

# “AGENCY THREATS” AND THE RULE OF LAW: AN OFFER YOU CAN’T REFUSE

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## INTRODUCTION

Over the past several decades, scholars and practitioners have documented how regulatory agencies have increasingly relied on guidance, best-practice documents, policy statements, and other informal pronouncements to achieve regulatory ends.<sup>1</sup> Agencies often do so to avoid executive regulatory review and other accountability measures that ostensibly slow the regulatory process.<sup>2</sup> Much of the debate surrounding the use of informal regulatory mechanisms has focused on the extent to which such mechanisms improperly create new law outside the processes set forth in the Administrative Procedure Act.<sup>3</sup> What the literature on informal methods of rulemaking has ignored until recently, however, is policymaking through the issuance of completely unenforceable threats.

In a 2011 *Duke Law Journal* essay entitled *Agency Threats*, Professor Tim Wu sets forth a defense of bald-faced threats by agencies meant to achieve regulatory ends. As he put it:

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1. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1393 (1992); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 874; David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 295 (2006).

2. Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1417–18 (2012).

3. See Tim Wu, Essay, *Agency Threats*, 60 DUKE L.J. 1841, 1841–42 (2011) [hereinafter *Agency Threats*].

[T]he scholarly presumption is that rulemaking or formal adjudication is an intrinsically superior process for most agency action. The use of threats is considered an abuse of power, a means of avoiding judicial review, or perhaps just good old-fashioned laziness. The point of this Essay is to challenge that general presumption. Rule by threats, I argue, is, under certain circumstances, a superior means of regulatory oversight.<sup>4</sup>

Given the boldness of this claim and the eminence of its proponent,<sup>5</sup> the “agency threats” thesis deserves a response. Providing one is the aim of this short article. I conclude that not only is Wu’s thesis wrong, but it is also dangerous. Part I of this article reviews Wu’s essay, defining what constitutes an agency threat and when it is justified according to Wu. Part II critiques Wu’s thesis by showing, among other things, that it is based on a false dilemma; that it assumes an unwarranted level of knowledge on the part of regulators; that it assumes—contrary to evidence—that regulators are good proxies for the public interest; and that it ignores the costs of eschewing the regulatory process. Part III concludes by concretely illustrating the real-world consequences of agency threats. It does so by presenting a case study of a toy manufacturer driven out of business by threats from the Consumer Product Safety Commission.

## I. AGENCY THREATS AND THEIR USE

In defending the use of threats, Wu has a very specific type of agency action in mind, so it is important to define what exactly constitutes an “agency threat” according to him. Wu explains that by “regulatory threats” he means those statements that are “similar but not identical to the statutory category of ‘interpretative rules,’”<sup>6</sup> and he specifically includes in his definition of

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4. *Id.* at 1848.

5. In addition to being a professor at Columbia Law School, Tim Wu is an influential commentator who contributes regularly to *Slate* and *The New Yorker*. From 2011 to 2012, Wu served as a senior advisor to the Federal Trade Commission for consumer protection and competition issues. Press Release, Columbia Law Sch., Professor Tim Wu Named Advisor to Federal Trade Commission on Consumer Protection, Competition (Feb. 8, 2011), available at [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2011/february2011/timwu-ftc](http://www.law.columbia.edu/media_inquiries/news_events/2011/february2011/timwu-ftc), [<http://perma.cc/0eJPozLdPuk>].

6. *Agency Threats*, *supra* note 3, at 1843–44.

agency threats “warning letters, official speeches, interpretations, and private meetings with regulated parties.”<sup>7</sup> Wu further narrows what he means by agency threats by noting that “it is essential that the action not simply express opinions or report on an issue. Rather, the action must give at least some warning of agency action related to either ongoing or planned behavior. That distinction leaves out mere policy guidelines, studies, reports, and similar materials . . . .”<sup>8</sup> The reason he leaves out “mere” guidelines and reports, Wu says, is that, to him, threats are much more akin to rules and adjudications because they “share the direct goal of specifying desired behavior.”<sup>9</sup> In other words, threats are meant to compel specific behavior.

Wu explains that there are two types of agency threats: public and private.<sup>10</sup> Private threats are issued in warning letters or private meetings.<sup>11</sup> He gives the example of a “secret letter” that the Federal Trade Commission (FTC) sent to retailers of new “bamboo clothing,” which the agency believed was not made from organic materials as claimed, but from artificial rayon.<sup>12</sup> Public threats, on the other hand, are official speeches or statements that threaten regulation or enforcement.<sup>13</sup> Wu cites as an example a 2004 speech by then Federal Communications Commission (FCC) Chairman Michael Powell in which, according to Wu, “Powell instructed the industry to respect four ‘Internet Freedoms’ of every Internet user, including the right[] to reach applications of their choice . . . .”<sup>14</sup> This was followed by an enforcement action against a small telephone company that allegedly was blocking voice-over-Internet applications.<sup>15</sup>

The examples that Wu presents as paradigms of salutary threats are rather remarkable. In the case of the FTC’s bamboo

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7. *Id.* at 1844.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1845.

13. *Id.* at 1844.

14. *Id.* at 1844–45.

15. Madison River Communications, LLC and Affiliated Companies, 20 FCC Rcd. 4295 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-05-543A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf), [<http://perma.cc/0H69uavjgBg>] [hereinafter Madison River] (order and consent decree).

clothing letters, it is not clear that the agency had any evidence that the warning letter's recipients were engaging in any illegal activity.<sup>16</sup> Yet this does not seem to matter to Wu, who writes that private threats are especially useful when the issuing agency "does not know the facts that bear on the enforcement decision" precisely because a warning letter can "simply put a stop to the activity in question."<sup>17</sup>

In the case of the FCC's "Internet Freedoms" threat, the agency enforced against a company what was essentially an edict that Chairman Powell issued on his own authority, without any rulemaking whatsoever.<sup>18</sup> After Powell (as Wu puts it)

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16. It should be noted that Wu's description of the events surrounding the bamboo clothing letters and the citations he employs are incorrect. Wu writes that the FTC in 2009 sent warning letters to "retailers and manufacturers" of bamboo clothing. *Agency Threats*, *supra* note 3, at 1845. Yet, to support that statement, Wu cites a list of letter recipients dated 2010, not 2009, that includes only retailers, not manufacturers. *Id.* at 1845 n.12. Wu then states that these warning letters "led . . . to formal enforcement action against various manufacturers." *Id.* at 1845. To support that statement he cites a 2009 consent decree against a manufacturer. *Id.* at 1845 n.13. It is not possible that the letters Wu references, which were sent to retailers in 2010, could have led to the enforcement action against manufacturers in 2009. What actually took place is that in August 2009 the FTC took action against four bamboo clothing manufacturers and subsequently settled its complaints with three of them. Press Release, Fed. Trade Comm'n, FTC Charges Companies with 'Bamboo-zling' Consumers with False Product Claims (Aug. 11, 2009), available at <http://ftc.gov/opa/2009/08/bamboo.shtm>, [<http://perma.cc/04xwa4TSkWc>]. Later, in January 2010, the FTC sent letters to 78 retailers threatening FTC action if rayon clothing is mislabeled as bamboo. Letter from James A. Kohm, Assoc. Dir., Fed. Trade Comm'n, to Retailers (Jan. 27, 2010), available at <http://www.ftc.gov/os/2010/02/100203model-bamboo-letter.pdf>, [<http://perma.cc/0b2ehDnb4xT>]. From the text of the letter, it is not apparent that the FTC had evidence that the recipients were selling mislabeled clothing, but merely that they were selling clothes labeled as bamboo, and that the FTC staff was "concerned" that they might be rayon. *Id.*

17. *Agency Threats*, *supra* note 3, at 1852.

