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# CENTRALIZED OVERSIGHT OF THE REGULATORY STATE

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*Born out of a Reagan-era desire to minimize regulatory costs, and not fundamentally reconsidered since its inception, the centralized review of agency rulemakings has arguably become the most important institutional feature of the regulatory state. Yet it is a puzzling feature: although centralized review is sometimes justified on the ground it could harmonize the uncoordinated sprawl of the federal bureaucracy, the agency tasked with regulatory review, the Office of Management and Budget (OMB), has never embraced that role. It has instead doggedly clung to its original cost-reduction mission, justifying its function as a check on the federal bureaucracy with reference to the pervasive belief that agencies will systematically over-regulate.*

*This article shows why this belief is wrong. The claim that agencies are systematically biased in favor of regulation finds little support in public choice theory, the political science literature, or elsewhere. In any event, theories predicting rampant over-regulation are no more plausible than alternative theories suggesting that agencies will routinely under-regulate. Even if zealous agencies captured by powerful interest groups did characterize the regulatory state, OMB review is a curious and poorly designed counterweight. There is no reason to believe that OMB's location in the Executive Office of the President will inoculate OMB from the pathologies that afflict other agencies, and some reason to think that it will exacerbate them. As a response to these problems, we urge a reconsideration of the foundational role that centralized review should play in our regulatory state, and a revival and re-conceptualization of the neglected principles of harmonization that once ostensibly animated it.*

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#### INTRODUCTION

Sweeping into office on a promise to reform what he saw as a lumbering and wasteful regulatory apparatus, President Reagan in 1981 tapped the Office of Management and Budget (OMB) to review agency rulemaking and help streamline the administrative state. Proponents of centralized executive review of agency decision-making justified it with reference to two goals: the promotion of political accountability, inter-agency coordination, rational priority-setting, and cost-effective rulemaking (the harmonizing function);<sup>1</sup> and the curbing of the regulatory excesses of overzealous bureaucrats bent on promoting their agencies’ narrow agendas (the checking function).<sup>2</sup>

In practice, however, Reagan-era centralized review did a lot of checking and not much harmonizing. Indeed, OMB’s advocates were frank that its primary function was to create a “rebuttable presumption against regulation” in order to curb agencies’ supposed instincts to over-regulate.<sup>3</sup>

<sup>1</sup> See E.O. 12,498 pmb.; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

<sup>2</sup> *Id.* at 1081.

<sup>3</sup> Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NATURAL RESOURCES L. 1, 4 (1984) (quoting Reagan-era OIRA director Jim Tozzi).

Less attention was given to the role that OMB was supposed to play in providing centralized oversight of the regulatory state. Given the Reagan administration's "professed aim . . . to cut back significantly, if not actually to destroy, the regulatory system established by Congress," its commitment to deregulation at the expense of harmonization is hardly surprising.<sup>4</sup> What *is* surprising, however, is that the basic contours of the Reagan-era executive review mechanism remain in place today. In part because presidents from both political parties have embraced OMB review, there is even an emerging consensus in the administrative law literature that it is simply one more neutral tool that the President can use to further his administration's agenda.<sup>5</sup>

This Article shows why this view is wrong. Part I demonstrates that many of the features of OMB review create a profound institutional bias against regulation—a bias which is inexplicable except with reference to the implicit Reagan-era belief that agencies will systematically over-regulate. Advocates justify this bias with reference to a simple and remarkably stable story, namely, that health and safety agencies are frequently captured by pro-health and safety constituencies, leading systematically to overzealous and inefficient regulation. Because "[w]e all know"—or so the story goes—"that a government agency . . . will invariably wish to spend 'too much' on its goals," OMB should stand as a bulwark against the parochial preferences of pro-regulation agencies and promote a national agenda more representative of public preferences.<sup>6</sup>

Part II argues that the claim that agencies are systematically biased in a pro-regulatory direction finds little support in public choice theory, the political science literature, or elsewhere. Standard public choice accounts would suggest that agencies could easily (and more plausibly) reflect anti-regulatory interests. Moreover, even if we believed that some agencies (say, the Environmental Protection Agency (EPA)) had pro-regulatory biases, other federal agencies (say, the Department of Energy (DOE)) would be likely to have corresponding anti-regulatory proclivities. A one-size-fits-all executive review process that automatically disfavors regulation is therefore inappropriate. We similarly conclude that no other accounts of bureaucratic over-zealousness—whether based on

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<sup>4</sup> Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062-63 (1986).

<sup>5</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463 n.3 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1070 (2002); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1954-2004*, 90 IOWA L. REV. 601, 713 (2005).

<sup>6</sup> DeMuth & Ginsburg, *supra* note 1, at 1081.

administrators' purported budget-maximizing preferences, hyper-cautious risk assessors, a bureaucratic staff's identification with its agency's mission, or stories about how political appointees inevitably "go native"—provide plausible support for the view that we challenge. Even if the regulatory state were in fact characterized by zealous agencies captured by powerful interest groups, Part III argues that OMB review is a poorly designed solution to that problem for the simple reason that OMB's location within the Executive Office of the President does not immunize it from the pathologies that affect other agencies.

Because of its unwarranted embrace of an unjustifiable anti-regulatory mission, OMB review has largely failed to capitalize on its potential to promote regulatory rationality. Part IV therefore urges a reconsideration of the foundational role that OMB review should play in the regulatory state, and a revival and re-conceptualization of the neglected harmonization principles that once ostensibly animated it. Cost-benefit analysis would remain a cornerstone of its work. But many other issues are amenable to centralized review, and we offer several suggestions as to what a centralized agency dedicated to playing a harmonization role might do. Most importantly, however, we recommend that scholars discard outmoded theories of bureaucratic behavior and begin thinking seriously about reshaping OMB review to further the positive role it can play as a harmonizing force in the administrative state.

## I.

### THE ANTI-REGULATORY ROLE OF OMB UNDER THE EXECUTIVE ORDERS

Within a month of his inauguration in 1981, President Reagan promulgated Executive Order 12,291 and asserted an unprecedented level of control over the administrative apparatus. Encouraged by a groundswell of commentators urging more robust executive control of the administrative state<sup>7</sup> and an electoral mandate to curb overzealous agencies, Reagan called on agencies to weigh the costs of their regulations against their anticipated benefits<sup>8</sup> and installed OMB as the final arbiter of the substantive appropriateness of newly promulgated regulations.<sup>9</sup> Reagan also promulgated Executive Order 12,498, which required regulatory agencies to submit annual regulatory plans to OMB—more specifically, to the Office of Information and Regulatory Affairs (OIRA)—each year to ensure

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<sup>7</sup> See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (Wald, J.); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L. J. 1395, 1414 (1975).

<sup>8</sup> E.O. 12,866 § 2(b).

<sup>9</sup> *Id.* § 3.

“consistency with the goals of the Administration”<sup>10</sup> and to curtail agencies’ capacity to deviate from those pre-announced plans.<sup>11</sup> The two orders, taken together, “placed OIRA in the center of regulatory planning.”<sup>12</sup>

Reagan’s supporters provided two often-conflated justifications for executive control: the need for centralized review of agency decision-making to promote a coordinated and cost-effective administrative state;<sup>13</sup> and the need to curb the excesses of regulators bent on promoting their agencies’ narrow agendas.<sup>14</sup> To conservatives in the 1980s, the conflation of the two justifications was natural: *Rational* administration necessarily meant *less* administration.<sup>15</sup>

Unsurprisingly, the newly minted review process provoked controversy.<sup>16</sup> Critics argued that cost-benefit analysis would in practice be used as a tool not for the accurate calibration of regulations, but as an analytically (and politically) respectable method of curbing the administrative state. Particularly because OIRA involved itself only at the tail end of a long rulemaking process, at which point it was “virtually impossible to do anything productive,”<sup>17</sup> critics feared that OIRA would thwart the implementation of needed regulations. OIRA’s tiny staff was charged with reviewing thousands of technically complex rules, leading to the charge that OIRA review would necessarily impose costly and lengthy delays on agency action.<sup>18</sup> If that were not enough, the secrecy of OIRA review would give regulated industries unprecedented access to the administrative machinery.<sup>19</sup> In short, under Reagan’s orders, regulatory

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<sup>10</sup> E.O. 12,498 § 1(d).

