S., E.U. Issue Guidelines for Merger Review Process (Oct. 30, 2002), <http://www.useu.be/Categories/Antitrust/Oct3002USEUMergerReviewGuidelines.html>. As one observer has concluded of antitrust best practices, “[m]any of the best practices memorialize and make more transparent practices that have been in place informally for quite some time.” R. Hewitt Pate, *Antitrust Enforcement at the United States Department of Justice: Issues in Merger Investigations and Litigation*, 2003 COLUM. BUS. L. REV. 411, 418. Nor is it limited to the United States and Europe. The International Competition Network of antitrust regulators, which includes “more than 80 agencies from over 70 jurisdictions, among them the competition authorities

tion,<sup>111</sup> telecommunications,<sup>112</sup> and other areas has resulted in an epidemic of standardization.<sup>113</sup> These efforts are unsurprising in the international system, which is famously anarchic and not subject to command and control by a world government. Indeed, an international effort at regulatory cooperation that did not rely on suggestion and modeling would be a surprising one. The anarchic nature of the world system may explain the popularity of best practices internationally among regulators who have no need to resort to the paradigm domestically.

All of this started with informal banking agreements in the 1970s, only slightly before the concept of best practices became popular in business management studies, and grew in popularity at approximately the same time, in the 1980s and 1990s. International harmo-

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of almost all industrial countries and many transition and developing countries," has as one of its purposes "to advance knowledge about best practices on competition matters of common interest." Oliver Budzinski, *Toward an International Governance of Transborder Mergers? Competition Networks and Institutions Between Centralism and Decentralism*, 36 N.Y.U. J. INT'L L. & POL. 1, 20 (2003); see also International Competition Network, About the ICN, <http://www.internationalcompetitionnetwork.org/aboutus.html> (last visited Jan. 25, 2006) (describing ICN as "focused on improving worldwide cooperation and enhancing convergence through dialogue"). For a particularly helpful discussion of other aspects of regulatory cooperation in antitrust, see Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1785-87, 1802-07 (2000). See also Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 208 (2003) (adopting "a critical stance within the ongoing debate [over whether there should be an 'international antitrust regime'] by applying different theories of global governance to antitrust law at the international level").

<sup>111</sup> The Codex Alimentarius Commission is one of the primary, but not only, organizations around which labeling and food safety standards are harmonized. For information, see Codex Alimentarius Comm'n, Codex Alimentarius, <http://www.codexalimentarius.net> (last visited Jan. 19, 2006). The FDA and the USDA both send representatives to the Codex process, with the USDA's Food, Safety, and Inspection Service being in charge of coordinating the participation of American regulators on the process. See USDA, Regulations and Policies: Codex Alimentarius, [http://www.fsis.usda.gov/regulations\\_&\\_policies/Codex\\_Alimentarius/index.asp](http://www.fsis.usda.gov/regulations_&_policies/Codex_Alimentarius/index.asp) (last visited Jan. 22, 2006).

<sup>112</sup> See, e.g., George A. Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 968 (1996) (noting that "a further illustration of problem-solving regulatory cooperation is the current program of cooperation between the U.S. Federal Communications Commission and the [European] Commission's DG XIII (Telecommunications) on telecommunications issues").

<sup>113</sup> See Stewart, *supra* note 104, at 455. Stewart notes:

Such coordination helps to reduce barriers to trade and commerce created by differing national regulations and to address transnational regulatory problems that exceed purely domestic capabilities. For example, national regulators may agree to accept each others' product regulatory standards as mutually equivalent or pool information and coordinate antitrust measures with the practices of multinational firms.

*Id.*

nizers quickly adopted the vocabulary of best practices at least in part because it fit well with the disaggregated, decentralized milieu in which they tried to establish order through common, nonbinding approaches.

### 3. Antecedents in Legal Practice

Although best practices are new, and newly popular, they are not without antecedents. I discuss these antecedents briefly here because I do not want to overstate the revolutionary nature of my claims about this new form of administrative action. Best practices are new, important, and, in some ways, problematic, but they are not unprecedented. Informal guidance has been around for as long as there have been agencies. Handbooks have been used to guide regulators in their application of rules, as has policy guidance that does not have the force of law.<sup>114</sup> No-action letters suggest how regulators interpret their rules; these are as exempt from judicial review, as are best practices standards and agency decisions declining to bring enforcement actions against regulated entities.<sup>115</sup>

In other ways, best practices are reminiscent of—although more disaggregated and less self-consciously expert than—such classics of legal standardization as model codes<sup>116</sup> and restatements.<sup>117</sup> Even less

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<sup>114</sup> The APA does not apply to “interpretive rules,” or agency statements of what it thinks a statute means, “general statements of [agency] policy” that do not have the force and effect of law, and rules of agency organization, practice, or procedure. 5 U.S.C. § 553(b)(3)(A) (2000).

<sup>115</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985). The Court held:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency’s construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

*Id.* Some scholars, however, have criticized the unreviewability of agency inaction. See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1661 (2004) (contending “that courts obligated to police . . . [corrosive] influences in the domain of agency action also should do so in the domain of agency inaction”).

<sup>116</sup> The Uniform Commercial Code, for example, has in places explicitly attempted to codify industry practice. And we see best practices used in the context of model rules. Sentencing experts, for example, have noted that because “[s]entencing commissions, if not well designed, [or] if they are instructed badly, can produce abominations, . . . it’s unavoidable in a project of this kind that we have to . . . look[ ] . . . [for] a model of best practice of the most successful innovations that we have some track record with.” 80th Annual Meeting of the American Law Institute: Discussion of Model Penal Code: Sentencing, 2003 A.L.I. PROC. 202, 228–29 (statement of Prof. Reitz); see also 77th Annual Meeting of the American Law Institute: Discussion of Transnational Insolvency Project, Principles of Cooperation in Transnational Insolvency Cases Among the Members of NAFTA, 2000

binding, treatise authors make recommendations as to best practices.<sup>118</sup> So have, in the past, aggregators of research such as the *American Law Reporter*<sup>119</sup> and *American Jurisprudence*.<sup>120</sup>

#### 4. Conclusion

As a mechanism taken from business, consistent with increasingly important forms of international regulation, and in tune with a bipartisan and *au courant* skepticism of hard regulation, best practices have found their moment.

It is a moment premised on an entirely different kind of ordering. Rather than being rooted in the prospect of command and control,

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A.L.I. PROC. 144, 163 ("[M]any of these General Principles and Procedural Principles are meant to be used as guideposts by the courts under current law. That is, we want to suggest this is best practice or best understanding of current law as well.").

<sup>117</sup> And, of course, state regulators increasingly gather at national conventions to discuss means of harmonizing their own approaches to state regulatory problems; they frequently exchange views on best practices. The National Association of Insurance Commissioners (NAIC) is a principal example (the federal government does not regulate insurance). The NAIC has been in existence since 1871. See National Association of Insurance Commissioners, The NAIC's History and Background, <http://www.naic.org/about/background.htm> (last visited Feb. 6, 2006) ("[T]he NAIC provides a forum for the development of uniform policy when uniformity is appropriate."). See generally Kevin T. Salter, *Regulation of Insurance, in INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW* 171, 178 (PLI Litig. & Admin. Practice, Course Handbook Series No. 584, 1998) (discussing history and organization of NAIC).

<sup>118</sup> See, e.g., 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 127 (3d ed. 1999) ("If the government dismisses particular counts, or other surplusage is to be stricken, the best practice is for a written order to be prepared for the court's signature with specific dismissals from and deletions of the indictment."); 3 CHARLES ALAN WRIGHT, NANCY J. KING & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE § 517 (3d ed. 2004) (stating that best practice in polling jury is for court or clerk of court to ask each juror individually whether verdict announced is his verdict); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 195(3) (9th ed. 1990) ("The best practice is . . . to order reimbursement for payment of some community debts, but not for others. The worst practice is to defer the issue for decision at trial, since 'it offers no help to the parties and, indeed, can be a considerable hindrance to settlement.'") (citations omitted)).

<sup>119</sup> Typically the term is used to illustrate the best of a series of options where the other options, while technically permissible, are less desirable. See, e.g., David Carl Minneman, Annotation, *Significant Connection Jurisdiction of Court to Modify Foreign Child Custody Decree Under §§ 3(a)(2) and 14(b) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA)*, 28 U.S.C.A. §§ 1738A(c)(2)(b) and 1738A(f)(1), 67 A.L.R.5th 1, 37 (1999) ("In cases where there is any doubt whether a sibling-state has continuing jurisdiction or has declined to exercise it, the best practice is to communicate with the court of the sibling-state."); J.A. Bryant, Jr., Annotation, *Propriety and Effect of Trial Court's Adoption of Findings Prepared by Prevailing Party*, 54 A.L.R.3d 868 (1973) ("To adopt verbatim a party's proposed findings of fact and conclusions of law is not the best practice, even if both sides have submitted proposals, but it is not reversible error where those findings and conclusions essential to the decision reached are sufficient and are supported by the evidence.").

<sup>120</sup> See, e.g., 75B AM. JUR. 2D *Trial* § 1284 (1992) ("It is the best practice for the court to act immediately, on counsel's general objection, to determine the propriety of evidence.").

best practices presume an environment where there is no commander, and where control is impossible. We might call this kind of environment *anarchism*—not anarchism as it is conventionally termed, but anarchism as a concept of international relations: anarchism as the governing principle of regimes without central authorities, such as domestic markets and international arenas.<sup>121</sup> The regulators who make rules through best practices are changing the context of rulemaking away from command and control, and towards a paradigm where there is no central authority.

### C. *The Appeal of Best Practices*

In the first part of this section, I described the doctrinal preconditions—a lack of either judicial or congressional supervision of agency best practices initiatives—for why the technique might prosper. In the second part, I traced the intellectual evolution of the concept in an effort to explain why best practices have seized the bureaucratic imagination now, rather than, say, during the 1960s, when the appeal of a rulemaking procedure that existed outside of judicial supervision and APA requirements might, if anything, have seemed *more* attractive to downtrodden regulators. In this part, I describe the incentives of best practices regulation. These incentives are two-fold, both rational and behavioral.