18. The FCC never enforced any law or rule against Madison River. Instead, it merely opened an investigation of Madison River's actions, which it quickly settled via a consent decree. See *Madison River*, *supra* note 15, at 2. The investigation was ostensibly meant to look at whether Madison River was in compliance with section 201(b) of the Communications Act. *Id.* at 1. Yet it is unlikely that Madison River's actions would have constituted a violation of the Communications Act. James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 101, 124-26 (2010); *Net neutrality and the FCC: what's being done to preserve it*, COLUM. SCI. & TECH. L. REV. (Mar. 29, 2007), available at <http://www.stlr.org/2007/03/net-neutrality-and-the-fcc-whats-being-done-to-preserve-it/>, [<http://perma.cc/0rpkJnegXyI>]. Additionally, the parties agreed that the consent decree did "not constitute either an adjudication on the merits or a

“instructed” the industry to behave in a certain way, the FCC’s Enforcement Bureau opened an investigation into Madison River Communications, a small telephone company that was allegedly acting in contravention of Powell’s instructions.<sup>19</sup> The FCC quickly extracted a consent decree and a “voluntary” \$15,000 payment from the company in return for terminating the investigation.<sup>20</sup> Madison River never admitted any wrongdoing or even that the FCC had any authority in the matter,<sup>21</sup> and subsequent court rulings have repeatedly found that the FCC does not have the statutory authority to issue the types of Internet regulations that the Powell edict encompassed.<sup>22</sup>

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factual or legal finding regarding any compliance or noncompliance with the requirements of the Act and the Commission’s orders and rules.” Madison River, *supra* note 15, at 3.

Moreover, it is widely understood that the Madison River case was a *de facto* enforcement of Chairman Powell’s “Internet Freedoms” edict. For example, in a statement accompanying the consent decree, Chairman Powell noted it was predicated on “his vision of ‘Internet Freedom,’” not the Act. Press Release, Fed. Commc’ns Comm’n, FCC Chairman Michael K. Powell Commands Swift Action to Protect Internet Voice Services (Mar. 3, 2005), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-257175A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257175A1.pdf), [<http://perma.cc/0ND9m821Quh>]. Additionally, testifying before the Senate Commerce Committee in favor of codifying Powell’s “Internet Freedoms” into law (itself an admission that they were not law), Prof. Lawrence Lessig stated:

In my view, the most important action that this government has taken to preserve the Internet’s end-to-end design was the decision by Chairman Michael Powell to commit the FCC to enforce what he referred to as the Internet’s four ‘Internet Freedoms.’ . . . Those principles were relied upon by the FCC when it stopped DSL provider Madison River Communications from blocking Voice-over-IP services. That enforcement action sent a clear message to network providers that the Internet that they could offer must continue to respect the innovation-promoting design of end-to-end. It is my view that Congress should ratify Powell’s “Internet Freedoms,” making them a part of the FCC’s basic law.

*Network Neutrality: Hearing Before the S. Comm. On Commerce, Sci., and Transp.*, 109th Cong. 54 (2006) (testimony of Professor Lawrence Lessig).

19. See Madison River, *supra* note 15, at 2.

20. *Id.*

21. See *id.* at 3.

22. In 2005, the FCC adopted a “policy statement” on net neutrality based in large part on Powell’s “Internet Freedoms.” Fed. Commc’ns Comm’n, FCC Rcd. 05-151, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 1486 (2005). This policy statement was issued concurrently with, but not as part of, a final order that was the product of notice-and-comment rulemaking. *Id.* In April 2007, the FCC issued a Notice of Inquiry, asking the public for comment on whether its Internet Policy Statement was enforceable. Broadband Industry Practices, 22 FCC Rcd. 7894 (2007). Before that proceeding

It is striking that Wu would support such seemingly unaccountable agency actions. Therefore, it is only “under certain circumstances” that he argues that threats are “a superior means of regulatory oversight.”<sup>23</sup> Indeed, the point of Wu’s essay is to identify those circumstances. Wu writes that the question he seeks to answer is not the one usually posed about guidance and interpretations (i.e. can they be enforced?).<sup>24</sup> Instead, the question he is interested in is, “[I]f informational threats are assumed to be unenforceable, when should agencies nonetheless use such threats instead of legally binding rules?”<sup>25</sup>

Wu’s answer is that “in rapidly developing industries in which rulemaking is impracticable, highly informal methods are justified.”<sup>26</sup> He explains:

The use of threats instead of law can be a useful choice—not simply a procedural end run. My argument is that the merits of any regulative modality cannot be determined without reference to the state of the industry being regulated. Threat regimes, I suggest, are important and are best justified when the industry is undergoing rapid change—under conditions of “high uncertainty.” Highly informal regimes are most useful, that is, when the agency faces a problem in an environment in which facts are highly unclear and evolving. Ex-

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was concluded, the FCC acted to enforce its policy statement against Comcast and found the company in violation. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008). Comcast challenged the order and the D.C. Circuit vacated it and the Internet Policy Statement, holding that the FCC did not have jurisdiction over Comcast’s Internet service under the Communications Act. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (2010). Later in 2010, the FCC adopted via notice-and-comment rulemaking new net neutrality rules similar in effect to the Internet Policy Statement and Powell’s “Internet Freedoms.” Preserving the Open Internet, 25 FCC Rcd. 17905 (2010). Verizon has since challenged the FCC’s authority to issue these rules and the D.C. Circuit is presently considering the case. Motion of the FCC to Defer Consideration of Verizon’s Motion For Panel Assignment and to Defer Filing of the Record, *Verizon v. FCC*, 2011 WL 1235523, No. 11-1014 (D.C. Cir. 2011).

23. *Agency Threats*, *supra* note 3, at 1848.

24. *Id.* at 1845–46; *see also id.* at 1842.

25. *Id.* at 1846. Wu goes on to write, “Surprisingly, there is comparatively less attention directed to this question.” *Id.* at 1846. But it may not be that surprising. It is quite possible that most scholars find the purposeful use of such unaccountable regulatory behavior so unthinkably irresponsible that they have not bothered to debate its merits.