<sup>11</sup> *Id.* at § 3(c).

<sup>12</sup> Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (2005).

<sup>13</sup> See E.O. 12,498 pmb1.

<sup>14</sup> DeMuth & Ginsburg, *supra* note 1, at 1081; see also Morrison, *supra* note 4, at 1061 (“The charge was that many agencies were administering their laws with no consideration of other interests or the economic effect of their decisions.”).

<sup>15</sup> See DeMuth & Ginsburg, *supra* note 1, at 1081 (“Centralized review of proposed regulation under a cost/benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation . . . Assessments of social costs and benefits force regulators to confront problems of covert redistribution and overzealous pursuit of agency goals, which experience has shown to be common in regulatory programs.”).

<sup>16</sup> For discussions of this view, see THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991); Olson, *supra* note 3; Pildes & Sunstein, *supra* note 12, at 4-6.

<sup>17</sup> E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 L. & CONTEMP. PROBS. 167, 169 (1994).

<sup>18</sup> Pildes & Sunstein, *supra* note 12, at 5.

<sup>19</sup> Olson, *supra* note 3, at 31-35.

benefits would be systematically undervalued, costs systematically inflated—and the administrative state would grind to a halt.

When President Clinton was elected in 1992, many observers expected that he would abandon a Reagan-era executive review process that had been so thoroughly tagged as biased.<sup>20</sup> Recognizing, however, that Reagan's innovation gave him an opportunity to exercise substantial control over an ever-more important regulatory state, Clinton instead co-opted the Reagan orders and made them his own. Executive Order 12,866, issued in 1993, cemented OIRA review of “significant regulatory action[s]”<sup>21</sup> while maintaining the existing structure of the regulatory review process.<sup>22</sup> In response to critics, however, the Clinton order imposed more robust disclosure requirements,<sup>23</sup> emphasized that agencies should weigh “qualitative measures,” including “distributive impacts” and “equity,” when engaging in cost-benefit analysis,<sup>24</sup> and set deadlines that prevented OIRA from permanently stalling the implementation of a regulation.<sup>25</sup> Important academic commentators, most notably Richard Pildes and Cass Sunstein, thoughtfully scrutinized Clinton's reformed executive review process and were guardedly optimistic about the possibilities of a more rational and democratically legitimate administrative state.<sup>26</sup>

In recent years, the functional appropriateness of Executive Order 12,866 as a template for executive control of the administrative process has not been seriously challenged. The tacit assumption, bolstered particularly by Elena Kagan's article detailing Clinton's harnessing of the administrative state to his own progressive political ends,<sup>27</sup> is that OMB review is a neutral tool that can promote a pro- or anti-regulatory agenda depending on its implementation. On this view, George W. Bush's decision to continue to operate under Clinton's executive order was natural: If it ain't broke, don't fix it.

Without denying that it provides a sitting president, Democrat or Republican, with a powerful tool to promote his political agenda, we submit that this view fails to consider that Executive Order 12,866—based as it is on an order designed explicitly to promote an anti-regulatory

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<sup>20</sup> Pildes & Sunstein, *supra* note 12, at 6.

<sup>21</sup> E.O. 12,866 § 2(f) (“‘significant regulatory action’ means any regulation action that is likely to result in a rule that [*inter alia*] may . . . [h]ave an annual effect on the economy of \$100 million or more . . .”).

<sup>22</sup> See Kagan, *supra* note 5, at; Pildes & Sunstein, *supra* note 12, at 6.

<sup>23</sup> *Id.* § 6(b)(4).

<sup>24</sup> *Id.* § 1(a).

<sup>25</sup> *Id.* § 6(b)(2).

<sup>26</sup> Pildes & Sunstein, *supra* note 12, at 125-26.

<sup>27</sup> See Kagan, *supra* note 5, at 2281-2319.

agenda—contains within it several structural and institutional biases against regulation. First, OIRA reviews agency rules only to determine whether the benefits of the regulation warrant the costs, and therefore whether the regulation is too stringent. But, of course, the regulation could be too lax and cost-benefit analysis might call for a more robust regulatory response. Second, OIRA rarely reviews agency decisions to deregulate with the same rigor that it reviews new regulations. OIRA thus stands as a structural roadblock on the path of regulation, but not deregulation—an asymmetry which cannot be justified on cost-benefit grounds. Third, perhaps most importantly, OIRA generally does not review agency inaction. Agency inertia is therefore privileged under the current system of OIRA review, and many regulations that would have positive net benefits are never enacted. Fourth, at least two procedural features of OIRA review cut against regulation: the delay associated with OIRA review (exacerbated by OIRA's small size), and OIRA's exemption from the constraints of the APA. To be sure, some of OIRA's anti-regulatory bent can be attributed to politics; Republican presidents have after all overseen OIRA for all but eight of its twenty-five year existence. But whatever the political affiliation of the President, this Part shows that several aspects of OIRA's institutional design work together to impose a sizeable drag on the regulatory state. **[Ricky - I'm disinclined to discuss how OIRA review operated much the same during the Clinton years, in part because Clinton himself had a mildly deregulatory agenda. I don't have strong feelings, however—we can certainly add a discussion if you feel it would add something.]**

#### *A. The Selective Use of Cost-Benefit Analysis*

In practice, OIRA reviews agencies' cost-benefit analyses only to ensure that they do not enact regulations with costs that exceed their benefits.<sup>28</sup> As a historical matter, this approach makes sense: from its

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<sup>28</sup> See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 140 (5th ed. 2002) (noting common critique that "OIRA's analysis is weighted too heavily in favor of minimizing costs"); CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING [x](1988) [hereinafter CARNEGIE COMMISSION] ("Policy actions [at OMB] have largely focused on the economic impacts of individual rules and regulatory initiatives and on preventing the promulgation of regulations that appear too costly. Few initiatives have been taken to control threats to public health and the environment."); Elliott, *supra* note 17, at 172 (recalling from his years as EPA's general counsel OMB's "typical concern—that the rule was too expensive"); Morrison, *supra* note 4, at 1065 ("[T]he system of OMB review created by the Executive Orders [has been used] to implement a myopic vision of the regulatory process which places the elimination of cost to industry above all other considerations."); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L & CONTEMP. PROBS. 127, 161 (1991) ("Executive Office reviewers have consistently sought to



inception, “OIRA’s basic mission has been to stop unjustified rules,”<sup>29</sup> and using cost-benefit analysis to strike down and revise rules that impose regulatory costs that exceed regulatory benefits serves this mission admirably well.

But by failing to concentrate on those cases in which agencies enact regulations where the net benefits have not been maximized—in other words, those cases when imposing greater costs would yield even greater benefits—OIRA’s use of cost-benefit review operates as a one-way ratchet. Lax agency regulations can run the gauntlet of OIRA review unscathed, whereas more-stringent rules run a very real risk of being struck down. While the administrative state thus grows ever-leaner as OIRA review compensates for one kind of inefficiency (over-regulation), the full potential of the administrative apparatus remains untapped because OIRA review does not compensate for a different kind of inefficiency (under-regulation).

OIRA’s denials notwithstanding,<sup>30</sup> there is substantial evidence that emphasizing the cost side of the cost-benefit ledger remains a pervasive and entrenched feature of OIRA review. For example, in an extensive 2003 report on OIRA, the General Accounting Office (GAO) traced OIRA’s influence on the 393 economically significant rules that had been altered during the formal OIRA review process over a one-year period. GAO found seventeen rules that had been “significantly changed” during that process, fourteen of which came from EPA.<sup>31</sup> Noting that “attention to the cost side of economic effects was most prevalent in OIRA’s comments and suggestions,”<sup>32</sup> the report found that six EPA rules were changed to eliminate regulatory provisions or delay their implementation; four were

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make the regulations EPA does issue less stringent.”); Seidenfeld, *supra* note 5, at 1069 (“What OIRA desk officers share . . . is a focus on the costs of regulation, which makes it likely that they will object to a rule if there is uncertainty about whether the regulatory benefits are sufficient to justify the costs of the rule.”); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489 (2002) (“For over twenty years, the executive branch of the federal government has required regulatory agencies to assess the costs and benefits of regulation, *and to attempt to ensure that the benefits outweigh, or justify, the costs.*”) (emphasis added). *But see* John D. Graham, *Reigning in the Regulatory State: The Smart-Regulation Agenda*, CATO Institute Hill Briefing, Oct. 3, 2003 (claiming that OIRA is not “uniformly pro-regulation or anti-regulation in our decision making”).