Rationally, best practices offer the promise of freedom from constraint and a delegation of onerous responsibilities. Operating through best practices offers agencies relative freedom from supervision, especially judicial supervision.<sup>122</sup> It is a sort of freedom that rational choice theorists have long presumed to be desired by regulators.<sup>123</sup> Moreover, inviting best practices can mobilize private parties—like regulated entities or experts—to devise practices that they

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<sup>121</sup> In leading international relations theorist John Mearsheimer's view, the domain of "international relations" is defined by "relentless security competition" between states under conditions of "anarchy," in that "there is no 'government over governments.'" JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 30 (2001) (quoting INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 14 (4th ed. 1971)); *see also* Jonathan D. Greenberg, *Does Power Trump Law?* 55 STAN. L. REV. 1789 (2003) (engaging realist international relations paradigm of anarchic world order).

<sup>122</sup> *See supra* notes 57–62 and accompanying text.

<sup>123</sup> Of course, the desire to operate unsupervised and to empire-build is not uncontroversial. *See generally* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

think fit the bill.<sup>124</sup> In this way, best practices can reduce the transaction costs of rulemaking, at least for central rulemakers.<sup>125</sup>

But there is more to the story than purely rational bureaucratic decisionmaking. Best practices can be a coherent, rather than chaotic, way to implement a nationwide regulatory program because of what we know about behavioral economics and psychology. Best practices work because of the mixed blessings of cascades, copying, and follow-on imperatives.

Simply put, people confronted with a surfeit of options find it hard to choose among them, and regulators are no different.<sup>126</sup> Best practices provide a manageable way of limiting the range of options for regulatory programs. In a world of technical complexity, where agencies are granted a great deal of discretion over how to regulate, the range of options is vast, and the complexities of supervision daunting.

Confronted with a wide range of remedial options in a complex issue-area, regulators can rationally save costs through the adoption of “off the shelf” rules, such as best practices.<sup>127</sup> The phenomenon is one that I have written about before in the context of district courts facing complex institutional reform lawsuits.<sup>128</sup> Government officials, like most people, rarely prefer lengthy adducements of reasons to act in a particular way to more straightforward algorithms listing programs to

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<sup>124</sup> For example, for better or worse, an agency like the SEC may substitute for the promulgation of hard rules, an attempt to leverage gatekeeper organizations—private exchanges, trade organizations, and gatekeepers such as accountants and lawyers—to add substance to its regulatory requirements. *Implementation of the Sarbanes-Oxley Act of 2002: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 108th Cong. 33–47 (2003) (statement of William H. Donaldson, Chairman, SEC). Indeed, “industry efforts to establish standards and recommend best practices go a long way toward building strong compliance systems and toward strengthening the industry’s reputation with its clients.” Paul F. Roye, Dir., Div. Inv. Mgmt., SEC, Priorities in Investment Adviser Regulation, Remarks Before the IA Compliance Summit and Best Practices Update (Apr. 8, 2002) (transcript available at <http://www.sec.gov/news/speech/spch549.htm>).

<sup>125</sup> This may appeal to bureaucrats who feel overmatched by their regulatory tasks, or who are interested in getting their industries to “buy in” to their programs with a limited right of participation.

<sup>126</sup> For a recent explanation of this phenomenon, see BARRY SCHWARTZ, *THE PARADOX OF CHOICE* 2 (2004). Schwartz notes that “as the number of choices keeps growing, negative aspects of having a multitude of options begin to appear. As the number of choices grows further, the negatives escalate until we become overloaded.” *Id.*

<sup>127</sup> See Zaring, *supra* note 25, at 1037 (describing how participants in judicially-headed regulatory schemes adopt such regulations); *see also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 V.A. J. INT'L L. 1, 60 (2002) (describing attraction of “off the shelf” regulation more generally).

<sup>128</sup> See Zaring, *supra* note 25.

adopt.<sup>129</sup> The “horizontalness” of best practices regulation helps to solve problems of unconstrained choice by providing available “go-bys” that limit the universe of choices.

Thus, best practices are consistent with theories of rational ignorance, under which regulators choose not to acquire sufficient information to fully develop regulatory alternatives, under the assumption that the costs of the acquisition of the information would ordinarily be greater than any expected benefits.<sup>130</sup>

But the way the best practices regime is organized suggests some of the reasons why best practices might become widespread, but not always optimal. Information cascades, herding,<sup>131</sup> and other network effects result from these sorts of boundedly rational decisionmaking heuristics.<sup>132</sup> This means that best practices imitation will not always result in the “right” regulatory program being adopted, but rather that the first one will often be adopted. As Ivo Welch and his co-authors have explained, “cascades predict that you can get massive social imitation, occasionally leading everyone (the ‘herd’) to the incorrect choice.”<sup>133</sup>

Accordingly, although best practices seem imbued with a sense of technocratic possibility—the concept, after all, is designed to get at “best” forms of regulation—it need not necessarily be a particularly thoughtful concept. Indeed, the widespread adoption of best practices may tell us very little about the “bestness” of the practice. Best prac-

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<sup>129</sup> *Id.* at 1073. As I and others have noted, this preference makes a case for legal opinions that list rules of conduct, rather than reasoned elucidations of the principles that officials ought to consider when exercising their discretion. *See id.*; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1462 (1995) (defending fact that judicial opinions have characteristics, such as “complexity, inaccessibility to nonspecialists, and dullness,” which make them similar to statutes or regulations).

<sup>130</sup> For an overview, see WILLIAM A. MCEACHERN, ECONOMICS 78 (1988).

<sup>131</sup> An information cascade results when regulators choose to follow the practices of other regulators, independent of their own information. Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *Informational Cascades and Rational Herding: An Annotated Bibliography and Resource Reference* (June 1996) (UCLA/Anderson and Ohio State University and Yale/SOM, Working Paper), <http://welch.econ.brown.edu/cascades>. Some cascades scholars characterize this process as “herding” and I treat the two concepts as essentially identical.

<sup>132</sup> Adrian Vermeule has written about these phenomena in another context. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 378 n.47 (2004) (discussing herding in context of writing constitutions); *see also* Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 992–94 (1992) (arguing that “localized conformity of behavior and the fragility of mass behaviors can be explained by informational cascades,” which are defined as times “when it is optimal for an individual, having observed the actions of those ahead of him, to follow the behavior of the preceding individual without regard to his own information”).

<sup>133</sup> Bikhchandani, Hirshleifer & Welch, *supra* note 131.

tices work through copying.<sup>134</sup> Again, the paradigm is to keep up with the Joneses, instead of doing the Joneses one better.

In the next Part, I explain the Jones-following phenomenon through a study of best practices under the Clean Water Act. Then, in Part V, I add a less detailed survey of some of the many other federal regulatory contexts in which best practices have been used.

#### IV

#### CAN BEST PRACTICES CONTROL WATER POLLUTION?

Runoff from cities and, in particular, farms remains the most serious—and least traditionally regulated—form of water pollution in the United States.<sup>135</sup> Agriculture, the most common source of runoff pollution, is “the leading source of pollutants in assessed rivers and streams, contributing to 59 percent of the reported water quality problems and affecting about 170,000 river miles.”<sup>136</sup>

The federal response to water pollution from runoff has been to regulate through best practices. In fact, best practices regulation is

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<sup>134</sup> Frederickson, *Review Essay*, *supra* note 89 (reviewing NAT'L PERFORMANCE REVIEW, VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993), <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/>).

<sup>135</sup> As the EPA has observed in its nonpoint source pollution literature: “[N]onpoint sources constitute the leading sources of water pollution in the United States today.” EPA, SECTION 319 SUCCESS STORIES VOLUME III: THE SUCCESSFUL IMPLEMENTATION OF THE CLEAN WATER ACT’S SECTION 319 NONPOINT SOURCE POLLUTION PROGRAM 2 (2002) [hereinafter EPA, SUCCESS STORIES III], available at [http://www.epa.gov/owow/nps/Section319III/pdf/319\\_all.pdf](http://www.epa.gov/owow/nps/Section319III/pdf/319_all.pdf) (citing 1998 National Water Quality Inventory); see also Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60,653, 60,653 (Oct. 23, 2003) (“Nonpoint source pollution continues to be, and is increasingly recognized by the public as, the largest remaining source of water quality impairments in the nation.”).

<sup>136</sup> Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,587 (July 13, 2000). The agency has assessed agriculture as “a source of pollution for 48% of the impaired river miles reported in the United States.” EPA, NATIONAL MANAGEMENT MEASURES FOR THE CONTROL OF NONPOINT SOURCE POLLUTION FROM AGRICULTURE 1-1 (2003) [hereinafter NPS MANAGEMENT MEASURES], available at <http://www.epa.gov/owow/nps/agmm>. Moreover, the problem has been a persistent one. See George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 462 (1990) (noting that “little progress has been made in reducing agricultural pollution” even though problem has been recognized for some time). For a more technical discussion of the most common forms of agricultural nonpoint source pollution, see NPS MANAGEMENT MEASURES, *supra*, at 2-9 to 2-30 (discussing nutrients, animal wastes, and pesticides that may transport pollutants and their impacts on habitats).

currently the *only* form of federal regulation of runoff, or “nonpoint source” pollution.<sup>137</sup>

The best practices promulgated by the EPA are entirely voluntary. They aren’t even developed by the EPA—the agency simply points to practices that other water pollution regulators have developed as effective ones.