26. *Agency Threats*, *supra* note 3, at 1843.

amples include periods surrounding a newly invented technology or business model, or a practice about which little is known. Conversely, in mature, settled industries, use of informal procedures is much harder to justify.<sup>27</sup>

Without access to threats, Wu writes, a climate of “high uncertainty” would leave an agency with only two choices: “to make law—through a rulemaking or adjudication—or to ignore the area altogether.”<sup>28</sup> Rulemaking is not a satisfying option, Wu says, because it “forces the agencies to make law likely to last a long time based on poorly developed facts, and it invites long periods of uncertainty created by the judicial review process.”<sup>29</sup> On the other hand, completely ignoring the area “surrenders any public oversight or input during what may be a critical period of industry development.”<sup>30</sup>

Therefore, Wu purports to present threats as a nimble and reasonable third alternative between onerous regulation and doing nothing. In this way, he justifies issuing behavior-altering commands without conforming to the traditional regulatory process.

## II. THE PROBLEMS WITH AGENCY THREATS

This part addresses the many problems with Wu’s thesis. At the outset, however, it must be noted that his thesis rests on a false dilemma: confronted with a potential regulatory question about a dynamic industry, a regulator can only regulate or do nothing at all. Of course, an agency faced with “poorly developed facts” could engage in an investigation to determine the necessary facts. Agencies do so routinely through notices of inquiry, staff investigations, workshops, and other methods. An agency can even begin, and later halt, a rulemaking proceeding if it ultimately determines that regulation is unnecessary. Indeed, without well-developed facts, how can an agency ever know if any intervention is warranted?

The very “Internet Freedoms” case that Wu presents as an example of a successful agency threat demonstrates that agen-

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27. *Id.* at 1842.

28. *Id.*

29. *Id.*

30. *Id.*

cies have ample investigatory powers that allow them to establish facts. Three years after Chairman Powell's speech, the FCC issued a notice of inquiry on whether the Commission could enforce Powell's "Freedoms" when faced with market failures,<sup>31</sup> and ultimately it promulgated a rule on the matter.<sup>32</sup> If "poorly developed facts" made immediate regulation problematic, then the FCC could have issued its notice of inquiry earlier in lieu of Powell's edict. If agencies choose to employ threats, it is not because they lack fact-finding capabilities.

Wu also suggests that in "rapidly developing industries" rulemaking can be "impracticable," thus justifying "highly informal methods."<sup>33</sup> But it is not clear that rulemaking is ever "impracticable," especially given that the Administrative Procedure Act (APA) provides for expedited and emergency rulemaking.<sup>34</sup> What Wu presents can be analogized to the "ticking bomb scenario."<sup>35</sup> In that scenario, the possibility of an imminent terrorist attack may justify torturing a suspect believed to have information about the attack—the ultimate "highly informal method."<sup>36</sup> But such instances, if they ever exist, are vanishingly few. It is therefore unwise and dangerous to establish that contravention of due process to allow torture in some circumstances is an acceptable law enforcement method. The same is true about agency threats; the ends should not justify the means.

There is nothing about a rapidly developing industry that "forces" an agency either to issue a new law or to sit on the sidelines. Agencies can engage in fact-finding and public discourse without resorting to threats. Wu's suggestion to the contrary is a false choice predicated on a misplaced sense of urgency—meaning his thesis is predicated on a fallacy.

The agency threats thesis suffers from other problems as well. First, threats may ultimately be no less costly than the rulemaking and adjudication that they are meant to replace.

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31. Broadband Industry Practices, 22 FCC Rcd. 7894, 7898 (2007).

32. Preserving the Open Internet, FCC Rcd. 17905, 17906 (2010).

33. *Agency Threats*, *supra* note 3, at 1843.

34. Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B) (2012).

35. See Alan M. Dershowitz, *The Case for Torture Warrants*, ALANDERSHOWITZ.COM, <http://www.alandershowitz.com/publications/docs/torturewarrants.html>, [http://perma.cc/0m6w5R71]mi].

36. See *id.*



Second, the threats in Wu's thesis are meant to ensure "public input" in an industry's development, which is not the traditional purpose of regulation. Third, eschewing the regulatory process in favor of "threat regimes" places undue power in the hands of regulators unconstrained by predictable procedures.

A. *The Uncertainty of Uncertainty*

As we have seen, uncertainty is at the heart of Wu's justification of agency threats. Wu is not defending threats as a means of eliciting desired behavior under any circumstance, but only "in particular contexts,"<sup>37</sup> and those contexts are defined by uncertainty. Uncertainty is the limiting principle he proposes for a "threat regime[]"<sup>38</sup> that might otherwise swallow the entire APA.

"Whether the case is stronger for threats or rulemaking depends on the state of industry," Wu writes.<sup>39</sup> He defines two possible states: stable and dynamic.<sup>40</sup> In dynamic industries, he writes, regulators confront "high uncertainty"—a situation in which it is difficult to predict what will happen in the future.<sup>41</sup> Citing F.A. Hayek, Wu makes the sensible argument that, because an agency will have limited knowledge about a dynamic industry, "issuing specific rules based on guesses about the future runs a grave risk of creating a bad law."<sup>42</sup> By contrast, in stable industries, Wu writes, "business models are relatively settled, and the facts relevant to regulation are therefore likely clearer."<sup>43</sup> The implication is that, as far as stable industries go, regulators will have all the knowledge they need to intervene without running into the problems Hayek identified. Wu's seemingly pragmatic prescription is for agencies to avoid regulation of dynamic industry by relying on "mere" threats instead.

For uncertainty to be a limiting principle that defines when the use of threats is appropriate, there must be some coherent way to distinguish between dynamic and stable industries. The probability that a regulator can accurately predict an industry's

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37. *Agency Threats*, *supra* note 3, at 1842.

38. *Id.*

39. *Id.* at 1848.

40. *Id.*

41. *Id.*

42. *Id.* at 1849.

43. *Id.* at 1848.

future is not a very satisfying criterion given that it is virtually impossible to calculate—which, after all, was Hayek’s point. So either Wu accepts Hayek’s argument that the local knowledge required for rational economic planning is distributed among many individual actors, and thus outside the grasp of a central planner,<sup>44</sup> or he does not. If he does (as he seems to, because he cites Hayek approvingly), then he should conclude that regulators face the same “grave risks” of making bad decisions based on guesses about the future when issuing threats as they do when issuing regulations.

What Wu seems to be implying, however, is that mistakes cost less when regulators make threats than when they issue rules, so regulators should feel free to make more mistakes. But if we acknowledge that threats have costs, even if we stipulate that they may be less costly than formal regulation, making more mistakes can result in zero net benefit.

Wu downplays the costs of threats. “Threats are, by their nature, just that: threats to enforce or enact a rule, not binding actions in the usual sense of that word,” he writes, arguing that targeted entities can simply choose not to comply.<sup>45</sup> Yet this is at odds with his stated intended effect: that threats alter behavior. If threats can be ignored without consequence, why would he suggest that agencies issue them at all? The fact is that threats do alter the behavior of targeted parties, as in the case of the small telephone company that the FCC targeted.<sup>46</sup> Yes, that a threat is nonbinding means that the target of a threat can ignore or challenge it, but it would be naïve to think that ignoring threats systematically would have no consequences.<sup>47</sup>

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44. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

45. *Agency Threats*, *supra* note 3, at 1843.