<sup>29</sup> Hahn & Sunstein, *supra* note 2829, at 1521.

<sup>30</sup> John Graham, *Smarter Regulation: Progress and Unfinished Business*, Address at the Kennedy School of Government (Sept. 25, 2003), at <http://www.whitehouse.gov/omb/inforeg/speeches/030925graham.html> (“We are not uniformly pro-regulation or anti-regulation in our decision making, despite what your image of conservative Republicans may be.”).

<sup>31</sup> GENERAL ACCOUNTING OFFICE, *OMB’S ROLE IN REVIEWS OF AGENCY RULES AND THE TRANSPARENCY OF THOSE REVIEWS* (2003) [hereinafter GAO REPORT ON OIRA].

<sup>32</sup> *Id.* at 87.

altered so as to favor regulatory alternatives that imposed fewer costs on regulated entities; and three were sent back for revisions to be made in the calculation of costs and benefits.<sup>33</sup> *None* of these rules were made more stringent (i.e., more costly for industry) in an effort to capture greater net benefits. David Driesen examined those same rulemakings in a 2005 study and concluded that OIRA review “never moves in the direction of encouraging more stringent regulation than the agency would adopt on its own, even when benefits far outweighed costs.”<sup>34</sup>

This review process’s asymmetry moreover has a pernicious effect on agencies’ incentives to promulgate rules. Aware that over-regulation may lead to reversal while under-regulation will go unchecked, rationally risk-averse agencies initiating significant regulatory actions will, in the face of asymmetrical OIRA review, have powerful incentives to make their regulations less stringent (i.e., impose fewer compliance costs) if the expected benefits of a particular regulation are contingent, fairly contestable, or difficult to quantify<sup>35</sup>—that is, nearly always.<sup>36</sup> **[Ricky – I think you softened this in an earlier draft to “quite frequently.” Isn’t “nearly always” as accurate, and a little stronger?] An agency that believes a watered-down regulation is preferable to no regulation at all will be sorely tempted to craft regulations that may not maximize net benefits but will nevertheless not attract unwelcome attention from OIRA.<sup>37</sup> This dynamic effect will also extend to agency decisions of what to regulate: confronted with biased OIRA review, agencies will naturally devote scarce resources to rulemakings that are less vulnerable to the charge that they reflect a too-rosy assessment of regulatory benefits.<sup>38</sup>**

### B. Little Review of Deregulation

Because “OMB often does not intensively review deregulatory measures,”<sup>39</sup> agencies can more easily nix old regulations, or make them

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<sup>33</sup> *Id.* at 76-78.

<sup>34</sup> David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, at 48 (forthcoming 2005, on file with authors).

<sup>35</sup> See Seidenfeld, *supra* note 5, at 1075 (“OMB review is likely to encourage the agency to propose a rule that may be less effective but also less costly than the rule the agency otherwise would consider best.”).

<sup>36</sup> See Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255 (2002) (detailing highly contingent nature of cost-benefit analysis, particularly on the benefits side).

<sup>37</sup> Similarly, commentators have noted that the risk of reversal creates incentives for agencies to generate a regulatory record that, whatever its utility for the rulemaking process, will satisfy a judicial inquiry. See, e.g., MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS (1988).

<sup>38</sup> See, e.g., Olson, *supra* note 3, at 50 (noting that EPA starts off with “reduced expectations” and engages in a “guessing game” to “draft rules it believes will clear OMB”). DOT refuses, for example, to propose certain types of regulatory provisions that it knows will run into trouble at OIRA. GAO REPORT ON OIRA, *supra* note 3132, at 130.

<sup>39</sup> Driesen, *supra* note [Error! Bookmark not defined.](#)<sup>35</sup>, at 15.

less stringent, than implement new ones. This imbalance—which contrasts with the judiciary’s even-handed practice of scrutinizing agency decisions to deregulate<sup>40</sup>—sharply favors deregulatory initiatives over proregulatory alternatives.

The asymmetry of the process appealed to OIRA’s Reagan-era advocates, who wanted to check agencies that were regulating “too much,” not rein in agencies that were *deregulating* “too much.”<sup>41</sup> Deregulation was the entire point.<sup>42</sup> As a result, during the 1980s and the early 1990s, OIRA “applied its criteria selectively, requiring no analysis for proposals that eliminate regulation, and no cost analysis for those that relax existing standards.”<sup>43</sup>

The practice under Clinton’s executive order, however, has allegedly been different. Under Executive Order 12,866, deregulatory initiatives fall within OIRA’s jurisdiction over “significant regulatory actions” because deregulation can “have an annual *effect* on the economy of \$100 million or more,” including non-monetary effects.<sup>44</sup> In line with this language, OIRA has been careful to express an interest in reviewing the cost-benefit analyses that accompany deregulatory rulemakings.<sup>45</sup> And to facilitate OIRA review, deregulatory initiatives from the agencies do often come accompanied by regulatory impact analyses that monetize costs and benefits,<sup>46</sup> although these analyses rarely provide a quantitative assessment of the costs and benefits of alternative regulatory options (such as imposing a more-stringent alternative).<sup>47</sup>

Experience suggests that OIRA does not carefully scrutinize deregulatory cost-benefit analyses, however. We offer one important example relating to EPA’s promulgation of a 2002 rule relaxing new source

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<sup>40</sup> See *Motor Vehicle Manufacturers Ass’n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (“[A]n agency changing its course by rescinding a rule obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”).

<sup>41</sup> See Olson, *supra* note 3, at 54 (reporting that “if an EPA action *relaxes* a standard, there is likely to be no effort on OMB’s part to assess the costs and benefits of the action”); Percival, *supra* note 2829, at 188 (noting that OIRA cleared EPA’s rescission or relaxation of lead standards because it would not have a significant adverse economic impact).

<sup>42</sup> E.O. 12,291 pmb. (giving top billing to the goal of “reduc[ing] the burdens of existing and future regulations”).

<sup>43</sup> Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 542 (1987) (internal cites removed).

<sup>44</sup> E.O. 12,866 § 3(f)(1) (emphasis added).

<sup>45</sup> OIRA, CIRCULAR A-4 ON REGULATORY ANALYSIS 1 (2003) [hereinafter CIRCULAR A-4] (“This requirement applies to rulemakings that rescind or modify existing rules as well as to rulemakings that establish new requirements.”).

<sup>46</sup> See, e.g., Energy Conservation Program for Consumer Products, 66 Fed. Reg. 38822 (July 25, 2001) (quantifying costs and benefits of less-stringent new regulation).

<sup>47</sup> Hahn et al., *Assessing Regulatory Impact Analyses*, 23 HARV. J. L. & PUB. POL’Y 859, 874 (2000).

review (NSR) requirements for existing pollution sources.<sup>48</sup> The scope of the rule is broad, applying to all “stationary sources” in the United States, with a “stationary source” defined as any facility “which emits or may emit any air pollutant”—a definition that includes all power plants, oil refineries, manufacturing plants, and utilities in the country.<sup>49</sup>

Although the details are quite complex, the Clean Air Act essentially splits stationary sources into two groups, existing sources and new sources. While any new sources must install tight environmental controls, only minimal federal environmental regulation covers existing sources—in other words, these sources are “grandfathered” in.<sup>50</sup> To stave off obsolescence, however, these older and more-polluting stationary sources will eventually have to renovate their facilities or else face closure. The catch is that under the Clean Air Act these existing sources will be considered “new sources”—thereby triggering NSR and forcing the plants to implement state-of-the-art environmental standards—whenever they undergo “any modification,” which includes anything beyond routine maintenance that increases pollution.<sup>51</sup> Older plants thus have strong incentives to put off renovating their facilities, and will sometimes be deterred from making productivity-enhancing upgrades that might also lower emission rates.<sup>52</sup>

EPA’s new rule relaxes its definition of “modification” to give existing facilities additional flexibility to upgrade their facilities without triggering NSR.<sup>53</sup> That flexibility would allow existing sources to modernize, but it would also allow them to delay, perhaps indefinitely, the day on which they become too old to operate productively—creating a very real risk that grandfathered plants will never be retired in favor of newer, cleaner facilities.<sup>54</sup>

EPA undertook a screening analysis in which it determined that the new rule would not have effects (either increasing costs or reducing benefits) above \$100 million and was therefore not “economically significant.”<sup>55</sup> As a result, EPA declined to submit the rule to formal cost-

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<sup>48</sup> EPA, Final Rule, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

<sup>49</sup> CAA § 111(a)(3).