But instead of the chaos that one might expect from a nonmandatory, decentralized regulatory system, the best management practices regime overseen by the EPA is a relatively coordinated approach to nonpoint source pollution that is, whatever its flaws, complex but coherent. Rather than rulemaker, the EPA plays the role of funder of nonpoint source best practices, as well as, in a limited way, endorser of them, via the promulgation of particular practices that it and other regulators find to be effective.<sup>138</sup>

The EPA’s legislatively required resort to regulation through best practices is the oldest and most developed example of the phenomenon that I am aware of. As such, it is worth some consideration. In my view nonpoint source best practices shows:

- Coherence. If nothing else, in creating a federal environmental strategy that encourages copying and coordination of approach, along with an administratively inexpensive regime, the federal approach to nonpoint source pollution shows how an alternative form of administrative regulation can create standardization.
- Averageness. But this regime does not force innovations in technology to deal with nonpoint source pollution. It instead delegates the standardization to a disaggregated, state level process. The process is not a magically good substantive one. It instead represents a procedural choice about where to put

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<sup>137</sup> The term “nonpoint source” comes from the Clean Water Act (CWA), and it refers to pollution that doesn’t come from “any discernible, confined and discrete conveyance.” 33 U.S.C. § 1326(14) (2000). Congress has declared that “it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented . . . so as to enable the goals of this [Act] to be met through the control of both point and nonpoint sources of pollution.” 33 U.S.C. § 1251(a)(7) (2000). But, as the Tenth Circuit has explained, “Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution.” Am. Wildlands v. Browner, 260 F.3d 1192, 1197 (10th Cir. 2001); *see also* Sierra Club v. Meiburg, 296 F.3d 1021, 1025–26 (11th Cir. 2002) (describing interaction between NPS statutory scheme and EPA’s Total Management Daily Loads scheme); Nat’l Res. Def. Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975), *aff’d*, 564 F.2d 573 (D.C. Cir. 1977) (holding that EPA must distinguish between point and nonpoint sources, and then apply appropriate regulatory program).

<sup>138</sup> As the Ninth Circuit has explained, the nonpoint source portion of the CWA “does not require states to penalize nonpoint source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices.” Nat’l Res. Def. Council v. EPA, 915 F.2d 1314, 1318 (9th Cir. 1990).

the locus of the decision about environmental standards; here, with a disaggregated process that develops from below.

- (Non)federalism. In creating this surprisingly standardized regime, the best management practices approach to water pollution also shows a way to reconcile state authority with federal oversight, thus offering insights into the debate over whether state or federal primacy ought to be encouraged in environmental law. Best practices are a light federal approach to a state focused paradigm, and so offer a bridge in the debate between scholars such as Richard Revesz and Kristin Engel, who have argued about whether an environmental law regime in which states played a primary role would lead to a race to the top or the bottom.<sup>139</sup> Best practices, by permitting states to develop rules while placing the federal government in the role of harmonizer, are a way of avoiding a race to anywhere in particular.

At the margins of best practices, we see all of the usual fissures of administrative law—states pushing for more flexibility and the federal government trying to ensure adherence to its dictates by linking best practices to funding rules.<sup>140</sup> I will explore these facets of the regime in what follows; the idea is to show that best practices are part of a palette of regulation, not that they are a stand-alone alternative to command and control. That's not how they work in practice, as an exploration of the full story of one approach in practice demonstrates.

#### A. *The Statutory Scheme*

Best management practices (BMPs) have never been mandated,<sup>141</sup> but their adoption has been incentivized. In fact, BMPs might be characterized as an incentive featuring a stick of very limited size, a carrot of also limited, but sometimes compelling allure, and an emphasis on non-required planning and coordination.<sup>142</sup>

What follows in this subsection is a technical tour through the nonpoint source pollution regime created by Congress and the EPA. It imposes few direct requirements on states, but does encourage them to develop best practices by making funding available for those states

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<sup>139</sup> See *supra* note 22 and accompanying text.

<sup>140</sup> See *infra* notes Part IV.C.

<sup>141</sup> See, e.g., *Am. Wildlands*, 260 F.3d at 1197 (“[N]othing in the CWA demands that a state adopt a regulatory system for nonpoint sources.”) (internal quotation marks omitted).

<sup>142</sup> Robert D. Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 ENVTL. L. 807, 825–27 (1989) (using carrot/stick language to describe statutory scheme); cf. Zaring, *supra* note 25, at 1072–73 (explaining that judicial institutional reforms, like best practices, “proceed largely through consent”).

that do. The next section explores the similarities among the actual practices that most states have adopted under the nonpoint source pollution control scheme.

Pursuant to section 319 of the Clean Water Act (CWA), in order to reduce nonpoint source pollution “to the maximum extent practicable,” states were required to assess their nonpoint source pollution problems, after which they could identify “best management practices”<sup>143</sup> to deal with the problems, devise programs to implement the BMPs, and finally submit a schedule of annual implementation milestones to the EPA.<sup>144</sup> As an initial matter, this requirement extends to so-called “assessment reports,” which if states choose to file one, requires them to, among other things, “[i]dentify those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards.”<sup>145</sup>

While the states were devising, submitting, and then launching their plans, the EPA was, and still is, required to report annually to Congress on “the progress made in reducing pollution in the navigable waters resulting from nonpoint sources and improving the quality of such waters.”<sup>146</sup>

Although under the terms of the CWA, the federal agency cannot impose a management program upon a state, in practice, every state has participated in the program—that is, submitted assessment reports, management plans, and annual reports on the progress of their implementation.

Some of the reasons for this compliance lie in the insidious appeal of best practices that I described in the prior section of this Article. In addition, part of the appeal of the regime lies in its linkage to funding. States that implement nonpoint source pollution programs and that can show that their chosen BMPs are effective in meeting annual milestones can receive funds from the EPA.<sup>147</sup>

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<sup>143</sup> 33 U.S.C. § 1329(a)(1)(C) (2000).

<sup>144</sup> § 1329(a)(1)(C)–(D). States must also make public disclosures about water pollution problems and estimates of potential solutions. § 1329(a)(1)–(b)(2).

<sup>145</sup> § 1329(a)(1) (2000).

<sup>146</sup> 33 U.S.C. § 1329(m)(1) (2000 & Supp. II 2001–03).

<sup>147</sup> § 1329(h). For conditions on renewal of grants, see subsections 8–9 of § 1329(h). Despite the lack of proverbial “sticks” to force compliance, many states have taken the initiative to utilize the funding provided by this section to reduce nonpoint source pollution in their navigable waters as well as their groundwater (which is not covered by the primary provisions of section 319); *see also* EPA, NATIONAL WATER QUALITY INVENTORY: 2000 REPORT 14, available at <http://www.epa.gov/305b/2000report/chp2.pdf> (comparing leading sources of nonpoint source pollution and explaining difficulties of identifying such sources). *But see* Erin Tobin, Pronsolino v. Nastri: *Are TMDLs for Nonpoint Sources the*

They cannot get vast quantities of money; the section 319 program is budgeted at only \$209 million for fiscal year 2005.<sup>148</sup> But as things now stand, section 319 funding is the largest EPA water-quality program implemented through payments to states.<sup>149</sup> The agency's contribution may be as large as sixty percent of the program's cost, with the state funding the rest.<sup>150</sup>

The EPA's funding guidelines have been the source of most of the harder central rules—to the extent that such rules characterize the program at all—that it has applied to state BMP plans. In 1996, for example, the EPA outlined nine “key elements” that it expected to see in any such plan.<sup>151</sup> States that adopted the elements, provided they also had “a proven track record of effective implementation,”

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*Key to Controlling the ‘Unregulated’ Half of Water Pollution?*, 33 ENVTL. L. 807, 809 (2003) (criticizing progress of this interplay).

<sup>148</sup> National Association of Conservation Districts, Funding Issues—Water Quality, available at <http://www.nacdnet.org/govtaff/issuemaps/va-hud.htm> (last visited Oct. 21, 2004). From 1987 to 1989, only \$3.8 million was appropriated for nonpoint source pollution control, and between 1990 and 1993, such funding never exceeded \$50 million per year. *See id.* (figures showing EPA and NOAA appropriations).

<sup>149</sup> That figure, however, reflects a \$30 million decrease in funding from fiscal year 2004, *id.*, and when compared to a total water quality funding decrease of \$23 million, it appears that section 319 has suffered a significant and targeted funding drop in the past year. *See* EPA, 2005 Budget in Brief 2-1, <http://www.epa.gov/ocfo/budget/2005/2005bib.pdf>. When measured against the total EPA budget for water quality management, the section 319 program accounts for only seven percent. *Id.* Given that the water quality budget represents only 37.9% of EPA's total budget, the spending on section 319 grants, while notable, is not particularly great when compared to non-permissive regulatory programs.

<sup>150</sup> EPA, **APPLYING FOR AND ADMINISTERING CWA SECTION 319 GRANTS: A GUIDE FOR STATE NONPOINT SOURCE AGENCIES 9** (2003), available at <http://www.epa.gov/owow/nps/319/319stateguide-revised.pdf> (also note helpful chart on mechanics of section 319 grants at 6).

<sup>151</sup> The nine principles are broad ones. In theory, every management plan should have:

1. Explicit short- and long-term goals, objectives and strategies to protect surface and ground water.
2. Strong working partnerships and collaboration with appropriate State, inter-state, Tribal, regional, and local entities (including conservation districts), private sector groups, citizens groups, and Federal agencies.
3. A balanced approach that emphasizes both State-wide nonpoint source programs and on-the-ground management of individual watersheds where waters are impaired or threatened.
4. The State program (a) abates known water quality impairments resulting from nonpoint source pollution and (b) prevents significant threats to water quality from present and future activities.
5. An identification of waters and watersheds impaired or threatened by nonpoint source pollution and a process to progressively address these waters.
6. The State reviews, upgrades and implements all program components required by section 319 of the Clean Water Act, and establishes flexible, targeted, iterative approaches to achieve and maintain beneficial uses of water as expeditiously as practicable.
7. An identification of Federal lands and objectives which are not managed consistently with State program objectives.

could be “afforded substantially reduced oversight and maximum flexibility to implement their state programs and to achieve water quality objectives,” in addition to more funding.<sup>152</sup>

### B. The Regime in Action

In light of the nature of the carrot (the prospect of federal money) and the stick (the limited ability to reject state BMP plan proposals), nonpoint source pollution responses might seem likely to vary widely among the states. But in action, the actual best practices devised by the EPA and the states are a study in coordination.

The EPA does not promulgate best management practices but instead identifies, in an unassuming way, practices that it likes, and serves as a clearinghouse for the exchange of information by states on practices that they like. States, on the other hand, come up with the practices, and report them to the EPA for inclusion as “success stories” that other states might wish to emulate. The practices involved can be disaggregated, involving, say, very particular directions to particular groups of farmers in a particular watershed. Nonetheless, the same BMPs appear over and over again, in state management plan after state management plan. The copied BMPs include technical ones, general ones, and even a bureaucratic BMP through which state officials have been urged to partner with state and other federal bureaucracies to fund their programs.