46. *See* Madison River, *supra* note 15.

47. FDA “warning letters” are a good example of mere threats that can neither be ignored nor challenged. *See* Lars Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 907 (2008). The FDA frequently issues “warning letters” alleging some regulatory infraction and giving the recipient a deadline by which to alter its behavior. *Id.* In some cases the agency has advised governmental purchasing entities not to deal with the recipient until the matter is addressed. *Id.* Because the federal government is the largest purchaser of prescription drugs in the country, recipients often can do little but comply. *Id.* “If a company dared to disagree with the agency’s allegations and chose to pursue a judicial challenge rather than accede to its demands, the FDA invariably argued that the controversy was not ripe for review.”

If threats alter behavior, then the mistakes of regulators will have real costs. Not only is the risk of making a mistake greater in a fast-moving industry where “facts are highly unclear and evolving,”<sup>48</sup> but the cost of such mistakes will also be greater. As Brent Skorup and Adam Thierer have noted, if an industry sector is highly dynamic and evolving, then regulating it is neither necessary nor wise.<sup>49</sup> Furthermore, fast-moving industries are “the last sectors regulators should be preemptively micromanaging since they lack the requisite knowledge of whether a market development will harm or benefit consumers in the long-term.”<sup>50</sup>

### B. *The Purpose of Regulation*

According to Wu, an agency concerned about developments in a quickly evolving industry sector has three options: it can make law, it can ignore the situation until it settles down, or it can “issue threats that indicate where it has concerns, and possibly which directions it hopes the industry will grow.”<sup>51</sup> Waiting is dangerous, Wu argues, because “the public’s interest may be entirely unrepresented during the industry’s formative period,” and taking a wait-and-see approach risks “that the industry’s norms and business models will, effectively, be set without any public input.”<sup>52</sup> A threat regime, on the other hand, “may bake in the public’s interest and opinion during the formative years of an industry without strangling the industry with premature rules.”<sup>53</sup> Implicit in this description of the choices facing agencies is a specific conception of the purpose of regulation. The purpose of government intervention, it

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*Id.*; see also Rebecca Boxhorn, Note, *FDA Goes Loko with Warning Letters*, 12 MINN. J.L. SCI. & TECH. 749, 751 (2011) (noting that a recipient’s only choices are “to defy the FDA and await a potential formal enforcement action or to challenge the Warning Letter itself,” but that “parties that attempt to challenge FDA Warning Letters face a nearly impossible task” because the FDA and courts will not see the warning letters as final action that is ripe for review).

48. *Agency Threats*, *supra* note 3, at 1842.

49. Brent Skorup & Adam Thierer, *Uncreative Destruction: The Misguided War on Vertical Integration in the Information Economy*, 65 FED. COMM. L.J. 157, 196 (2013).

50. *Id.* at 196–97.

51. *Agency Threats*, *supra* note 3, at 1849.

52. *Id.* at 1850.

53. *Id.* at 1851. While although premature rules can strangle an industry in its formative years, according to Wu, threats also aimed to alter behavior will not strangle—maybe just do a little light choking.

seems, is to make sure to allow “public input” and to “bake in public opinion.” This democratic view of regulation is problematic on several counts.

First, it is not clear how one will know if threats have “worked” other than noting whether they caused the targeted entities to change their behavior. That is, if the purpose of regulation, and therefore threats, is to ensure that industries heed “public input” and conform to “public opinion,” then there is no limiting principle that would either restrict their use or serve as a point of reference to measure their effectiveness. By contrast, regulatory scholars and economists generally believe that intervention should only be undertaken to address an identifiable market failure or other systemic problem.<sup>54</sup> Indeed, this approach is recognized in President Clinton’s Executive Order No. 12,866, which has long applied to executive rulemaking.<sup>55</sup>

Second, Wu assumes that regulators will faithfully represent the public interest. Indeed, he says as much: “[T]he use of threats relies on faith that agencies will be good proxies for the public’s interest.”<sup>56</sup> That faith is misplaced. Today, economists generally agree with Professor Fred S. McChesney’s judgment that “[t]he notion that government regulates in some disinterested, ‘public-interest’ fashion to repair market failure has crumbled. Too much regulation is demonstrably at odds with the general welfare for any such public-interest explanation now to be taken seriously.”<sup>57</sup>

Indeed, the authors of two leading textbooks on economic regulation conclude that “the fundamental problem with the public interest theory of regulation is that it simply does not perform well empirically,”<sup>58</sup> and that it “has lacked supporters for several decades . . . [given] the large amount of evidence that refutes it.”<sup>59</sup> Notice-and-comment rulemaking—and the

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54. See SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 89–92 (2012).

55. Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

56. *Agency Threats*, *supra* note 3, at 1853.

57. FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 156 (1997).

58. DAVID L. KASERMAN & JOHN W. MAYO, GOVERNMENT AND BUSINESS: THE ECONOMICS OF ANTITRUST AND REGULATION 518 (1995).

59. W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 326 (2d ed. 1995).

regulatory review process that surrounds it—at least tries to procedurally limit regulators' range of options in an effort to better approximate the public interest. Wu's threats regime, by contrast, eschews such protections.

Finally, the most problematic aspect of Wu's conception of regulation is that, because it has no limiting principle, it leaves the regulatory process without much meaning. If the purpose of threats is to enact public opinion (or at least regulators' interpretation of it) before the facts can establish that there is a market failure to be addressed, then there is little that industries cannot be asked to concede through threats. Such a system would obviously be ripe for abuse. "To be sure, threats can be abused, and are," Wu counters. "But that the action can be abused does not mean that it lacks merit, if used properly."<sup>60</sup> That is a mighty big "if," and it places an unwarranted amount of trust in men unrestrained by law.

### C. *Rule of Men, Not Rule of Law*

In many ways, what Professor Wu proposes is that government agencies behave like mobsters, making demands and forcing compliance through extralegal means. Consider Wu's paradigmatic example of an agency threat: Chairman Powell's "Internet Freedoms" speech, in which the broadband industry was "instructed" to behave in a particular way absent any regulatory process.

In a protection racket, a mobster approaches a business owner and says, "This is a nice shop you have here. It would be a shame if anything happened to it." He then offers protection at affordable prices. The threat is almost subtle because the mobster can deny he meant anything nefarious by his words. But it probably only takes one shop burning to the ground before all the other shop owners in town are playing ball.