<sup>50</sup> CAA §§ 111 (laying out “standards of performance for new stationary sources”); 165(a)(4) (requiring new sources to use the “best available control technology”); 169(3) (defining best available control technology as a standard no less rigorous than the new source performance standard of § 111).

<sup>51</sup> CAA § 111(4); 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971).

<sup>52</sup> For a comprehensive discussion of this effect, see Johathan Remy Nash & Richard L. Revesz, *The Law and Economics of New Source Review* (forthcoming 2006).

<sup>53</sup> Or rather, a pair of rules. See *id.* at [x].

<sup>54</sup> *Id.* at [x].

<sup>55</sup> GAO REPORT, CLEAN AIR ACT: EPA SHOULD USE AVAILABLE DATA TO MONITOR THE

benefit analysis. OIRA concurred that the rule was not significant, but asked EPA for a more-extensive cost-benefit analysis on the grounds that the new rule was important public policy. EPA demurred, citing gaps in its data, and OIRA ultimately agreed that formal cost-benefit analysis was unrealistic.<sup>56</sup>

All of this would be unexceptionable but for the fact that OIRA did not contest EPA's implausible contention that the end result of its new rules would be to improve environmental quality.<sup>57</sup> EPA based this conclusion on self-serving anecdotal evidence from four industry groups, which claimed that the previous incarnation of NSR rules caused them to reject various interim energy-efficiency projects, and that therefore making the rules less stringent might reduce emissions overall.<sup>58</sup> Yet virtually all objective observers believe that EPA's prediction is flat-out wrong.<sup>59</sup> The non-partisan National Association of Public Administration (NAPA), for example, contends that the new NSR rules would "thwart the intent of Congress for NSR to promote replacing or upgrading old, more polluting equipment."<sup>60</sup> EPA's own Office of Inspector General (OIG) concluded that the rules had been promulgated without adequate support and would hamstring effective EPA enforcement efforts.<sup>61</sup> The "usually staid" American Lung Association, together with a consortium of environmental groups, predicted strong increases in pollutants and called the new rule "the most harmful and unlawful air-pollution initiative ever undertaken by the federal government."<sup>62</sup> And a vast majority of the states' environmental officials who responded to a GAO survey indicated they believed emissions would increase as a result of the new rule.<sup>63</sup>

In spite of the evidence that EPA misstated the effects of its new NSR rule, OIRA declined to press it to generate a cost-benefit analysis. It did not even question EPA's bizarre determination that the NSR rule was not "economically significant."<sup>64</sup> Given the broad scope of the NSR rule and its manifest importance to the environment and the economy, OIRA's

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EFFECTS OF ITS REVISION TO THE NEW SOURCE REVIEW PROGRAM 10 (2003) [hereinafter GAO REPORT ON CAA].

<sup>56</sup> *Id.* at 13.

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* at 17.

<sup>59</sup> See Nash & Revesz, *supra* note 5254, at [x].

<sup>60</sup> NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, A BREATH OF FRESH AIR: REVIVING THE NEW SOURCE REVIEW PROGRAM 117-19, 141 (2003).

<sup>61</sup> OFFICE OF INSPECTOR GENERAL, NEW SOURCE REVIEW RULE CHANGE HARMS EPA'S ABILITY TO ENFORCE AGAINST COAL-FIRED UTILITIES 14-20, 22-28 (Sep. 30, 2004), at <http://www.epa.gov/oigearth/reports/2004/20040930-2004-P-00034.pdf>.

<sup>62</sup> Bruce Barcott, *Changing All the Rules*, N.Y. TIMES (Magazine), Apr. 4, 2004, § 6, at 38.

<sup>63</sup> Jennifer 8 Lee, *Most States Expect Pollution to Rise if Regulations Change*, N.Y. TIMES, Feb. 6, 2004, at A1.

<sup>64</sup> GAO REPORT ON CAA, *supra* note 5557, at 17.

failure to push EPA to monetize costs and benefits suggests a relative nonchalance about the effects of deregulation—a nonchalance that, as discussed above, OIRA does not share with respect to regulation.

In short, the experience with the NSR rule, coupled with a long institutional history in which deregulation fell outside the scope of its authority, raise a powerful inference that OIRA does not review deregulatory rulemakings with the same rigor that it reviews regulations imposing compliance costs.

### C. No Review of Regulatory Inaction

An even more profound objection to OIRA review is that it is almost wholly reactive: an agency submits a proposed rule to OIRA, and OIRA reviews it to ensure that it passes cost-benefit muster and is in line with the president's priorities.<sup>65</sup> Agencies' decisions *not* to regulate can be every bit as costly to society as overly expensive regulations, however;<sup>66</sup> “studies show that adding some regulations, while removing or improving others, could save tens of thousands of lives and millions of dollars annually, thus giving simultaneous boosts to health, safety, and economic growth.”<sup>67</sup> But until recently, there was no institutional mechanism at OIRA to prompt recalcitrant agencies to regulate when cost-benefit analysis would support the implementation of a new rule.<sup>68</sup>

In 2001, however, OIRA announced that it would begin sending “prompt letters” in an effort “to bring a policy matter to the attention of agencies” and goad them into needed regulatory action.<sup>69</sup> Since then, OIRA has issued fourteen prompt letters to a number of agencies on a variety of issues. For instance, OIRA has asked OSHA to “consider whether promotion of [automatic external defibrillators (AEDs)] should be elevated to a priority,”<sup>70</sup> requested more information from EPA about its implementation of a congressional beach-protection act,<sup>71</sup> and encouraged

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<sup>65</sup> OIRA, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COST AND BENEFITS OF REGULATIONS 21 (2002) [hereinafter 2002 REPORT TO CONGRESS] (“Historically, OIRA has been a reactive force in the regulatory process, responding to proposed and final rulemakings generated by Federal agencies.”).

<sup>66</sup> John D. Graham, *The Failure of Agency-Forcing*, 1985 DUKE L.J. 100, 121 (“Both types of error are costly to society.”).

<sup>67</sup> Hahn & Sunstein, *supra* note 2829, at 1521-22.

<sup>68</sup> *Id.* at 1522 (“no institution in government has yet vindicated the hopes of those who believed that cost-benefit analysis could be used to . . . spur agency action when it is justified.”).

<sup>69</sup> 2002 REPORT TO CONGRESS, *supra* note 6567, at 21-22.

<sup>70</sup> Letter from John D. Graham, Administrator, OIRA, to John Henshaw, Assistant Secretary of Labor, Occupational Health and Safety Administration (Sept. 18, 2001), at [http://www.reginfo.gov/public/prompt/osha\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/osha_prompt_letter.html).

<sup>71</sup> Letter from John D. Graham, Administrator, OIRA, to Benjamin Grumbles, Acting Assistant Administrator, Environmental Protection Agency (Apr. 16, 2004), at [http://www.reginfo.gov/public/prompt/epa\\_beach-act-2000.pdf](http://www.reginfo.gov/public/prompt/epa_beach-act-2000.pdf).