Below, I survey the sort of guidance on best practices that the EPA does provide, and discuss some of the common approaches to agricultural runoff adopted by many states. Again, the survey will be a technical one; its focus will be on practices adopted to prevent agricultural runoff in particular.

Specific best management practices—riparian fencing for cattle herds, say, or the creation of containment pools—are not devised by

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8. Efficient and effective management and implementation of the State's nonpoint source program, including necessary financial management.
  9. A feedback loop whereby the State reviews, evaluates, and revises its nonpoint source assessment and its management program at least every five years.

EPA, NONPOINT SOURCE PROGRAM AND GRANTS GUIDANCE FOR FISCAL YEAR 1997 AND FUTURE YEARS (1996), available at <http://www.epa.gov/OWOW/NPS/npsguid1.htm>.

<sup>152</sup> EPA, SUCCESS STORIES III, *supra* note 135, at 3. In 2003, the EPA announced a general revision of its funding guidelines. The EPA called this “guidelines for States’ implementation of nonpoint source management programs under Section 319 of the Clean Water Act and for the award of Section 319 grants to States to implement those programs.” Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60,653, 60,653 (Oct. 23, 2003).

the EPA and urged upon states and farmers.<sup>153</sup> Nor does the EPA publish a list of best practices that would qualify as section 319 models. Instead, the agency collects information from successful projects and consolidates this information in a database of section 319 "success stories," listing the projects by state.<sup>154</sup>

The EPA publicizes these stories, and conditions funding on the adoption of its key principles for developing such practices.<sup>155</sup> The agency has also developed guidelines for the administrative side of implementation of nonpoint source management programs,<sup>156</sup> and has monitored the effectiveness of these programs, in addition to identifying successful versions of them.<sup>157</sup> In addition, the EPA has created a "list of agriculture documents"—most notably BMP manuals—that it has found to be "especially well done."<sup>158</sup>

But the agency doesn't require anything more. In spite of the flexibility and voluntariness of these programs, regulators generally

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<sup>153</sup> The EPA issues disclaimers as to voluntariness throughout its nonpoint source guidance. For example, it notes that it "does not impose legally-binding requirements on the EPA, states, territories, authorized tribes, or the public." NPS MANAGEMENT MEASURES, *supra* note 136, at 1-2.

<sup>154</sup> See, e.g., EPA, SUCCESS STORIES III, *supra* note 135, at i-vi. It also provides resources that point states to sources for finding BMPs developed by other groups. *Id.* at vii. The EPA makes materials available for states through its website. This site (<http://www.epa.gov/owow/nps/agriculture.html>) contains links to groups that create BMPs for agricultural nonpoint source pollution. In addition, the EPA has sought "to provide technical assistance to State program managers and others on the best available, economically achievable means of reducing nonpoint source pollution of surface and ground water from agriculture." Notice of Availability of Guidance for Controlling Nonpoint Source Pollution from Agriculture and Request for Comments, 65 Fed. Reg. 61,325, 61,325 (Oct. 17, 2000). The agency's guidance "provides background information about agricultural nonpoint source pollution, where it comes from and how it enters the Nation's waters, discusses the broad concepts of assessing and addressing water quality problems on a watershed level, and presents up-to-date technical information about how to reduce agricultural nonpoint source pollution." *Id.* at 61,325.

<sup>155</sup> See *supra* note 151 and accompanying text.

<sup>156</sup> See, e.g., EPA Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60,653, 60,653 (Oct. 23, 2003); see also 60 Fed. Reg. 53,875, 53,875 (Oct. 18, 1995) (discussing "Guidance Manual for Developing Best Management Practices (BMP)").

<sup>157</sup> LAURA A. LOMBARDO ET AL., SECTION 319 NONPOINT SOURCE NATIONAL MONITORING PROGRAM SUCCESSES AND RECOMMENDATIONS 3 (2000), [http://www.bae.ncsu.edu/programs/extension/wqg/section319/NMP%20Lessons%20Learned%2011\\_00.pdf](http://www.bae.ncsu.edu/programs/extension/wqg/section319/NMP%20Lessons%20Learned%2011_00.pdf) (publishing, by means of EPA grant, successes of and lessons from nonpoint source monitoring). However, most of the recommendations produced by the monitoring program concerned coordination between states and private parties and accuracy of data collection, emphasizing the importance of clearly defining roles and responsibilities of the agencies involved to ensure coordination as well as collecting accurate data so that even an unsuccessful program can teach valuable lessons. *Id.* at 11-12.

<sup>158</sup> Archive of EPA and Non-EPA Agriculture Websites, <http://www.epa.gov/owow/nps/agriculture.html> (last visited Nov. 10, 2005) (referencing list of agriculture documents located at <http://www.epa.gov/owow/nps/bestnpsdocs.html> (last visited Jan. 19, 2006)).

urge farmers to adopt a consistent set of practices, turning on four categories of practices in particular: pesticide management, nutrient management, conservation tillage, and buffer practices.<sup>159</sup> These sorts of agricultural BMPs are, apparently, "fairly simple," and, as the best practices have spread, have become known to most regulators.<sup>160</sup>

Accordingly, it is unsurprising that these sorts of practices have become widespread: Twenty-one states, particularly those with large livestock industries, commonly employ grazing management systems for cattle to reduce pollution from manure and erosion that results from over-grazing; BMPs used include riparian fencing, water lines for the cattle, and rotating grazing patterns.<sup>161</sup> To address the problem of erosion along stream banks, twenty-one states have employed stream bank reforestation projects as a means of reducing downstream sedimentation;<sup>162</sup> another set of twenty-one states have urged farmers to adopt certain practices (particularly tillage reduction), in reducing pollution from agricultural runoff.<sup>163</sup> States have also tried to reduce sedimentation in particular drainage systems through the use of

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<sup>159</sup> These are the "Core4" practices that the Department of Agriculture encourages farmers to adopt. USDA NATURAL RESOURCES CONSERVATION SERVICE, CORE4 CONSERVATION PRACTICES TRAINING GUIDE: THE COMMON SENSE APPROACH TO NATURAL RESOURCE CONSERVATION i (1999), available at <http://www.nrcs.usda.gov/technical/ECS/agronomy/core4.pdf>. The EPA considers the Core4 principle to be particularly well done. See EPA, Best Nonpoint Source Documents, <http://www.epa.gov/owow/nps/bestnpsdocs.html> (last visited Jan. 19, 2006); *supra* note 158 and accompanying text.

<sup>160</sup> LAURA A. LOMBARDO ET AL., 2003 SUMMARY REPORT: SECTION 319 NATIONAL MONITORING PROGRAM PROJECTS app. III, at 324 (2003), <http://www.bae.ncsu.edu/programs/extension/wqg/03rept319/indexframe.html>.

<sup>161</sup> These types of practices were used in Arizona, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. EPA, SUCCESS STORIES III, *supra* note 135, at 13, 56–57, 63, 78, 83, 90–92, 107–08, 114, 119, 129, 140, 143, 144, 151, 154, 161–62, 165, 167, 172 (listing each state's programs in alphabetical order).

<sup>162</sup> The following states use stream bank erosion reduction practices as part of section 319 management programs: Alaska, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and Wisconsin. See EPA, SUCCESS STORIES III, *supra* note 135, at 10, 27, 36, 37, 40, 45, 49, 52, 53, 81, 92, 94, 98, 104, 113, 117, 126, 131, 132, 144, 149, 154, 168.

<sup>163</sup> States also sometimes urge particular farming practices on farmers, such as tillage reduction, improved irrigation, and field grade management practices. The states using these practices in their section 319 programs are: Alabama, California, Connecticut, Illinois, Indiana, Louisiana, Maine, Missouri, Montana, New York, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. See EPA, SUCCESS STORIES III, *supra* note 135, at 7, 23, 29, 50, 55, 66, 67, 87, 90–92, 109, 117, 120, 124, 139, 141, 146, 147, 149, 164, 168; see also Larry C. Frahey, *Toward the Development of Performance Criteria Beyond Best Management Practices*, 48 OKLA. L. REV. 353, 356–60 (1995) (surveying best management practices adopted by Florida for Lake Okeechobee watershed).

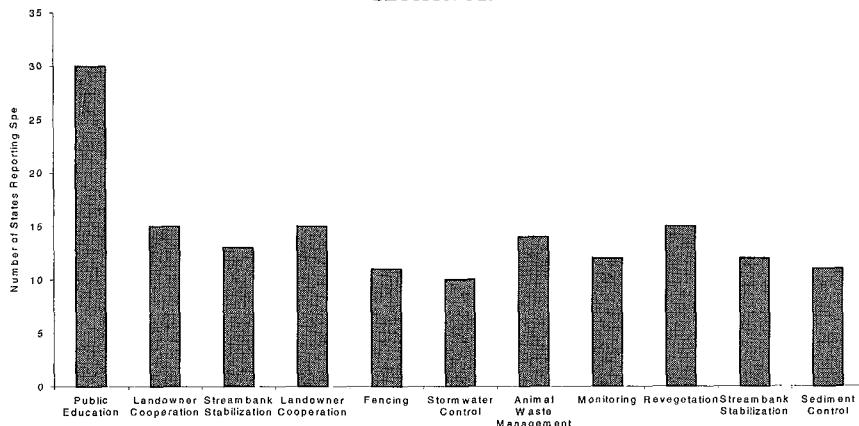
constructed wetlands.<sup>164</sup> And many other BMPs advertised by the EPA as “successes” find places in many other states.<sup>165</sup>

States also pursue more complex BMP strategies.<sup>166</sup> But there too, copying is common.

<sup>164</sup> These include Colorado, the District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia. See EPA, SUCCESS STORIES III, *supra* note 135, at 25, 34, 41, 52, 55, 57, 62, 98, 101, 103, 111, 146, 158.