Much like a mobster's threat, Chairman Powell's speech was a mere suggestion to the industry. After all, the FCC had no legal way to enforce his edict. Powell was just saying, "Boy, it would sure be nice if the industry started behaving this way." Then the FCC's Enforcement Bureau opened an investigation into a small carrier; a simple letter of inquiry, not a formal en-

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60. *Agency Threats*, *supra* note 3, at 1853–54.

forcement action predicated on any agency rulemaking.<sup>61</sup> In less than a month, however, the carrier had signed a consent decree pledging to adhere to the suggestions in Powell's speech and coughing up a \$15,000 contribution to the U.S. Treasury. The rest of the industry got the message loud and clear.

If this seems like a harsh comparison, note that it is not mine, but Wu's. He concludes his essay with a joking reference to the mafia:

In *The Godfather*, Don Vito Corleone pursued most of his regulatory goals using threats. Some were delivered in formats that would be considered unusual by administrative law standards but did not want for clarity. Don Corleone resorted to actual enforcement actions only when absolutely necessary and did not seem to make use of notice-and-comment procedures.

The comparison shows why threats have a bad name, suggesting why agencies prefer terms like "guidelines" or "interpretative rules." Nonetheless, whatever the nomenclature, I believe that regulatory threats are an important tool for agencies dealing with certain types of problems.<sup>62</sup>

It is interesting that Wu felt compelled to anticipate critics by comparing regulatory threats to racketeering. There is a reason why the extralegal use of force without due process is criminal, and that reason applies as much to regulatory agencies as it does to mobsters. When Wu says that threats are just threats and a target of threats can simply "test the threats,"<sup>63</sup> he is ignoring the fact that even unjustified threats impose costs. When a physically imposing person raises his fists at a slight person, it is "just a threat" and not really violence. Yet we punish that as assault because even if the threat is never carried out, a harm is inflicted.<sup>64</sup> This is no less true of regulatory threats than of mafia tactics.

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61. Madison River, *supra* note 15, at 2; see also *VoIP: Blocking*, CYBERTELECOM, <http://www.cybertelecom.org/voip/blocking.htm>, [<http://perma.cc/02jDAATjLAu>].

62. *Agency Threats*, *supra* note 3, at 1857 (footnotes omitted).

63. *Id.* at 1843.

64. MODEL PENAL CODE § 211.1(1)(c) (1962) (defining assault as, inter alia, "attempts by physical menace to put another in fear of imminent serious bodily injury").

Ignoring these costs, Wu focuses on the benefits, arguing that “[t]he greatest advantage of a threat regime is its speed and flexibility.”<sup>65</sup> And, of course, he is right. Dispensing with the regulatory process makes regulation cheap and quick. He does not show, however, that the benefits of threats outweigh their costs. Instead, he attempts to minimize the importance of those costs. Wu says that if a threat “is perceived as unsuccessful or unnecessary, the threat can usually be retracted.”<sup>66</sup> He cites no evidence to support that claim, and intuitively one would expect quite the opposite, because regulators, like the mafia to which Wu compares them, might want to protect their reputation. (And again, it is also not clear what metric one would use to judge success or necessity.) Wu adds that “counterintuitively, regulated industries may prefer an informal process to the legal paralysis common to formal procedures,”<sup>67</sup> thereby turning a cost into a benefit. But that is like saying that in *The Godfather* Jack Woltz preferred waking up to his horse’s severed head, given the alternative.<sup>68</sup>

What Wu is blithely suggesting when he endorses Don Corleone’s speedy and flexible tactics is supplanting the rule of law with the rule of men. Surprisingly, Wu does so to confront uncertainty, but such tactics only serve to sow their own uncertainty. Hayek noted that only under the rule of law can an individual invest and make plans for the future, safe in the knowledge “that the powers of government will not be used deliberately to frustrate his efforts” through “*ad hoc* action.”<sup>69</sup> As Hayek defined it, the rule of law

means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discre-

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65. *Agency Threats*, *supra* note 3, at 1851.

66. *Id.*

67. *Id.* at 1849.

68. See *THE GODFATHER* (Paramount Pictures 1972).

69. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 73 (1944).

tion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough.<sup>70</sup>

Yet Wu would place in the hands of regulators the power to strong-arm without any reference to law. Such a system would make it difficult for individuals—especially those in fast-moving and dynamic sectors—to plan for the future. Not only would such a system be ripe for abuse, but simple mistakes in “an environment in which facts are highly unclear and evolving”<sup>71</sup> would also take their toll.

This is, of course, not lost on Wu, who assures us that he is only advocating for “the responsible use of agency threats,” and that it is important “to try to develop a sense of the difference between the proper use of threats and their abuse.”<sup>72</sup> He develops guidelines to help distinguish between proper and improper uses of threats, consisting of “a list of domains in which the use of threats is presumptively abusive and ought to be avoided.”<sup>73</sup> Presumably Wu’s guidelines exist so that regulators can self-regulate, because he does not mention how they would be enforced.

The irony seems to be lost on Wu that, having ejected the rule of law in an attempt to secure “speed and flexibility,” he is forced to recreate a stand-in of that very same rule of law through “guidelines” and “lists” made to prevent the predictable consequences of the rule of men. As much as one would like to have omniscient, benevolent angels for regulators, unfortunately only “fallible men” are available.

### III. WHAT “AGENCY THREATS” LOOK LIKE

So far we have looked at agency threats abstractly, although we have examined Wu’s examples of public and private threats. This Part presents a concrete case study that illustrates

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70. *Id.* at 72–73.

71. *Agency Threats*, *supra* note 3, at 1842.

72. *Id.* at 1843.

73. *Id.* at 1843. Among these presumptively abusive practices are threats that seek “to avoid explicit congressional limits on power.” *Id.* This is at odds, however, with Wu’s “Internet Freedoms” example, because in that case the FCC was seeking to act outside its statutorily delegated authority. *See supra* note 3 and accompanying text.



the real-world consequences of agency threats unchecked by the regulatory process. What follows is one anecdote, but it is presented in the hope that it will focus the mind on the real costs of abandoning the Rule of Law.

In 2009, Craig Zucker and his friend Jake Bronstein saw a YouTube video of people making geometric shapes by combining many small rare-earth magnets, and they had the idea to market sets of the small magnetic balls as a desk toy.<sup>74</sup> With an investment of \$2,000 they started a company, Maxfield & Oberton, out of their Brooklyn apartment and imported the magnets from China.<sup>75</sup> In March they began selling the magnets online under the “Buckyballs” brand.<sup>76</sup> The toys were an immediate hit with consumers.<sup>77</sup> In October, Maxfield & Oberton began wholesaling to brick-and-mortar retailers and, according to Zucker, the magnets were “instantly a top-seller in high-end gift shops, bookstores, stationary stores, museum shops, and hundreds of other independent specialty gift stores.”<sup>78</sup> In December, *Rolling Stone* named Buckyballs “Toy of the Year” in its annual gift guide.<sup>79</sup>

Maxfield & Oberton was a pioneer in a niche industry. About a dozen other companies, including Zen Magnets, also began selling small rare-earth magnets as desk toys.<sup>80</sup> Soon after these toys were introduced in the market, reports surfaced of children swallowing the tiny magnetic balls, resulting in intestinal

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74. April Joyner, *Case Study: Feds Crack Down on Buckyballs*, INC. (Sept. 25, 2012), <http://www.inc.com/magazine/201210/april-joyner/case-study-government-regulators-buckyballs.html>, [<http://perma.cc/0CjYgTLEj9>].