USDA and HHS to consider the risks of trans-fatty acids and the benefits of omega-3 fatty acids in revising the dietary guidelines and the food pyramid.<sup>72</sup> John Graham points to his “innovation” of prompt letters, which “represent the first time that [OIRA] has publicly used its analytic resources to encourage new regulatory actions as opposed to reviewing decisions initiated by agencies,” as evidence that OIRA now utilizes cost-benefit analysis in a more even-handed fashion.<sup>73</sup>

Without denying that the prompt letter is a salutary development, there are several reasons to be skeptical that OIRA has embraced a regulation-spurring function.<sup>74</sup> First, the prompt letter is not an institutionalized feature of centralized review, but is rather an ad hoc OIRA innovation not mandated by the text of the executive order. Perhaps for that reason, OIRA has inadequate resources to support the promulgation of prompt letters. OIRA’s staff consists of just fifty-five full-time employees, only twenty-two of whom actually review regulations.<sup>75</sup> Those twenty-two employees must review roughly 600 economically significant rules a year,<sup>76</sup> for an allocation of more than *twenty-seven* rulemakings for each analyst per year—or about one every two weeks. Given the technical complexity of most of these important regulations, it is hard to imagine that analysts have enough time to review the regulations agencies *have* proposed, much less consider the potential costs and benefits of regulations they *haven’t*. Unsurprisingly, then, OIRA has only issued fourteen prompt letters in four years—an improvement over the status quo, to be sure, but hardly a revolution in regulatory oversight. This rate of production—three or four prompt letters per year—is moreover insignificant when considered against the twenty-five rules that GAO discovered that OIRA “significantly affected” (normally by lowering compliance costs) over a single one-year period.<sup>77</sup>

Second, prompt letters are simply mechanisms to “bring issues to the attention of agencies in a transparent manner that permits public scrutiny and debate,”<sup>78</sup> and as such are not necessarily pro-regulatory tools. Prompt letters can pressure agencies to deregulate as effectively as they can pressure them to regulate. John Graham acknowledges as much: “The

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<sup>72</sup> Press Release, Office of Management and Budget, OMB Encourages Lifesaving Actions by Regulators, at <http://www.whitehouse.gov/omb/pubpress/2001-35.html> (2001).

<sup>73</sup> *Id.*

<sup>74</sup> See GAO REPORT ON OIRA, *supra* note 3132, at 38 (noting that some “recent OIRA policies and practices are only incrementally different from those evident in previous administrations or have caveats that must be recognized in their implementation”).

<sup>75</sup> *Id.* at 60 n.21.

<sup>76</sup> *Id.* at 24.

<sup>77</sup> *Id.* at 72.

<sup>78</sup> Press Release, *supra* note 7274.

prompt letter is not simply a pro-regulatory tool; we will be using it to encourage agency efforts to streamline the regulatory process.”<sup>79</sup>

Predictably, then, the prompt letters do not reflect consistent attempts to push agencies to implement costly but beneficial regulations,<sup>80</sup> but rather a hodgepodge of reform efforts that include suggestions to strip away old regulations that may no longer provide net benefits. For example, OIRA sent one of its most important prompt letters to a set of independent agencies in January 2003, asking them to consider a raft of forty-nine regulatory-reform proposals that had been submitted to OIRA.<sup>81</sup> Industry groups suggested most of the reforms,<sup>82</sup> which included petitions to the FCC that it revoke its recent rule requiring cellular phone companies to allow consumers to keep their same number when switching cellular services,<sup>83</sup> and to the FTC that it weaken a regulation granting a three-day right of rescission to consumers who buy anything worth more than \$25 from door-to-door salesmen.<sup>84</sup> Another prompt letter raised concerns with DOE’s National Energy Modeling System, which OIRA claimed insufficiently took into account the views of “some industry observers” regarding the market penetration of hybrid and diesel cars.<sup>85</sup> Readjusting the modeling system to account for a dramatic and highly speculative increase in the market penetration of fuel-efficient cars, however, would reduce DOE’s projections as to how much fuel American drivers are likely to burn in the future—a change which would have the effect of making less-stringent fuel-efficiency standards for automobiles more attractive. Of

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<sup>79</sup> John D. Graham, Presidential Management of the Regulatory State, Address Before Weidenbaum Center Forum (Dec. 17, 2001), at [http://www.whitehouse.gov/omb/inforeg/graham\\_speech121701.html](http://www.whitehouse.gov/omb/inforeg/graham_speech121701.html).

<sup>80</sup> See Driesen, *supra* note [Error! Bookmark not defined.35](#), at 49-52. Contrary to Driesen’s argument that “[n]one of the prompt letters addressing environmental, health, and safety regulation sought to initiate fresh regulation,” *id.* at 50, a few prompt letters have pushed for the prioritization of tighter health and safety regulations. For instance, OIRA asked OSHA to consider making AED promotion a regulatory priority, and urged NHTSA to consider using a certain kind of crash test. Driesen dismisses the OSHA letter because OIRA left the ultimate choice of whether to regulate to OSHA, and the NHTSA letter because assessing the new crash test was already on NHTSA’s regulatory agenda. *Id.* at 51. But nudging agency priorities can be an important part of inciting regulation. Driesen’s main point nonetheless holds: that the prompt letters are rarely geared towards increasing the stringency of health and safety regulations.

<sup>81</sup> Memorandum from John D. Graham, Administrator, OIRA, to the Heads of Selected Independent Agencies (Jan. 22, 2003), at [http://www.reginfo.gov/public/prompt/graham\\_response\\_regreform.pdf](http://www.reginfo.gov/public/prompt/graham_response_regreform.pdf).

<sup>82</sup> GAO REPORT ON OIRA, *supra* note [3132](#), at 109.

<sup>83</sup> OIRA, STIMULATING SMARTER REGULATION: SUMMARIES OF PUBLIC SUGGESTIONS FOR REFORM OF REGULATIONS AND GUIDANCE DOCUMENTS 236 (2002), at [http://www.whitehouse.gov/omb/inforeg/summaries\\_nominations\\_final.pdf](http://www.whitehouse.gov/omb/inforeg/summaries_nominations_final.pdf).

<sup>84</sup> *Id.* at 269.

<sup>85</sup> Letter from John D. Graham, Administrator, OIRA, to Mary Hutzler, Director, Office of Integrated Analysis and Forecasting, U.S. Department of Energy (Feb. 24, 2003), at [http://www.reginfo.gov/public/prompt/prompt-ltr\\_eia.pdf](http://www.reginfo.gov/public/prompt/prompt-ltr_eia.pdf).



the remaining prompt letters, “[t]he overwhelming majority . . . endorsed ongoing efforts to improve disclosure and use of information,” not making regulations more stringent so as to reap larger net benefits.<sup>86</sup>

Third, OIRA has concentrated its proactive reform efforts not on prompt letters, but on generating what have become known as “hit lists” of costly regulations.<sup>87</sup> In May 2001, OIRA issued a public request for suggestions of agency rules that should be rescinded or modified in order to reduce regulatory burdens.<sup>88</sup> It received seventy-one suggestions, a majority of which came from a research center headed up by a Reagan-era OIRA administrator,<sup>89</sup> and chose twenty-three of them for “high priority review.”<sup>90</sup> Since this first effort in 2001, OIRA has called annually for new nominations to the hit list,<sup>91</sup> and in 2004 it reported to Congress that groups seeking regulatory relief had made 189 nominations for regulatory changes.<sup>92</sup> GAO noted in 2003 that “many rules nominated for reform are being changed,” and that the trend is likely to continue.<sup>93</sup> The result is that OIRA publicly touts the prompt letter as a proregulatory and proactive mechanism for regulatory reform while lavishing most of its attention on rolling back regulatory burdens on industry.<sup>94</sup>

In short, the prompt letter is a sideshow. The main event remains reviewing regulations to ensure that they do not impose disproportionate regulatory costs. A new executive order with an invigorated dedication to prompting meaningful regulations, together with additional resources, would be necessary to fully institutionalize an innovation like the prompt letter. In the meantime, the basic mission of OIRA remains the same as it

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<sup>86</sup> Driesen, *supra* note [Error! Bookmark not defined.3534](#), at 52.

<sup>87</sup> OMB Watch, *The Problems with Any OIRA Hit List*, Jan. 10, 2005, at <http://www.ombwatch.org/article/articleview/2596/1/309?TopicID=3>.

<sup>88</sup> GAO REPORT ON OIRA, *supra* note [3132](#), at 103.

<sup>89</sup> *Id.* at 6 n.4.

<sup>90</sup> *Id.* at 103.