<sup>165</sup> For a rough cut on some of these practices, the EPA’s three volume compilation of success stories were searched for common practices. The particularly common ones, as drawn from the descriptions of the BMPs provided by the states to the EPA, were reported by between eleven and thirty states:

FIGURE 4: SUBJECTS OF STATE BEST PRACTICES INITIATIVES PURSUANT TO SECTION 319



EPA, SECTION 319 NONPOINT SOURCE SUCCESS STORIES (1994), [HTTP://WWW.EPA.GOV/OWOW/NPS/SECTION319I/INDEX.HTML](http://www.epa.gov/owow/nps/SECTION319I/INDEX.HTML); EPA, SECTION 319 SUCCESS STORIES: VOLUME II HIGHLIGHTS OF STATE AND TRIBAL NONPOINT SOURCE PROGRAMS (1997), [HTTP://WWW.EPA.GOV/OWOW/NPS/SECTION319II/INDEX.HTML](http://www.epa.gov/owow/nps/SECTION319II/INDEX.HTML); EPA, SUCCESS STORIES III, *supra* note 135, at 1–174; see also Reed A.J. Davis, State BMP Spreadsheet (Feb. 2005) (unpublished data on file with the *New York University Law Review*). For another chart that captures the breadth of the best practices available, see Larry Brown et al., Agricultural Best Management Practices, [HTTP://OHIOLINE.OSU.EDU/AEX-FACT/0464.HTML](http://ohioline.osu.edu/aex-fact/0464.html) (last visited Jan. 20, 2006).

<sup>166</sup> Indeed, I do not wish to overstate the descriptive claim: Although state BMP programs show lots of evidence of convergence, there are still many differences in many particulars. To take one tangential example, the Environmental Law Institute studied the enforcement mechanisms each state had for ensuring that BMPs were adopted, and found that although most states had such mechanisms in place, and that the mechanisms exhibited some common characteristics (exempting agriculture from the research of enforcement orders, for example), overall, the “diversity and ubiquity of state legal mechanisms” led to “inconsistent treatment of similar problems from one state to the next.” ENVTL. L. INST., ALMANAC OF ENFORCEABLE STATE LAWS TO CONTROL NONPOINT SOURCE WATER POLLUTION 3 (1998), available at [HTTP://WWW.ELISTORE.ORG/DATA/PRODUCTS/D8.07.PDF](http://www.elistore.org/Data/products/d8.07.pdf).

One popular term for this sort of horizontally aligned system of enforcement is a “network,”<sup>167</sup> a term used by the EPA itself to describe the process.<sup>168</sup>

Elsewhere, I have suggested that, in cases where central authority is circumscribed, rules are often created by “horizontal collaboration through networks of officials and private parties that exist alongside the more vertical, hierarchical structures into which they are more formally fitted.”<sup>169</sup>

The EPA has also networked with state officials to develop its approach to nonpoint source pollution; indeed its nine “key principles” to funding section 319 plans were developed after “joint discussions” with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA).<sup>170</sup> After the EPA issued its funding guidance, ASIWPCA explicitly endorsed it,<sup>171</sup> and since then has characterized its work on nonpoint sources as “the State/USEPA Nonpoint Source Partnership.”<sup>172</sup>

### C. Hard Rules in a Soft System

Finally, the EPA has taken some tentative steps toward linking its soft administrative program concerning nonpoint source pollution

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<sup>167</sup> Network governance is particularly popular in describing international regulation, as it, like the nonpoint source pollution regime, does not feature a strong central authority with the power to force compliance with rules. See, e.g., SLAUGHTER, *supra* note 41, at 38–64; Raustiala, *supra* note 127, at 7–26 (detailing “history and theory of transgovernmental cooperation” and analyzing “rise of networks in contemporary cooperation”); Anne-Marie Slaughter, *A Typology of Transjudicial Communications*, 29 U. RICH. L. REV. 99, 99–102 (1994) (highlighting global networking phenomena among courts).

<sup>168</sup> The EPA has commended states that have “strengthened and increased their partnerships, nurtured a vast network of community-based action on a watershed basis, and, in many cases, developed stronger financial bases and legal support for their upgraded programs” in order to implement their management programs. Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60,653, 60,654 (Oct. 23, 2003).

<sup>169</sup> Zaring, *supra* note 25, at 1029.

<sup>170</sup> Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants in FY 2001, 65 Fed. Reg. 70,899, 70,899 (Nov. 28, 2000) (indicating that principles were “a product of joint discussions in 1995 and 1996, with representatives of EPA Headquarters, Regions and the States, under the auspices of the Association of State and Interstate Water Pollution Control Administrators.”); EPA, SUCCESS STORIES III, *supra* note 135, at 4.

<sup>171</sup> See EPA, SUCCESS STORIES III, *supra* note 135, at 4.

<sup>172</sup> The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) claims that its partnership with the EPA on BMPs “relate[s] to watershed implementation, addressing urban and rural pollution, grants management, capacity building, information transfer and outreach and reporting results achieved.” ASIWPCA, Nonpoint Source, <http://www.asiwPCA.org/programs/nps.htm> (last visited Jan. 25, 2006); see also EPA, State/USEPA Nonpoint Source Partnership: Priorities for the Coming Year & Invitation to Participate on Work Groups, [http://www.epa.gov/owow/nps/2002\\_work\\_group\\_priorities.doc](http://www.epa.gov/owow/nps/2002_work_group_priorities.doc) (last visited Jan. 22, 2006) (listing potential areas for collaboration, such as pilot projects).

with its harder one limiting the number of pollutants that may be released into waters already designated as “impaired” under the CWA. In this way, the EPA has paired the advice and funding incentives contained within the best practices model with a stricter statutory scheme. The EPA has also encouraged states to tie their BMPs to hard pollution reduction targets by linking approximately half of the funding to programs where states are required to set such targets.<sup>173</sup>

This scheme, known as TMDLs, or Total Management Daily Loads, is based on section 303(d) of the CWA, which requires states to identify waters that cannot meet water quality standards through point source pollution controls and set TMDLs for those waters.<sup>174</sup> In setting TMDLs, the states must identify the point source and nonpoint source pollutants coming into the system and identify the maximum loads that the waterway can take in and still meet water quality standards.<sup>175</sup>

The EPA has advised states to incorporate TMDLs in their assessment reports and management programs under section 319.<sup>176</sup> In fact, up to twenty percent of the BMP funds from the EPA can be used to develop a program and set TMDLs, and in recent years the EPA has encouraged states to increase use of those funds in setting TMDLs.<sup>177</sup>

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<sup>173</sup> The EPA disburses the funding in two roughly equivalent piles: “base” funding and “incremental” funding. While base funding may be spent by the states on a variety of projects related to nonpoint source pollution reduction, incremental funding is targeted at projects aimed at “those watersheds identified as not meeting clean water and other natural resource goals.” Funding the Development and Implementation of Watershed Restoration Action Strategies under Section 319 of the Clean Water Act, Memorandum from Robert H. Wayland III, Dir., Office of Wetlands, Oceans & Watersheds to EPA Reg’l Water Div. Dirs., State & Interstate Water Quality Program Dirs. & Section 319-Eligible Tribal Water Quality Program Dirs. (Dec. 4, 1998), <http://www.epa.gov/owow/nps/fy19992.html>.

<sup>174</sup> See 33 U.S.C. § 1313(c) (2000) (setting out structure by which EPA interacts with state standards); see also 40 C.F.R. § 130.7(b) (setting out framework for states identifying and listing TMDLs for waters within their boundaries).

<sup>175</sup> Tobin, *supra* note 147, at 813 (defining TMDL as sum of point source, nonpoint source, and background waste load allocations).

<sup>176</sup> Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2002 and Subsequent Years, 66 Fed. Reg. 47,653, 47,653 (Sept. 13, 2001) (“This guidance is intended to strengthen the link between the Section 319 NPS program and the development and implementation of NPS TMDLs . . . .”). “In addition, since 1998, EPA has spent more than \$11 million to support development of technical guidance for developing TMDLs and identifying the most appropriate and efficient best management practices for nonpoint sources.” Withdrawal of Revisions to the Water Quality Planning and Management Regulations and National Pollutant Discharge Elimination System Program, 68 Fed. Reg. 13,608, 13,609–10 (Mar. 19, 2003).

<sup>177</sup> See Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2002 and Subsequent Years, 66 Fed. Reg. at 47,654; see also Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg.

Thus, at the margins of the practices, the EPA has continued to attempt to encourage states and localities to adopt more elaborate water management schemes through funding and by tying BMPs to other hard rule programs. The struggle of regulators to infuse soft regulatory schemes with some hard requirements is characteristic of the sort of regulatory entrepreneurship that goes hand in hand with the informal organization of horizontal standards. I raise this issue here because I want to admit to the complexity of best practices regimes. They are not simply efforts at voluntary horizontal standardization. They are also approaches to rulemaking that contain the usual tensions of administrative law—empire building,<sup>178</sup> path dependence, and all of the rest.

#### D. Conclusion

Commentators often decry the CWA's nonpoint provisions as an example of regulatory failure.<sup>179</sup> I have certainly turned a skeptical eye to Congress's efforts in the past.<sup>180</sup> But I think the criticism can obscure the fact that the federal approach to nonpoint source pollution is surprisingly uniform.

Moreover, it is likely to be the regime for some time to come. Congress may never permit the EPA to promulgate hard nonpoint pollution rules, either for political reasons,<sup>181</sup> or because of increasing levels of skepticism about the ability of large complicated rulemakings to achieve difficult goals, such as ensuring fishable and swimmable waters.<sup>182</sup>

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60,653, 60,656 (Oct. 23, 2003) ("In FY 2001, EPA recognized the need to increasingly focus Section 319 grant dollars on implementing nonpoint source TMDLs or the nonpoint source components of mixed-source TMDLs . . .").

<sup>178</sup> However, the classic concerns about agency empire-building are overblown. The empire-building tendency has neither been empirically proven, Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 320 (2002), nor is there much evidence of its theoretical soundness. Levinson, *supra* note 123, at 919–20 ("[R]ampant government empire-building would seem to require government officials who care about the interests of the institutions in which they are situated more than their own self-interest or the interests of the citizens they represent. Democratic governments are unlikely to generate such officials.").