75. *Id.*; see also Craig Zucker, *A Letter from Our CEO: The REAL Story Behind Why We're Fighting*, BUCKYBALLS, <http://web.archive.org/web/20121016023022/http://www.getbuckyballs.com/letter-from-ceo/> (last visited Nov. 17, 2013), [<http://perma.cc/0P7QJjkeHjt>].

76. *Id.*

77. Andrew Martin, *Fatal Attractions*, N.Y. TIMES, Dec. 18, 2012, at B3, available at <http://www.nytimes.com/2012/12/18/business/maker-of-buckyballs-says-it-will-stop-selling-them.html>, [<http://perma.cc/0MVcFxpHTV>].

78. Zucker, *supra* note 75.

79. *The Great Rock & Roll Gift Guide of 2009*, ROLLING STONE, <http://www.rollingstone.com/music/pictures/the-great-rock-roll-gift-guide-20091223/gift-guide-2009-games-and-toys-zoomdoggie-buckyballs-24163477>, [<http://perma.cc/0pUFW7frMFf>]; Joyner, *supra* note 74.

80. Martin, *supra* note 77.

blockages. This attracted the attention of the Consumer Product Safety Commission (CPSC).

The rare-earth magnet toy industry fits Wu's definition of an "industry . . . undergoing rapid change—under conditions of 'high uncertainty[,]'" which he says justifies "highly informal regimes."<sup>81</sup> He specifically gives the example of "periods surrounding a newly invented technology or business model" as one in which threats rather than formal processes are justified.<sup>82</sup> Indeed, the environment surrounding rare-earth magnets was not unlike his example of then-newly marketed bamboo clothing.<sup>83</sup>

Federal law requires that manufacturers of children's products comply with certain safety obligations, and certain products cannot be marketed to children at all.<sup>84</sup> At the time that Maxfield & Oberton began selling Buckyballs, what constituted a "children's product" was defined by statute as "a consumer product designed or intended primarily for children 12 years of age or younger."<sup>85</sup> According to Zucker, Buckyballs "were never intended, designed or marketed for children; so we labeled them for ages 13+ to make that clear."<sup>86</sup> In August, however, a new, mandatory toy safety standard from the CPSC came into effect, redefining a child as someone "*under 14 years of age*," making Buckyballs's "13+" label noncompliant.<sup>87</sup>

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81. *Agency Threats*, *supra* note 3, at 1842.

82. *Id.*

83. *Id.* at 1845.

84. Indeed, the standard that went into effect in August 2009 prohibited the sale of high-powered magnets to those under 14. See Press Release, Consumer Prod. Safety Comm'n, Buckyballs® High Powered Magnets Sets Recalled by Maxfield and Oberton Due to Violation of Federal Toy Standard (May 27, 2010), available at <http://www.cpsc.gov/en/Recalls/2010/Buckyballs-High-Powered-Magnets-Sets-Recalled-by-Maxfield-and-Oberton-Due-to-Violation-of-Federal-Toy-Standard>, [<http://perma.cc/0DPeuAz8Hr1>].

85. Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2052(a)(2) (2012).

86. Zucker, *supra* note 75.

87. American Society for Testing and Materials, Standard Consumer Safety Specification for Toy Safety F963-08 (banning altogether high-powered magnets and magnet components that are of a size that can be swallowed in toys for children younger than age 14).

In March 2010, the CPSC contacted Maxfield & Oberton about the discrepancy.<sup>88</sup> The company responded by removing all “13+” labels on Buckyballs’s product packaging, and also added a new label stating, “Keep Away From All Children,” as well as language explaining the hazard of swallowing magnets.<sup>89</sup> All told, Buckyballs sets contained five warnings on the packaging and instructions.<sup>90</sup> The company also worked with the CPSC to issue a voluntary recall of all Buckyballs sets with the old “13+” labels.<sup>91</sup>

Acknowledging that its adult toy posed a potential danger to children, Maxfield & Oberton went further. It developed a “Responsible Seller Agreement” that limited the retailers to which the company would wholesale Buckyballs.<sup>92</sup> Stores that exclusively sold children’s products were not eligible to carry Buckyballs, and stores with some children’s products had to place the Buckyballs in sections intended for adults.<sup>93</sup> As a result of the seller agreement, the company dropped about 600 retailers that did not meet the new criteria.<sup>94</sup>

Over the next eighteen months the company continued to expand, introducing new products including Buckycubes and colored Buckyballs. Major chains, including Macy’s, Brookstone, and Urban Outfitters, began carrying the company’s products and Buckyball sales totaled in the millions in 2011.<sup>95</sup> The CPSC, however, was still concerned about the danger that small high-powered magnets pose to children—even when

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88. Zucker, *supra* note 75; Press Release, Consumer Prod. Safety Comm’n, *supra* note 84.

89. *Id.*

90. Dina ElBoghdady, *Buckyballs magnets targeted by federal suit, citing dangers for children*, WASH. POST, July 25, 2012, available at [http://articles.washingtonpost.com/2012-07-25/business/35489674\\_1\\_magnets-maxfield-oberton-potentially-dangerous-products](http://articles.washingtonpost.com/2012-07-25/business/35489674_1_magnets-maxfield-oberton-potentially-dangerous-products), [<http://perma.cc/0QTBfnYTTkF>].

91. Press Release, Consumer Prod. Safety Comm’n, *supra* note 84.

92. Letter from Alan H. Schoem, Maxfield & Oberton, to Joseph F. Williams, Compliance Officer, Consumer Prod. Safety Comm’n, (July 12, 2012), available at <http://web.archive.org/web/20120901025742/http://www.getbuckyballs.com/maxfi> eld-response-to-cpsc-pre-determination-letter, [<http://perma.cc/0NnD4xDeDS9>]; see also *Buckyballs & Buckycubes ARE NOT Toys*, BUCKYBALLS, <http://www.getbuckyballs.com/safety/retailers/>, [<http://perma.cc/0uve8mSiLKd>].

93. *Buckyballs & Buckycubes ARE NOT Toys*, *supra* note 92.