<sup>91</sup> Chastened by public outcry over the industry orientation of most of the parties that nominated rules, OIRA in 2002 and 2003 expressed an interest in hearing about possible regulatory “changes,” including the promulgation of new rules or an expansion of existing rules, that would maximize net benefits. GAO REPORT ON OIRA, *supra* note [3132](#), at 108. Still, “most of the nominations sought modifications that would increase regulatory flexibility or rescind rules,” *id.* at 109, and in any event the abrupt about-face suggests that “the only reforms [OIRA] truly [seeks] are those that favor the manufacturing sector by rolling back” health, safety, and environmental protection.” OMB Watch, *supra* note [8789](#). This suspicion was confirmed in 2004, when OIRA returned to asking for “nominations of specific regulations, guidance documents or paperwork requirements that, if reformed, would result in substantive *reductions* in regulatory burden.” OIRA, PROGRESS IN REGULATORY REFORM: 2004 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS 58 (2004) [hereinafter 2004 REPORT TO CONGRESS] (emphasis added).

<sup>92</sup> *Id.* at 3.

<sup>93</sup> GAO REPORT ON OIRA, *supra* note [3132](#), at 103 (chapter title).

<sup>94</sup> See Driesen, *supra* note [Error! Bookmark not defined.35](#), at 53.

was under President Reagan.

#### *D. Procedural Biases*

Two procedural biases of OIRA review also push in an anti-regulatory direction. First, there is the delay associated with OIRA review. Agencies must submit their rules to OIRA and wait for its approval before they issue them, slowing an already cumbersome regulatory process. Because the same delay does not generally attach to deregulatory initiatives,<sup>95</sup> the length of OIRA review puts deregulatory measures at an advantage over proregulatory alternatives. This asymmetrical delay can sometimes be so burdensome as to operate as an effective veto over more-stringent regulation: during the Reagan and first Bush administrations, delay was OIRA's tactic of choice for stifling costly new regulations.<sup>96</sup>

In response to widespread condemnation of this tactic, Clinton's executive order imposed a 90-day cap (subject to a single 30-day extension) on the time that OIRA could review regulations.<sup>97</sup> John Graham's OIRA takes this requirement seriously, and the number of reviews that last longer than 90 days has dropped considerably over the past few years.<sup>98</sup> This pattern may be somewhat deceptive, however: the number of return letters and "voluntary" rule withdrawals have also increased, leading to the possibility that Graham's adherence to the 90-day window may reflect his greater willingness to force an agency to go back to the drawing board.<sup>99</sup> What is more, OIRA has taken to coordinating with agencies at early stages of the rulemaking process; its intervention may therefore delay rulemaking during these initial negotiations, even if it does not unduly hamper regulations during the formal review process.<sup>100</sup>

At any rate, OIRA review stands as yet another hoop for agencies to jump through before their regulations can become effective. So long as similar delay does not attach to deregulatory rulemakings, the overall effect is to delay the time when the net benefits of regulation can begin to be realized.

Second, the APA does not apply to OIRA,<sup>101</sup> inoculating its decisions

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<sup>95</sup> See *supra* Part I.B.

<sup>96</sup> See Judith Havemann, *OMB's Pledge: No More Foot-Dragging; Darmon Concedes Agency Procrastinated in Reviewing Regulations*, WASH. POST, July 4, 1989, at A21. For a thorough review of the ways in which OIRA used delay to impede the promulgation of rules in the 1980s and early 1990s, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1428-36 (1992).

<sup>97</sup> E.O. 12,866 § 6(b)(2)(B)-(C).

<sup>98</sup> GAO REPORT ON OIRA, *supra* note 3132, at 46.

<sup>99</sup> *Id.* at 45-48.

<sup>100</sup> *Id.* at 47-48.

<sup>101</sup> See *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding that the president is not an "agency" subject to the APA, despite the APA's inclusive language); Fred Anderson et al.,

from judicial review and making disclosure of its outside contacts with regulated entities a less-pressing concern for the agency. Undisclosed and rampant industry contacts were a substantial problem in the 1980s, when OIRA came under fire for its cozy and secretive relationships with industry representatives.<sup>102</sup> Sensitive to this issue, Clinton's order mandated that OIRA publicly disclose "[a]ll substantive communication" between OIRA and outside parties "regarding a regulatory action under review."<sup>103</sup> The disclosure requirements are, at least on paper, fairly robust: OIRA must send copies of any written communication it receives to the relevant agencies;<sup>104</sup> must keep a log of all of its interactions with outside parties;<sup>105</sup> and must invite an agency representative to any meetings it holds with outside parties.<sup>106</sup>

In practice, however, OIRA still offers a sheltered haven for regulated entities to advance a deregulatory agenda.<sup>107</sup> First, the disclosure requirements cover only the period of *formal* OIRA review,<sup>108</sup> despite OIRA's recent re-emphasis on early and informal involvement in agency rulemakings.<sup>109</sup> Although OIRA's current "informal practice" is to disclose communications between OIRA and outside parties relating to a rulemaking that OIRA has received in draft form, this practice is not a codified institutional feature of OIRA review.<sup>110</sup> Moreover, the disclosure requirements do not apply at the similarly important "preinformal review" stage of the process that takes place before a draft rule has been reduced to writing.<sup>111</sup> Second, the absence of the threat of judicial review makes OIRA sloppy: according to GAO, many of OIRA's disclosures "[are] not very informative," and include only sketchy information about the outside parties involved, the rule at issue, or the changes discussed.<sup>112</sup> GAO concluded that "OIRA's practice of providing minimal information to the public about its meetings with outside parties stands in contrast to the more formal, APA-driven practices" of single-mission agencies.<sup>113</sup>

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*Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL. L. & POL'Y F. 89, 127 (2001) (because the president is outside of the ambit of the APA, "courts do not engage in direct review of OIRA oversight today").

<sup>102</sup> Olson, *supra* note 3, at 40-73.

<sup>103</sup> E.O. 12,866 § 6(b)(4)(B).

<sup>104</sup> *Id.* § 6(b)(4)(B)(ii).

<sup>105</sup> *Id.* § 6(b)(4)(C).

<sup>106</sup> *Id.* § 6(b)(4)(B)(i).

<sup>107</sup> For a discussion of the representational imbalances between industry groups and public-interest groups, see *infra* Part II.A.

<sup>108</sup> E.O. 12,866 § 6(b)(4)(B).

<sup>109</sup> See 2004 REPORT TO CONGRESS, *supra* note 9193.

<sup>110</sup> GAO REPORT ON OIRA, *supra* note 3132, at 54.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 54-55.

<sup>113</sup> *Id.* at 55.

In short, delay and secrecy have long been the hallmarks of OIRA review, and current OIRA practice has not gone far too ameliorate these problems. Without an overhaul of the current executive review process, they will continue to nudge the regulatory state in an anti-regulatory direction.

## II. ZEALOTRY AND REGULATION

The anti-regulatory contours of our existing executive review process were shaped by a fear that, if left unchecked, regulatory agencies would consistently regulate “too much” and drive American industry into the ground.<sup>114</sup> As a result, OIRA concerns itself with ensuring that regulations are not unduly stringent, but pays scant attention to whether regulatory agencies have enacted regulations that are too lax or have failed to implement regulations that would provide net benefits. The assumption about regulatory zealotry, allegedly bolstered time and again by studies demonstrating how badly some agency regulations fare under cost-benefit analysis, remains pervasive today, and underscores for many the need for an executive review process that brings to bear a healthy bias against regulations.

But is the assumption justifiable? The two most important empirical studies are equivocal; they demonstrate only that agency regulations routinely fail to maximize net benefits, a conclusion consistent both with widespread under-regulation (i.e., regulations should in general be made more stringent to maximize net benefits) and over-regulation (i.e., less-stringent regulations would increase net benefits by reducing costs).<sup>115</sup> Lacking solid empirical support, the following Section canvasses the various theoretical arguments advanced to support claims about the over-

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<sup>114</sup> See CARNEGIE COMMISSION, *supra* note 2829, at [x] (“White House staff appeared for the most part to view regulatory agencies as victims of tunnel vision who were unconcerned about the costs of their activities and needed periodically to be restrained.”); Morrison, *supra* note 4, at 1061 (“[T]here arose a feeling . . . that agencies had run amuck and . . . were administering their laws with no consideration of other interests or the economic effects of their decisions.”). Peter L. Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 188 (1986) (“[T]he orders embody a perception that the principal defect in administrative regulation is that it has been unduly intrusive and imposed substantial costs without accompanying benefit.”).