<sup>179</sup> J.B. Ruhl has posited that "farms are virtually unregulated by the expansive body of environmental law that has developed in the United States in the past 30 years." J.B. Ruhl, *The Environmental Law of Farms: 30 Years of Making a Mole Hill Out of a Mountain*, 31 ENVTL. L. REP. 10,203, 10,203 (2001).

<sup>180</sup> See generally David Zaring, *Federal Legislative Solutions to Agricultural Nonpoint Source Pollution*, 26 ENVTL. L. REP. 10,128 (1996).

<sup>181</sup> See *id.* at 10,136.

<sup>182</sup> As Richard Stewart has put it, "Today we face an acute problem of growing regulatory fatigue. . . . It generally takes a very long time to formulate and adopt new regulations and a long time to implement them." Stewart, *supra* note 104, at 446; see also OSBORNE &

I have gone into some detail about the process because the EPA's experience shows four things.

First, best practices can result in a standard structure even when regulated entities are never required to adopt them. The use of best practices can engage a wide range of participants in a regulatory system. For nonpoint source pollution, state regulators, private citizens, experts, and other federal agencies have all played a role in the devising of management plans. But with all of these varied sources of inputs, the outputs are surprisingly similar.

Second, and relatedly, the number of actors involved in best practices regimes shows how local regulators can arrive at a scheme where the practices they recommend are substantially similar. So while environmental scholars have debated the values of a state managed environmental regime, and whether it would result in a race to the top or the bottom, environmental regulators have introduced a state developed, federally guided regime that results in neither.

Third, best practices will not necessarily result in optimal regulation. While BMPs do a lot of disaggregated work to create a common approach to a difficult environmental problem, they are, at bottom, a procedural solution. There is reason to believe that BMPs have created a standardized regime. But it is not clear that the use of them will result in standardization around an optimal rule, as opposed to a first-in-time rule or another rule that results from cascades or other network effects.

Fourth and finally, I've gone into some detail in my analysis of best practices to show the place they might occupy in a palette of regulation. In this case, unsurprisingly, we see EPA regulators tying their preferred best practice to regimes in which they have the power to regulate through hard rules, and we see private parties pushing for particular practices. The result is not so much a mosaic—best practices tend to result in regulators doing things the same way—as a different kind of regulatory tug of war, one that plays out not in the courts or in the EPA's comment periods, but in other places. In other contexts, it may be appropriate for the EPA to operate through more traditional forms of administrative procedure, creating more traditional forms of tension (and litigation).

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*GAEBLER*, *supra* note 95, at 11-12 ("Our thesis is simple: The kind of governments that developed during the industrial era, with their sluggish, centralized bureaucracies, their preoccupation with rules and regulations, and their hierarchical chains of command, no longer work very well.").

## V

## BEST PRACTICES EVERYWHERE

Best practices appear all over the federal government, and in this Part, I offer a brief palimpsest of some of these appearances. If anything unifies the contexts in which best practices have been used, it is their diversity. From older, funding-oriented programs such as those operated by the Department of Housing and Urban Development (HUD), to newer, higher profile ones involving welfare reform and homeland security, best practices represent a new, informal form of central administration.

Best practices are a type of administrative action that is spreading across issue areas.<sup>183</sup> Sometimes they are encouraged by statute, as with the CWA, and other times they are enacted purely administratively. While agencies like the Department of Health and Human Services (HHS) and HUD pair their best practices schemes with federal dollars, others, such as the Department of Homeland Security, use the concept to guide their international strategies and their internal organization.<sup>184</sup> Indeed, the administrators of the administrators are turning to best practices; the Office of Management and Budget has issued its own set of best practices on contracting and procurement.<sup>185</sup>

The uses of best practices are accordingly diverse, but the upshot is the same: Best practices appear in many different areas not as a form of experimentalism, but rather as a technique of harmonization.<sup>186</sup> They are a way to get dispersed regulatory actors—be they

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<sup>183</sup> And, of course, best practices are terms used at all levels of government. Chuck Sabel and James Liebman have surveyed best practices increasingly adopted by schools. See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 243–45, 296 (2003) (discussing, *inter alia*, data disseminators that have “begun to identify consistently improving schools and districts and to articulate, together with the educators responsible for the results, the best practices that produce the successes”); see also James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1703 (2003).

<sup>184</sup> More generally, as some observers have noticed, the federal government’s role in these circumstances “is less one of direct action than one of providing financial support, strategic direction, and leadership for other governmental actors[,] . . . less in championing particular institutions and practices than in mobilizing resources, encouraging experimentation, facilitating comparison and evaluation of alternative approaches, and diffusing the *best practices*.” PAUL OSTERMAN ET. AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* 151 (2001), quoted in Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2160 (2003) (reviewing OSTERMAN, *supra*) (emphasis added).

<sup>185</sup> See OFFICE OF FED. PROCUREMENT POLICY, OFFICE OF MGMT. & BUDGET, A GUIDE TO BEST PRACTICES FOR PERFORMANCE-BASED SERVICE CONTRACTING (1998), <http://www.arnet.gov/Library/OFPB/BestPractices/PPBSC/BestPPBSC.html>.

<sup>186</sup> Of course, my survey is by no means comprehensive, even with regard to conceptual issues—such as whether the following of best practices ought to be a litigation defense.

local officials, international counterparts, or bureaucrats within an agency—to do things the same way.

#### A. *Best Practices in HUD Funding Guidelines*

Like the EPA, HUD uses funding to encourage its client agencies into adopting best practices that its clients identify and it ratifies.<sup>187</sup> HUD's embrace of best practices typifies the way that the concept has found its place in the bread and butter of the federal administrative state. Moreover, if the EPA's BMPs were an example of regulation where a federal agency doesn't have the power to make hard rules, best practices to HUD exemplify the formally light touch that the federal government puts on much of the subsidy that it provides states and localities. HUD in particular evaluates grant applications by allocating points for programs that utilize "best practices."<sup>188</sup>

Unlike the EPA, or most agencies, HUD offers a definition of best practices, or at least the beginnings of one. As always, though, what exactly a "best practice" might be is not a straightforward matter. HUD defines a best practice as "a program or project, management tool, or technique."<sup>189</sup>

Such programs, projects, tools, or techniques must have at least two of the following characteristics: (1) generates a significant positive impact on those it is intended to serve or manage; (2) can be replicated in other areas of the country, region, or local jurisdiction; (3) demonstrates the effective use of partnerships among government agencies, non-profit organizations, or private businesses; or (4) displays creativity in addressing a problem, and demonstrates effective leveraging of resources.<sup>190</sup>

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For an example of this debate, consider the Equal Employment Opportunity Commission's Task Force Report on "Best" Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector, which surveyed private sector employees in an effort to "achieve equal employment opportunity in the workplace." Brief of Amicus Curiae Society for Human Resource Management in Support of Respondent at 18 & n.17, *Kolstad v. Am. Dental Ass'n.*, 527 U.S. 526 (1999) (No. 98-208) (quoting Letter from Hon. Reginald Jones, Comm'r, Equal Employment Opportunity Comm'n to Soc'y for Human Res. Mgmt. (Apr. 7, 1997)). The report listed programs that a blue ribbon commission in the EEOC deemed successful in meeting the agency's fair employment objectives.

<sup>187</sup> The department—a typical client-focused federal department—does not operate any of the low-income housing over which it exercises responsibility. It relies entirely on local government—cities and housing authorities—for that.

<sup>188</sup> See, e.g., Notice of HUD's Fiscal Year 2004, Notice of Funding Availability, Policy Requirements and General Section to the SuperNOFA for HUD's Discretionary Programs, 69 Fed. Reg. 26,942, 27,095 (May 14, 2004).

<sup>189</sup> HUD, St. Louis Best of the Best, <http://www.hud.gov/local/mo/library/archives/stlbpwin.cfm> (last visited Oct. 24, 2005).

<sup>190</sup> *Id.*

HUD's approach to best practices is like the EPA's. In both we see the importance of "copy-ability" across jurisdictions, and we see an ethic of partnership in HUD's version of best practices. Replication alone—explicitly encouraged by HUD, a hallmark of the nonpoint source pollution regime—is one thing. The mixing of public and private is another, and perhaps appropriate for a regulatory technique with corporate origins.

In addition to tying funding to programs that meet best practices, HUD has taken some institutional steps to encourage the sharing of best practices by its clients.<sup>191</sup> The department has, for example, convened symposia to examine the best approaches to providing fair and equal-opportunity housing in urban communities.<sup>192</sup> It has supported the development of best practices for both built and rented public housing.<sup>193</sup> HUD has also created a Fair Housing Best Practices Task Force that provides information to the public on fair-lending-best-practices lending agreements.<sup>194</sup> It also encourages lenders to sign agreements with HUD to lend through best practices.<sup>195</sup>

HUD's best practices experience is a typical one: It serves as an information clearinghouse to clients, who devise best practices that are then shared with other clients. The point is that control over clients is increasingly less a function of hard rules in the CFR and Federal Register, and more one of shared best practices.

I use HUD as an example of best practices in part because supervision of the department here is problematic for those who prefer administrators to be subject to judicial or congressional control. The routine funding decisions by HUD are unlikely to raise congressional interest; at the same time, the use of best practices as a factor in determining who benefits from HUD's largesse is not something that courts would supervise under the APA. Because best practices as used by HUD are the sort of low-stakes technical aides to decisionmaking

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<sup>191</sup> HUD has also done some best practices work in issue-specific areas. It has worked to identify best practices for community-based drug prevention initiatives in urban and public housing areas. Announcement of Funding Award FY 1996; Cooperative Agreement Between the Department of Housing and Urban Development and the Milton S. Eisenhower Foundation, 62 Fed. Reg. 31,837, 31,838 (June 11, 1997).

<sup>192</sup> See Fair Housing Initiatives Program; Notice of Public Forum Focus Group Meeting Information, 65 Fed. Reg. 25,432 (May 1, 2000).