94. Zucker, *supra* note 75.

95. *Id.*

they are used in products labeled for, and sold only to, adults.<sup>96</sup> In November 2011, Maxfield & Oberton, as well as other magnet toy makers, cooperated with the CPSC in issuing a consumer warning about the potential dangers of high-powered magnets.<sup>97</sup> In March 2012, the company also launched a magnet safety website and video and sent retailers additional signage explaining that Buckyballs were not for children.<sup>98</sup>

And then came the threats. Having concluded that rare-earth magnet toys should be banished from the market, the CPSC took action.<sup>99</sup> Unfortunately, it did not commence a notice-and-comment proceeding as is required by statute to ban a consumer product.<sup>100</sup> Instead, in early July 2012, the CPSC sent letters to Maxfield & Oberton, Zen Magnets, and other companies demanding that they cease the importation, distribution, and sale of magnetic toys, and that they recall outstanding units.<sup>101</sup> The agency gave Maxfield & Oberton two weeks to respond with a voluntary “corrective-action plan” or face an administrative suit.<sup>102</sup> Eleven manufacturers or importers of magnetic balls “voluntarily agreed to the CPSC staff’s requests.”<sup>103</sup> Only

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96. Jeff Plungis, *Toy-Related Injuries, Hospital Visits Rise, U.S. Says*, BLOOMBERG, Nov. 18, 2010, <http://www.bloomberg.com/news/2010-11-18/toy-related-injuries-rise-deaths-decrease-u-s-commission-says.html>, [<http://perma.cc/07jk8BR2YBB>] (quoting CPSC Chairman Inez Tenenbaum saying, “Look at Buckyballs . . . Buckyballs are very attractive to children. You don’t even want them in the house if you have small children”).

97. Press Release, Consumer Prod. Safety Comm’n, CPSC Warns High-Powered Magnets and Children Make a Deadly Mix (Nov. 10, 2011), *available at* <http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Warns-High-Powered-Magnets-and-Children-Make-a-Deadly-Mix>, [<http://perma.cc/0gAT6KjZV8R>]; *see also* Zucker, *supra* note 75.

98. Zucker, *supra* note 75; Letter from Schoem, *supra* note 92.

99. Letter from Joseph F. Williams, Compliance Officer, Consumer Prod. Safety Comm’n, to Shihan Qu, Owner, Zen Magnets (July 30, 2012), *available at* <http://neoballs.com/images/PDLetterJuly302012.PDF>, [<http://perma.cc/09z6BPEGTXm>] (demanding that Zen Magnets voluntarily cease all manufacture, importation, and sale of its magnets within 48 hours).

100. 15 U.S.C. § 2057 (2012).

101. Joyner, *supra* note 74.

102. Sohrab Ahmari, *What Happens When a Man Takes on the Feds*, WALL ST. J., Aug. 31, 2013, at A11.

103. Steve Raabe, *Denver-based Zen Magnets fights federal agency over safety of balls*, DENVER POST, Aug. 14, 2012, *available at* [http://www.denverpost.com/businessheadlines/ci\\_21305171](http://www.denverpost.com/businessheadlines/ci_21305171), [<http://perma.cc/03K1xhVJP8q>]; Press Release, Consumer Prod. Safety Comm’n, CPSC Sues Zen Magnets over Hazardous, High-

Maxfield & Oberton and Zen Magnets refused to comply immediately.<sup>104</sup>

Agency staff then began contacting Maxfield & Oberton's major retailers, "informing them of its investigation and suggesting they remove Buckyballs and Buckycubes from their shelves."<sup>105</sup> According to Zucker, the CPSC gave retailers forty-eight hours to inform the government whether they would comply, implying a threat.<sup>106</sup> These threats against retailers, as unenforceable as they may have been, were in fact more troublesome than the threats of action directed against the company itself because the reaction to the threats was outside the company's control. It could not choose to ignore or challenge the threats, and it is not difficult to imagine that the retailers had little incentive to challenge the CPSC on Maxfield & Oberton's behalf. Ultimately, Amazon.com, Brookstone, and Urban Outfitters, among others, yielded and ceased their sales of Buckyballs.<sup>107</sup>

Maxfield & Oberton submitted a corrective action plan at 4 p.m. on the date of the two-week deadline set by the CPSC.<sup>108</sup> The very next morning, however, the CPSC filed against Maxfield & Oberton its first administrative complaint in eleven years, seeking to force the company to recall its products.<sup>109</sup> The timing suggests that the CPSC did not seriously consider

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Powered Magnetic Balls Action Prompted by Ongoing Harm to Children from Ingested Magnets (Aug. 7, 2012), *available at* <http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Sues-Zen-Magnets-Over-Hazardous-High-Powered-Magnetic-Balls-Action-prompted-by-ongoing-harm-to-children-from-ingested-magnets>, [<http://perma.cc/0Q2HtAuTKpX>].

104. Press Release, Consumer Prod. Safety Comm'n, *supra* note 103.

105. Joyner, *supra* note 74.

106. Press Release, PR Newswire, Maxfield and Oberton Statement on Recent CPSC Action to Put Company Out of Business (July 25, 2012), *available at* <http://www.prnewswire.com/news-releases/maxfield-and-oberton-statement-on-recent-cpsc-action-to-put-company-out-of-business-163743526.html>, [<http://perma.cc/0ntjyXrgMNS>].

107. ElBoghdady, *supra* note 90; Casey Chan, *Buckyballs Magnets Have Been Banned by the Feds (Updated)*, GIZMODO (July 25, 2012), <http://gizmodo.com/5929064/buckyballs-have-been-banned-by-the-feds>, [<http://perma.cc/0C9Y4JeGnUE>].

108. Ahmari, *supra* note 102.

109. Complaint, In the Matter of Maxfield and Oberton Holdings, LLC, CPSC Docket No. 12-1 (July 25, 2012), *available at* <http://www.cpsc.gov/PageFiles/131696/maxfield1a.pdf>, [<http://perma.cc/0v5WsRmCU3>].

Maxfield & Oberton's proposal.<sup>110</sup> And though the complaint should have been the beginning of an adjudicatory process during which Buckyballs remained a legal product until found otherwise, according to Zucker, the "CPSC immediately issued a press release and began making statements to the national media, some of which were inaccurate or misleading and that went beyond the allegations in the lawsuit."<sup>111</sup> The agency later filed an administrative complaint against Zen Magnets as well.<sup>112</sup>

It is important to note that the CPSC predicated its actions on the grounds that "[n]otwithstanding the labeling, warnings, and efforts taken by [Maxfield & Oberton], ingestion incidents requiring surgery continue to occur because such warnings are ineffective."<sup>113</sup> That is to say, the labels and warnings did not reduce the incidence of swallowing to zero. That is very likely an impossible standard. The correct standard would have been whether the product "create[d] a substantial risk of injury to the public"—a high bar.<sup>114</sup> As many have pointed out, the CPSC alleged only twenty-two cases of magnet-related injuries since Buckyballs went on sale in 2009, or about one injury per 100,000 Buckyballs sets sold.<sup>115</sup> By some estimations, skateboards, bicycles, fireworks, and balloons are more dangerous than Buckyballs.<sup>116</sup> Although there have been no deaths related to swallowing magnets, several children die each year as a result of accidents involving balloons and bicycles, products that

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110. Ahmari, *supra* note 102.

111. Zucker, *supra* note 75; *see also, e.g.*, Press Release, Consumer Prod. Safety Comm'n, *supra* note 103.

112. Complaint, In the Matter of Zen Magnets, LLC, CPSC Docket No. 12-2 (Aug. 6, 2012), *available at* <http://www.cpsc.gov/PageFiles/131899/zen1a.pdf>, [<http://perma.cc/0rpmb9oFDc3>].