<sup>115</sup> See Tammy Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, in RISKS, COSTS, AND LIVES SAVED (R. Hahn ed. 1996); Robert W. Hahn, *Regulatory Reform: Assessing the Government’s Numbers*, in ROBERT W. HAHN, REVIVING REGULATORY REFORM: A GLOBAL PERSPECTIVE 32 (2000). Also compare Richard Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2003) (arguing that methodological flaws render these studies valueless), with Robert W. Hahn, 71 U. CHI. L. REV. 1021 (2004) (arguing that “the solution to . . . is not to eliminate quantitative economic analysis, but to gain a deeper understanding of its strengths and weaknesses, and to use it wisely”).

zealousness of regulatory agencies. These arguments fall into four analytically distinct categories: (1) public choice and capture stories; (2) arguments about excessive regulatory caution, particularly at health-and-safety agencies; (3) accounts of aggrandizing administrators bent on expanding their regulatory authority; (4) and stories about bureaucrats who are ideologically committed to pursuing their regulatory agendas.

We conclude that these theories reflect implausible over-generalizations about bureaucratic behavior, and form an altogether inappropriate conceptual foundation for a centralized regulatory review process. To be clear, we do not argue that agencies never regulate too much. Of course they do<sup>116</sup>—and in those circumstances, OIRA’s checking function serves an invaluable role. Nor do we claim that agencies regulate “too little” more often than they regulate “too much.” Our claim is more limited: that theories of agency over-regulation often rest on faulty premises and are in any event no more plausible than alternative theories suggesting that agencies will routinely under-regulate. We therefore contend that OIRA’s de-regulatory mission is analytically unfounded, and that its central role in promoting rationality in the regulatory state is ripe for reconsideration.

#### *A. Public Choice and Capture*

Sometime in the middle of last century, “capture theory” became the dominant paradigm of bureaucratic behavior.<sup>117</sup> No longer persuaded by a traditional model that cast agencies in the role of an apolitical “transmission belt[s] for implementing legislative directives”<sup>118</sup> nor a revised pluralist model that saw agencies as mini-legislatures that could equitably weigh interest group desires,<sup>119</sup> theorists became enamored of an alternative account that came to be known as “regulatory capture,” which put regulated industries at the center of administrative decisionmaking.<sup>120</sup>

In its classic form, capture theory involves three actors: an agency, the

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<sup>116</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 24-27 (1993) (discussing facts of *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1991)).

<sup>117</sup> B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 18 (1994).

<sup>118</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975).

<sup>119</sup> *Id.* at 1675.

<sup>120</sup> For one influential account from the legal literature, see Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 498 (1952) (arguing that Interstate Commerce Commission had come to accept “‘the public interest’ and the ‘railroad interest’ as synonymous terms”). For a discussion of the explosion of capture literature across academic disciplines from the fifties to the seventies, see WOOD & WATERMAN, *supra* note [117-119](#), at 19.

congressional committee that oversees that agency, and a powerful interest group. In order to secure favorable regulations, the interest group (or so the story goes) will aggressively lobby committee-members and provide support, financial or otherwise, for the members' reelection efforts. Those committee-members will then pressure the agencies to enact favorable regulations. Because the rest of Congress will be largely oblivious to the activities of that committee and the agency, this "iron triangle" will inevitably cater to the interest group's narrow desires to the detriment of the public interest.<sup>121</sup>

Capture theory got a shot in the arm with the advent of Mancur Olson's theory of group organization<sup>122</sup> and George Stigler's famous application of it to the legislative and regulatory process.<sup>123</sup> Their arguments were elegant: well-organized and tightly knit constituencies will inevitably have an organizational advantage over a dispersed public when it comes to providing "the two things that a [political] party needs: votes and resources."<sup>124</sup> The political branches will therefore be more attuned to the interests of those narrow interest-groups than to the desires of the general public. It follows that, "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."<sup>125</sup>

Made thus respectable by the garb of economics, a capture account oriented around public choice theory caught the hearts and minds of the legal community.<sup>126</sup> No longer seen as politically neutral dispensers of public goods, regulatory agencies were increasingly eyed with distrust as politically unaccountable incubators of narrow interest-group politicking.<sup>127</sup>

Capture theory did not remain tethered to its roots in iron triangle theory, however. Since the 1950s, more "subtle explanations" for the "industry orientation" of agencies have evolved.<sup>128</sup> These explanations look to how agencies cooperate with interest groups in order to procure needed information, political support, and guidance; the more one-sided that information, support, and guidance, the more likely that agencies will

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<sup>121</sup> For a good description of this dynamic, see LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 103 (1979). See also Stewart, *supra* note [118+20](#), at 1685-86 (detailing "more subtle explanations of industry orientation").

<sup>122</sup> MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

<sup>123</sup> George J. Stigler, *The Theory of Economic Regulation*, 3 BELL J. ECON. & MGMT. SCI. 3 (1971).

<sup>124</sup> *Id.* at 12.

<sup>125</sup> *Id.* at 3.

<sup>126</sup> See SHAPIRO, *supra* note [3739](#).

<sup>127</sup> See Stewart, *supra* note [118+20](#), at 1681-88 (discussing profound skepticism regarding public-serving exercise of agency discretion).

<sup>128</sup> See *id.* at 1685.

act favorably towards the dominant interest group.<sup>129</sup> These next-generation theories, which sometimes fall under the rubric of interest-group “dominance,”<sup>130</sup> gave new ammunition to those critics who, in a “dogmatic tone that reflects settled opinion,”<sup>131</sup> argued that regulatory capture was a pervasive pathology of the administrative state.

### 1. *The Logic of Collective Action*

President Reagan’s regulatory team latched onto public-choice and capture theories, and more generally to this new tone of skepticism, to advocate for a new executive review process that would put a stop to the interest-grubbing that they claimed characterized the regulatory state and led to overzealous regulation. Christopher DeMuth and Douglas Ginsburg, two former OIRA administrators under Reagan (and the latter now the Chief Judge of the D.C. Circuit), are the most commonly cited adherents of the view that because “regulation tends to favor narrow, well-organized groups at the expense of the general public,” an executive review process *should* correct for over-zealous agency regulation.<sup>132</sup>

We all know that a government agency . . . will invariably wish to spend “too much” on its goals. An agency succeeds by accomplishing the goals Congress sets for it as thoroughly as possible—not by balancing its goals against other, equally worthy goals. This fact of agency life provides the justification for a countervailing administrative constraint in the form of a central budget office. Without some countervailing restraint, EPA and OSHA would “spend”—through regulations that spend society’s resources but do not appear in the federal government’s fiscal budget—“too much” on pollution control and workplace safety. This tendency is reinforced by the “public” participation in the rulemaking process, which as a practical matter is limited to those organized groups with the largest and most immediate stakes in the results.<sup>133</sup>

This view takes as its core assumption that “narrow, well-organized groups” will, on the whole, “capture” agencies in order to pressure them to enact excessive regulation. The villains of this story are environmental

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<sup>129</sup> See Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 L. & SOC. INQUIRY 435, 439 (1991).

<sup>130</sup> See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459 (1999) (“[D]omination is a broader concept than capture; it occurs whenever an interest group consistently influences an agency to regulate for the benefit of the group rather than to promote stated statutory aims.”).

<sup>131</sup> See Stewart, *supra* note 118+20, at 1684.

<sup>132</sup> See DeMuth & Ginsburg, *supra* note 1, at 1080.

<sup>133</sup> *Id.* at 1081; see Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 796 (1984); Kagan, *supra* note 5, at 2279; Olson, *supra* note 3, at 13; Mark Seidenfeld, *A Civic Republican Justification For The Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

groups like the Sierra Club, labor unions like the Teamsters, and consumer advocacy groups like Public Citizen, all of whom are driven by their narrow ideologies and heedless of any costs to American industries. Through their superior organizational mettle, these ostensibly “public-serving” groups prey on the sensibilities of warm-hearted but fuzzy-headed bureaucrats and congressmen to drive through regulations that are unnecessary, unwise, or simply too costly.<sup>134</sup>

This story is wholly implausible. Public choice theory—which DeMuth and Ginsburg invoke to support their call for a biased executive review process—in fact suggests precisely the opposite outcome, namely, that well-organized industry groups that stand to gain from a reduction in burdensome regulations will normally provoke an *anti-regulatory* response from the administrative state.