<sup>193</sup> See, e.g., Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 319, 350 (2000) ("There is a well-defined set of section 8 best practices, but they are not widely practiced."); HUD, HOPE VI—BEST PRACTICES AND LESSONS LEARNED 1992–2002 Washington, D.C. (June 14, 2002).

<sup>194</sup> HUD, Doing Business with HUD, <http://www.hud.gov/directory/800/800num8.cfm> (last visited Oct. 25, 2005).

<sup>195</sup> *Id.*

beyond the purview of the courts and likely outside the interest of Congress, the best practices process here is one very much left to the agency and its clients. Here, best practices may help to achieve some measure of uniformity in local housing decisions, but it is not clear that this sort of disaggregated uniformity is worth the reduced administrative oversight that accompanies it.

### B. Best Practices as Welfare Reform

If HUD's use of best practices exemplifies the adoption of best practices for the day-to-day work of federal administration, the use of best practices in welfare reform shows how the concept has been harnessed in the service of the reinvention of government.

In the new welfare regime,<sup>196</sup> best practices are used by the Department of Health and Human Services and the Department of Labor<sup>197</sup> to solicit localities and organizations to start projects that will identify best practices to serve welfare recipients. As is the case with HUD's best practices program, the localities and organizations that adopt best practices identified by others and ratified by the central agency can receive funding for their efforts from HHS.<sup>198</sup>

All of this is a function of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which orders the Secretary to develop methods of disseminating information including "best practices among States and localities."<sup>199</sup> Under

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<sup>196</sup> Welfare reform was one of the most prominent examples of the reinvention of government touted by Al Gore and borrowed from Osborne and Gaebl. See *supra* notes 95–103 and accompanying text for a discussion of this process. See also Barbara L. Bezdek, Panel Discussion, *Public Oversight of Public/Private Partnerships*, 28 FORDHAM URB. L.J. 1357, 1365 (2001) (linking welfare reform to reinvention of government initiatives, both by Clinton administration and "worldwide").

<sup>197</sup> The Department of Health and Human Services (HHS) and the Department of Labor (DOL) split duty in this arena; some aspects that are related specifically to job training are handed down by the DOL, but most of the regulations, particularly those based on quality of life and services, are handled by HHS. The DOL uses best practices in other contexts as well, such as to describe ways in which disabled workers should be rehabilitated and introduced to new work opportunities. See Projects with Industry; Notice Inviting Applications for New Awards for Fiscal Year 2002, 67 Fed. Reg. 11,680, 11,680 (Mar. 15, 2002). The DOL also uses the term to describe procedures that should be taken for employees involved in corporate acquisitions. Revision to the Department of Labor Acquisition Regulations, 69 Fed. Reg. 22,990 (Apr. 27, 2004).

<sup>198</sup> See, e.g., DOL Workforce Investment Act, 65 Fed. Reg. 49,294, 49,320 (Aug. 11, 2000) (codified at 20 C.F.R. pt. 663) (directing localities receiving funding to set up "One-Stop" work training and placement facilities to develop best practices for assessment of clients); see also Notice of Republication of Standard Best Practices Planning and Implementation Grants Announcement, 69 Fed. Reg. 10,839, 10,840 (Mar. 8, 2004) (announcing availability of funding for projects to prevent substance abuse and to treat addicts).

<sup>199</sup> 42 U.S.C. § 613(c) (2000). For a recent discussion of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), focusing on the pairing of the

PRWORA, states are given block grants and assigned goals.<sup>200</sup> And their choices are aided by HHS's substantial best practices advice.<sup>201</sup> In order to assist them in this process, HHS has turned to best practices both in print and on the web.<sup>202</sup> Given that the states are now receiving block grants to fund their assistance programs and now receive little federal oversight,<sup>203</sup> the use of best practices is an important—although always optional—part of the welfare-to-work effort. As always, best practices are in theory a mechanism through which a hundred flowers may bloom. The federal government has okayed a variety of practices designed to enhance the employability of hard-to-serve assistance recipients and to improve their general quality of life.<sup>204</sup> Nonetheless, as with BMPs, most local welfare-to-work programs are managed in substantially similar ways.<sup>205</sup>

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encouragement of marriage with welfare-to-work, see Angela Onwuachi-Willig, *The Return of the Ring*, 93 CAL. L. REV. (forthcoming Dec. 2005).

<sup>200</sup> 42 U.S.C. § 601(a) (2000).

<sup>201</sup> 42 U.S.C. § 602(a) (2000).

<sup>202</sup> Department of Health and Human Services, Best Practice Initiative, <http://www.osophs.dhhs.gov/ops/BestPractice/> (last visited Oct. 22, 2005). See generally Jason Mitchell, Welfare to Work: A Best Practices Analysis (December 2001) (unpublished manuscript, on file with the *New York University Law Review*). Thus, this hunt for best practices, particularly in the realm of welfare-to-work, is a response to congressional deregulation of the mechanics of state welfare practices (while simultaneously imposing work requirements on welfare recipients). See Kathryn R. Lang, Note, *Fair Work, Not "Workfare": Examining the Role of Subsidized Jobs in Fulfilling States' Work Requirements Under the Personal Responsibility and Work Reconciliation Act of 1996*, 25 FORDHAM URB. L.J. 959, 968–70 (1998) (explaining what has happened to welfare laws after passage of PRWORA in 1996).

<sup>203</sup> See, e.g., Robert M. Coard, *Keeping Head Start Strong*, BOSTON GLOBE, Feb. 22, 2003, at A15 ("[B]lock grants are operated by the states with minimal or no federal oversight"); Paul Offner, *Medicaid Games*, N.Y. TIMES, May 19, 1995, at A31 (arguing that "giving states block grants to use as they please" is equivalent to "eliminating Federal oversight").

<sup>204</sup> Stacy L. Brustein, *The Intersection Between Welfare Reform and Child Support Enforcement: D.C.'s Weak Link*, 52 CATH. U. L. REV. 621, 671 n.335 (2003) (listing variety of best practices adopted by states and publicized by HHS); Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 601 nn.200–01 (1999) (discussing state best practices adopted pursuant to TANF program); see also Connect Richmond, Best Practices and Case Studies in Welfare Reform, [http://oncampus.richmond.edu/connect/issues/welfarereform/welfare\\_reform\\_best\\_practices.html](http://oncampus.richmond.edu/connect/issues/welfarereform/welfare_reform_best_practices.html) (last visited Jan. 31, 2006) (providing links to various studies). Nor is welfare to work the only area in which HHS engages in best practices style supervision. Its Office of Child Support Enforcement (OSCE) has published a "Compendium of State Best Practices" designed to facilitate the sharing of ideas on child support enforcement. See DEPT. HEALTH & HUMAN SERVS. CHILD SUPPORT ENFORCEMENT NINETEENTH ANNUAL REPORT TO CONGRESS 8–10 (1994), available at <http://www.acf.hhs.gov/programs/cse/annrpta.htm>.

<sup>205</sup> See, e.g., Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 146 (2002) ("A thor-

Welfare to work, unlike housing funding, is something for which legislative supervision has been forthcoming, meaning that the development of best practices standards is subject to some sort of outside check. With higher stakes comes a higher profile. As with HUD, though, the pursestrings-type of decisions made by the agency are likely to lead to a common approach to welfare reform; it is by no means clear that the welfare reformers had this sort of harmonization in mind. Best practices, then, is a principal technique in this area that lacks the indicia of legislative choice. Perhaps, then, this sort of mechanism calls for a bit more Congressional supervision.

### C. Best Practices in Very High Politics

Best practices aren't only vehicles for funding disbursement in either innovative or ordinary iterations. They are also deployed to fight terrorism and deal with foreign powers, as the 2002 statute governing the Department of Homeland Security (DHS) shows.<sup>206</sup>

That statute levies three different best practices requirements on its officials. The Special Assistant to the Secretary is responsible for the "development and promotion of private sector best practices to secure critical infrastructure,"<sup>207</sup> for sharing "best practices and technologies relating to homeland security" with friendly foreign nations,<sup>208</sup> and for "identifying, and serving as a clearinghouse for information regarding, best practices in software development and acquisition in both the public and private sectors."<sup>209</sup> And it's not just statutory. The Customs Service branch of DHS has recently published a summary of the "Best Practices of Compliant Companies"<sup>210</sup>—com-

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ough search revealed that every one of the fifty states has in fact adopted the mandatory paternity identification and child support enforcement rule.").

<sup>206</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

<sup>207</sup> 6 U.S.C.S. § 112(f)(7) (LexisNexis Supp. 2005).

<sup>208</sup> 6 U.S.C. § 459 (Supp. II 2001–03).

<sup>209</sup> Bob Stump National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 107-314, § 804(c)(2)(B), 116 Stat. 2458, 2604 (2002) (codified at 10 U.S.C. § 2302 note (Supp. II 2001–03)). The President has also issued an Executive Order requiring the identification of "best practices among Federal, State, local, and tribal governments and private organizations and individuals for emergency preparedness planning with respect to individuals with disabilities" by a council reporting to the department. Exec. Order No. 13,347, 69 Fed. Reg. 44,573 (July 26, 2004).

<sup>210</sup> See U.S. Customs and Border Protection Best Practices of Compliant Companies (Sept. 14, 2005), [http://www.cbp.gov/xp/cgov/import/regulatory\\_audit\\_program/importer\\_self\\_assessment/](http://www.cbp.gov/xp/cgov/import/regulatory_audit_program/importer_self_assessment/) (follow "Best Practices of Compliant Companies" hyperlink). This four-page document includes very broad principles: It urges, for example, importers to be sure to include "management's commitment to compliance," and the identification and analysis of risks that may impede compliance. *Id.* For a customs lawyer's attempt to explain the

pliant, that is, with the import laws and changes to them created by the USA Patriot Act.

The embrace of best practices really is everywhere. As the Homeland Security Act, as implemented, shows, best practices are used in the most sensitive areas of national security; it is in Congress; and it is particularly popular in international regulation.

The blend of best practices and high politics is particularly intriguing for administrative law scholars. Many of the anti-democratic tendencies of the phenomenon are, if anything, more likely to be mitigated by congressional interest in high profile initiatives like the fight against terrorism. Typically, however, the work to which best practices are being put is in managing the somewhat micro, specific aspects of that fight.