113. Complaint, *supra* note 109, ¶7.

114. 15 U.S.C. § 2064(a)(1) (2012).

115. Complaint, *supra* note 109, ¶¶ 23–34; Eliyahu Federman, *Banning Buckyball Magnets Is Statistically Ridiculous*, HUFFINGTON POST, July 31, 2012, [http://www.huffingtonpost.com/eliyahu-federman/banning-buckyball-magnets\\_b\\_1711110.html](http://www.huffingtonpost.com/eliyahu-federman/banning-buckyball-magnets_b_1711110.html), [<http://perma.cc/0Jcmtetpa12>].

116. *See, e.g.*, Federman, *supra* note 115; Joyner, *supra* note 74; Ruth Suehle, *Buckyballs Banned? Seven Things to Ban Next*, WIRED.COM, July 25, 2012, <http://www.wired.com/geekmom/2012/07/buckyballs-banned>, [<http://perma.cc/07NGzjieieU>].

are marketed to children.<sup>117</sup> Under Wu's system, however, that an agency "simply does not know the facts that bear on [an] enforcement decision" creates an uncertainty *that is the very justification* for issuing a threatening letter that "may also simply put a stop to the activity in question."<sup>118</sup>

Maxfield & Oberton launched a public relations campaign, which included a full-page advertisement in the *Washington Post*, to draw attention to its plight at the hands of the CPSC.<sup>119</sup> Ultimately, however, the company ceased operations in December 2012, driven out of business by the CPSC's threats to the company and its retailers before there was an adjudicatory determination that its products were unsafe, and certainly before a regulation was promulgated through a notice-and-comment proceeding banning magnetic balls.<sup>120</sup> Buckyballs may yet be legal, but the CPSC effectively banned them using only letters, investigations, and press releases.

Wu says threats are not as problematic as some imagine because "when [an] industry refuses to comply with agency commands . . . [the agency] must turn to formal action" and "this fact serves as an important check on agency power."<sup>121</sup> The demise of Maxfield & Oberton demonstrates the hollowness of that claim. The CPSC effectively ordered the company shut down absent any adjudicatory or regulatory process. It did not matter that the company sought a formal process because the CPSC had scared away its business partners and customers.<sup>122</sup>

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117. Susan P. Baker & Kopl Halperin, *Designing the Death Out of Balloons*, 274 J. AM. MED. ASSOC. 1805 (1995), available at <http://jama.jamanetwork.com/article.aspx?articleid=392658>, [<http://perma.cc/0hWWvdTWRvh>].

118. *Agency Threats*, *supra* note 3, at 1852.

119. Craig Zucker, *Open Letter to President Obama*, BUCKYBALLS (Aug. 2, 2012), <http://www.getbuckyballs.com/blog/2012/08/open-letter-to-president-obama/>, [<http://perma.cc/0qfioN54jy8>] (including a copy of the full-page ad that ran in the *Washington Post*).

120. In September 2012, the CPSC issued a notice of proposed rulemaking to prohibit magnet toys, but that proceeding remains open. Safety Standard for Magnet Sets, 77 Fed. Reg. 53,781 (proposed Sept. 4, 2012) (to be codified at 16 C.F.R. pt. 1240).

121. *Agency Threats*, *supra* note 3, at 1843.

122. As many commentators have pointed out, agencies often employ adverse publicity to induce "voluntary" compliance with agency requests. Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371 (2011); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV.

“Three years of building a business selling extremely popular products to adults was torn down by the CPSC in just a week, and without their ever talking with us, or responding in writing to anything we sent them on further ways to work cooperatively,” Zucker lamented.<sup>123</sup> Today the CPSC continues to pursue its lawsuit against the bankrupt Maxfield & Oberton, and it is now seeking to hold Zucker personally liable for recall, refund, and compliance costs.<sup>124</sup> This is what “agency threats” look like.

#### IV. CONCLUSION

It is no doubt frustrating to many that the regulatory process can be slow. Some argue that executive review and other analytical requirements have ossified the regulatory process, even though new empirical research calls this ossification into question.<sup>125</sup> And even though regulatory agency budgets have doubled and staffing has increased by over sixty percent since 2000,<sup>126</sup> some argue that agencies are under-resourced and struggling to keep up with new business practices and technologies. As a result, it is tempting to justify agencies resorting to informal methods of compelling behavior as a form of inevitable triage. This would be a mistake.

The regulatory process laid out in the APA and the executive regulatory review process to which many agencies are subject

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L. REV. 1380 (1973); Noah, *supra* note 1, at 889. Negative statements by government officials, even if unfounded, are potentially very damaging to a business, thus making voluntary compliance potentially less than voluntary. See Noah, *supra* note 1, at 889.

123. Zucker, *supra* note 75.

124. Ahmari, *supra* note 102; Erin M. Bosman, Ellen Nudelman Adler & Julie Y. Park, *CPSC Seeks To Hold Former CEO Responsible For Buckyballs Recall*, MORRISON & FOERSTER LLP, May 22, 2013, <http://www.mondaq.com/unitedstates/x/239976/>, [<http://perma.cc/0hqChE7TF1J>].

125. Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making “Ossified”?*, 20 J. PUB. ADMIN. RES. THEORY 261 (2010), available at <http://jpart.oxfordjournals.org/content/20/2/261.abstract?sid=7567c7bb-9661-4037-a0b4-188229d0e0a3>, [<http://perma.cc/0gVaQrFrp74>]; Yackee & Yackee, *supra* note 2.

126. SUSAN DUDLEY & MELINDA WARREN, GROWTH IN REGULATORS’ BUDGET SLOWED BY FISCAL STALEMATE: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2012 AND 2013, at 10–11, (2012), available at <http://wc.wustl.edu/files/wc/imce/2013regreport.pdf>, [<http://perma.cc/0B5WmGz4yy>].



exist, among other reasons, to check the potential mistakes and abuses of regulators. These checks are in place not only for the benefit of regulated parties, but more importantly for the benefit of the public, whose interests would be harmed by regulations that unnecessarily hamper innovation or restrict consumer choice. Regulatory methods that bypass these checks are therefore dangerous and not worth the putative gains in regulatory speed they promise.

Professor Wu is admirably concerned that enacting regulation affecting new and dynamic industries before all the facts are known could lead to mistakes that would be difficult to undo. However, the solution he proposes—agency threats—is just as subject to difficult-to-reverse mistakes and abuses.<sup>127</sup> It is also premised on the questionable assumption that existing regulatory processes can be impracticable in the face of new and dynamic industries. These processes may be slower than one would want, and for good reason, but they are not impracticable. Therefore, little reason exists to place so much trust in humans restrained only by their good intentions.

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127. For example, it is not clear how one could undo what the CPSC accomplished by threatening Maxfield & Oberton's retailers.