Even in matters of Homeland Security, the optimistic, technocratic search for best practices doesn't mean that *all* of the highest of political issues are being resolved through informal copying alone. But, of course, much administration is a matter of small, incremental steps; steps that, in DHS's case, will be resolved by a search for best practices.

## VI CONCLUSION

I conclude in two ways. First, I offer some practical recommendations for how best practices should be handled by agencies, courts, and Congress. Then I consider what best practices can tell us about informal mechanisms of rulemaking more generally.

### A. *Governing Best Practices*

There is no perfect solution to a form of administrative action that I have, in much of the rest of this article, spent plenty of time problematizing. But I think it is important to understand that best practices can be beneficial in some contexts, and worth extra scrutiny in others.

Best practices may be particularly appropriate in areas of regulation that offer tremendous complexity and a wide range of alternatives. There, best practices offer a low-impact form of coordination. Where such an approach is valuable, or unavoidable (as in the anarchic world of international regulatory cooperation), best practices can play a useful role. However, they are unlikely to be successful at

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changes, see J. Steven Jarreau, *International Law: U.S. Customs Best Practices*, 51 L.A. B.J. 219, 220–21 (2003).

forcing technology to adapt to new problems—best practices do not force anything.

Moreover, the substantive problems of regulation through best practices are exacerbated by the way they are implemented, which, as I explained in Part III of this article, essentially makes them the first and most important step in a two-step regulatory process.

In the first step best practices are used to identify the legal rules that would, if enacted, have the force of law. But this devising process occurs without any procedural safeguards—judicial review or guarantees of public participation.

The result is that when agencies finally do adopt the practices gleaned from one another and pointed to by central regulators—the second step of the process—they often can defend their adoption of best practices for a number of reasons that courts are likely to accept, such as because it conforms to a larger scheme, or it duplicates efforts that other jurisdictions have used.<sup>211</sup> The inability to challenge this sort of *fait accompli* is problematic.

To rectify this problem, I propose that Congress and the agencies themselves adopt some thoughtful policies about best practices, while retaining them as an alternative to APA rulemaking.

First, Congress should be encouraged to make extra efforts to exercise supervision over the institutionalized process of horizontal regulation. It could do so through the hearings process, or by the requirement of annual reports on best practices initiatives. Of course, Congress may wish to require agencies to make rules through best practices where appropriate (or indeed, permit agencies to develop best practices regimes on their own). We can predict that it would be more likely to provide active, police-patrol-style supervision in matters of high importance, such as high politics or high value harmonization initiatives. The potentially expensive adoption of international accounting standards is an example.<sup>212</sup>

Second, agencies should be encouraged to utilize best practices transparently. Agencies such as the EPA already publicize these practices on their websites; they should be encouraged to continue to do so and to publicize best practices initiatives in the Federal Register.<sup>213</sup> If a standard has been widely adopted, it may be appropriate for a fed-

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<sup>211</sup> To take just one example, consider the Federal Aviation Administration's recent noise standard rules. FAA Stage 4 Aircraft Noise Standards, 70 Fed. Reg. 38,742, 38,747 (July 5, 2005) (to be codified at 14 C.F.R. pts. 36 & 91) ("The final rule was developed by assessing the feasibility and availability of the best noise abatement technologies [i.e., best practices] for turbojet powered and propeller-driven large airplanes.").

<sup>212</sup> See *supra* notes 65–69 and accompanying text.

<sup>213</sup> See *supra* notes 155–58 and accompanying text.

eral agency to ratify it with notice and comment rulemaking.<sup>214</sup> Here is an area where Congress can provide guidance, perhaps through an “Informal Administrative Procedure Act,” modeled off the Regulatory Negotiation Act,<sup>215</sup> requiring agencies to publicly announce best practices initiatives and say why they are pursuing such practices.<sup>216</sup>

For those areas in which Congress is unlikely to provide engaged supervision, we should trust agencies to adopt informal norms of notice and comment for best practices initiatives that they suspect will need the support of regulated entities to develop the regulatory scheme.<sup>217</sup> For other initiatives, we may hope for now that the horizontal nature of the practices, and the peer-to-peer review of standards (problematic though such review is) may offer an imperfect check on the overly ambitious or misguided use of the phenomenon.

In sum, then, I suggest that we look to control this new form of agency rulemaking from within the agencies themselves, for the most part, unless Congress is willing to provide supervision. We can bolster that control with general congressional guidance for best practices, requiring that such initiatives be publicized when announced, and also providing supervision over best practices initiatives where Congress is so inclined. It is a satisfactory, rather than a perfect, mechanism of control over the use of best practices. For one thing, the addition of supervision over a bureaucratic tool that owes some of its popularity to the absence of constraint will surely make bureaucrats less willing to turn to it in the future. But, despite these concerns about deterrence, perhaps such a policy is appropriate for a mechanism born more from dissatisfaction with traditional bureaucratic process—by both bureaucrats as well as bureaucratic reinventors—than with enthusiasm for its own inherent virtues.

### B. *Contextualizing Best Practices*

I have now written about institutional mechanisms of informal harmonization in a number of different contexts, including courts,<sup>218</sup>

<sup>214</sup> Dorf and Sabel assume that this sort of ratification would happen as a matter of course. See Dorf & Sabel, *supra* note 19, at 350. I am less confident that agencies will do this, but I grant that such ratification would do some small amount of good in dealing with the democracy deficit problem.

<sup>215</sup> 5 U.S.C. §§ 561–570a (2000).

<sup>216</sup> Indeed, the Act could be extended to cover all regulatory harmonization initiatives, and, like the Regulatory Negotiation Act, it need not require judicial review.

<sup>217</sup> There is some evidence that agencies will voluntarily adopt such procedures in cases where they need their informal scheme, as American banking regulators have increasingly done with respect to the best practices harmonization initiatives of the Basel Committee. See Zaring, *supra* note 5, at 559.

<sup>218</sup> See generally Zaring, *supra* note 25.

international regulation,<sup>219</sup> and now domestic rulemaking. I close with some general observations about the implications of this form of harmonization, which I think can be fairly characterized as an increasingly robust, and intellectually coherent, alternative to central and formal rulemaking.

First, disaggregated methods of rulemaking lead to harmonization, rather than disaggregation. Without top down instruction, rulemakers simply copy one another, leading to a regulatory equilibrium that may be different than the one that would have been set by an ideal central rulemaker, but that nonetheless is real and generally stable.

Second, harmonization techniques come with their own set of problems, particularly the problems of network forms of governance. Copying can lead to the dominance of second best (or even worse) rules, where most of the networked rulemakers adopt a rule without seriously considering whether it is an optimal one.

Third, although the democracy deficit problems of disaggregated rulemaking are real, they are not insuperable. Sometimes networked, informal rulemakers voluntarily adopt the notice-and-comment procedures used by formal rulemakers to guarantee public participation in the rulemaking process.<sup>220</sup> Even when they do not, as with best practices, at least they proceed somewhat publicly, with nonguaranteed participation by a decentralized, and ever changing, constellation of actors. Congressional action to enhance the publicity surrounding best practices initiatives, as well as the choice by central regulators to pursue them, would help, and would provide a modicum of recentralization of the process by at least identifying the central purpose to which the best practices are to be put.

Fourth, best practices is the harmonization technique du jour, and its continuing and increasing prominence illustrates the tenacity of technocratic models of governance. Although “bestness” is by no means always realized by best practices, the ideals of experimentation, evaluation, and persuasion are rooted in a worldview of administrative law that suggests that there are right answers out there, and that harmonization techniques can reach them.<sup>221</sup> Specifically, regulators, if left to develop their own sorts of rules by sharing and copying, are presumed under the informal rulemaking rubric, to be capable of coming up with good ones.

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<sup>219</sup> See generally Zaring, *supra* note 5.

<sup>220</sup> See *id.* at 550–51.

<sup>221</sup> I discuss the tenacity of technocracy in the context of international regulation in Zaring, *supra* note 5.

What this means for administrative law (even the sort of administrative law administered by judges), is that administrators from low levels to high will fill voids where classic models of command-and-control regulation no longer have purchase. Sometimes these voids develop because agencies fail to regulate, perhaps because of a failure of technical capacity or political will. Sometimes they develop because central agencies do not exist.<sup>222</sup> Sometimes they develop because central authorities have not been given the power to pass hard rules, but have been given either a real or imagined purview over a particular subject matter.

In each of these cases, administrators are likely to fill the voids in central rulemaking, not because they are power-hungry empire builders—as there is little evidence that this sort of empire building happens in practice—but because the less formal alternatives are clear, precedented, customary, and, in the case of best practices, frequently encouraged.<sup>223</sup>

The dilemma for bureaucrats faced with particularly complex and technical problems is not unprecedented, but rather a problem that would-be legal standardizers have been grappling with for decades. Best practices might even be viewed as simply the newest technique of this lengthy project, which suggests that the nature of the problems and promise of best practices might afford us insights into how the law works more generally. And the existence of prior comparables may indicate that a cautious but intelligent embrace of the phenomenon as a tool of administrative policy may be, if not perfect, good enough for government work.

We should therefore be cautious about informal harmonization, whether through best practices or other means. But we needn't be too cautious because of the procedural deficiencies: Best practices are a means of avoiding traditional administrative legal procedural controls, to be sure, but they do afford some participation by interested parties, and my prescriptions for best practices reform are straightforward and implementable. The reason to be cautious is because there is no reason to suspect that the substantive creations of these procedural innovations will necessarily be good ones. They will just be copied ones, couched in the language of technocracy.

And it is finally the allure of technocratic regulation that I want to problematize most. Rather than a dialectic designed to reach some Platonic or Millian good, best practices are a bit more prosaic. They

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<sup>222</sup> As is the case in the international arena. *See generally* Zaring, *supra* note 5.

<sup>223</sup> *See supra* note 123.

are ways that low-level administrators figure out what to do next, not through reasoning, but through borrowing.

But the insights gleaned from best practices, in light of their new popularity, may suggest how these nonpublic legal and conduct-modifying programs can work.