Mancur Olson’s theory of group organization provides that any group—like the Sierra Club—that aims to procure a public good for a large and diffuse bloc of people is quite unlikely to form. Because any given individual will receive the benefits of the fruits of organizing whether or not she participates in group advocacy, that individual will have little or no incentive to devote her time and energy to joining.<sup>135</sup> Olson thus argues that, “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in the common interest, rational, self-interested individuals will not act to achieve their common or group interests.”<sup>136</sup> Furthermore, Olson’s theory suggests that large groups, in the unlikely event they do form, will face substantial difficulties in actually achieving the organization’s goals: “the larger the group, the farther it will fall short of providing an optimal amount of a collective good.”<sup>137</sup>

On the flip side, Olson theorized that smaller groups—for example, industry groups with, as DeMuth and Ginsburg put it, the “largest and most immediate stakes in the results”<sup>138</sup> of agency rulemaking—are *more* likely to organize because each individual member will have a much greater stake in securing the public good. This conclusion flows from the premise that a smaller group “may very well be able to provide [itself] with a collective good simply because of the attraction of the collective good to the

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<sup>134</sup> Kagan, *supra* note 5, at 2279 (“Proponents of [Reagan’s executive review process] stressed the need . . . to guard against regulatory failures—in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees.”).

<sup>135</sup> OLSON, *supra* note [122424](#), at 9-16.

<sup>136</sup> *Id.* at 11 (emphasis omitted).

<sup>137</sup> *Id.* at 31 (emphasis omitted).

<sup>138</sup> See DeMuth & Ginsburg, *supra* note 1, at 1081.



individual members.”<sup>139</sup> Public-choice theory, then, suggests that the large “pro-regulatory” interest groups against which DeMuth and Ginsburg rail will be consistently outgunned in the legislative and regulatory process by smaller, better-organized and better-financed industry groups.

And as an empirical matter, they are. Take environmental regulation, for example. Although protecting the environment consistently ranks among the most salient concerns of Americans,<sup>140</sup> “pro-environment” groups are, as a rule, far larger and less well-funded than their industry counterparts. Together, the three most prominent environmental groups in the country—the Sierra Club, the National Resources Defense Council, and the Environmental Defense Fund—counted over 2.15 million members<sup>141</sup> and total yearly operating revenues of \$180 million,<sup>142</sup> only a fraction of which is spent on direct lobbying. Compare that to the \$130 million annual budget of the American Chemistry Council, a *single* trade association with a far narrower mission representing just 140 chemical companies.<sup>143</sup> Or to the National Rural Electric Cooperative Association, which counts fewer than 1,000 power cooperatives as members and yet boasts annual revenues of \$189 million, \$20.4 million of which is explicitly earmarked for “lobbying, regulatory, and communication programs.” Or to the American Petroleum Institute, with revenues of more than \$65 million in 2000<sup>144</sup> and a membership roster of just 400.<sup>145</sup>

This imbalance has not gone unnoticed. A 1977 Senate Report concluded that regulated industries far outspent public-interest groups in lobbying agency decision-makers, with regulated industries sometimes lavishing anywhere between fifty and one hundred times as much as their public-interest counterparts.<sup>146</sup> In one study on EPA, Cary Coglianese detailed how “[b]oth in rulemaking and in litigation, industry groups are

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<sup>139</sup> OLSON, *supra* note [122124](#), at 36.

<sup>140</sup> See Barcott, *supra* note [6264](#), at 38 (citing to 2001 Gallup survey that “81 percent of Americans supported stronger environmental standards for industry . . . [and] only 11 percent thought the government was doing ‘too much’ to protect the environment”).

<sup>141</sup> National Resources Defense Council, About Us, <http://www.nrdc.org/about/default.asp> (“more than 1 million members”); Felicity Barringer, *Bitter Division for Sierra Club on Immigration*, N.Y. TIMES, Mar. 16, 2004, at A1 (750,000 members of Sierra Club); Environmental Defense Fund, About Environmental Defense, <http://www.environmentaldefense.org/aboutus.cfm?subnav=aboutus>.

<sup>142</sup> National Resources Defense Council, *supra* note [141143](#); Barringer, *supra* note [141143](#), at A1 (\$83 million in revenue); ENVIRONMENTAL DEFENSE FUND, 2003 ANNUAL REPORT 16 (\$44.6 million in revenue).

<sup>143</sup> *From the K Street Corridor*, NAT’L J., May 29, 2004.

<sup>144</sup> *What Trade Associations Paid Their Chiefs*, NAT’L J., Mar. 30, 2002, at 13.

<sup>145</sup> *Id.*

<sup>146</sup> Staff of Senate Comm. On Governmental Affairs, 95th Cong., 1<sup>st</sup> Sess., *Studying on Federal Regulation*, Vol. III: Public Participation in Regulatory Agency Proceedings vii (1977).

the most common players,”<sup>147</sup> and found that for a series of 28 hazardous waste regulations promulgated from 1988 to 1990, industry groups provided 67% of the comments while environmental groups provided just 2%.<sup>148</sup> His survey of filings in the D.C. Circuit over the same period showed that 91% of the challengers to EPA regulations were corporations or trade associations, while only 8% were environmental groups.<sup>149</sup> A litany of studies all support the conclusion that “regulated parties enjoy much greater presence in agency decisionmaking than do public interest groups and other outside parties.”<sup>150</sup> Taken together, these studies provide overwhelming empirical support for our theoretical conclusion that if any group has disproportionate access to the administrative state, it is industry.

In addition, DeMuth and Ginsburg focus on health-and-safety agencies, but while many of the rules OIRA reviews have a health-and-safety angle, many others do not. As Steven Croley points out, roughly two-thirds of the economically significant rules that OIRA reviews come from EPA, the Department of Health and Human Services (HHS), the Department of Transportation (DOT), and the Department of Agriculture (USDA); other major contributors are the Department of Commerce (DOC), the Department of the Interior (DOI), and the Department of Labor (DOL).<sup>151</sup> Only a handful of these agencies issue rules promoting health and safety. For example, OIRA recently completed review on economically significant regulations from USDA governing sugar reexport,<sup>152</sup> from HHS on the electronic transmission of prescription information,<sup>153</sup> and from HUD relating to its operating allocation formula.<sup>154</sup> With respect to rules like these, which have no clear health-and-safety angle and attract no obvious pro-regulatory constituency—yet which make up a substantial fraction of OIRA’s oversight duties—it is

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<sup>147</sup> Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC. REV. 735, 743 (1996).

<sup>148</sup> *Id.* at 741.

<sup>149</sup> *Id.*

<sup>150</sup> Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 126-41 (1998) (reviewing studies).

<sup>151</sup> Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 846 (2003).

<sup>152</sup> New Provisions and Revisions to Sugar Reexport Programs Under 7 CFR 1530, 68 Fed. Reg. 23230-31; Executive Order Submissions with the Review Completed in the Last 30 Days, <http://www.whitehouse.gov/OIRA/library/OIRAREGSC.html> (visited Jan. 15, 2005).

<sup>153</sup> Department of Health and Human Services Regulatory Agenda, 69 Fed. Reg. 73167 (proposing rule change titled “Medicare Modernization Act; Electronic Prescribing”); Executive Order Submissions Under Review, <http://www.whitehouse.gov/OIRA/library/OIRAREGSP.html> (visited Jan. 15, 2005).

<sup>154</sup> Operating Fund Allocation Formula (FR-4874), 69 Fed. Reg. 72764; Executive Order Submissions Under Review, <http://www.whitehouse.gov/OIRA/library/OIRAREGSP.html#HUD> (visited Jan. 15, 2005).

difficult to see precisely how DeMuth's and Ginsburg's critique applies at all.

OIRA moreover reviews regulations from agencies that we would expect, if anything, to be captured by powerful anti-regulatory groups. The Forest Service, for example, was once described by Justice Douglas as “notorious for its alignment with lumber companies.”<sup>155</sup> FDA has recently been the subject of searing criticism because of its cozy relationship with the pharmaceutical industry.<sup>156</sup> And DOE policy is closely aligned with the interests of the energy industry that it regulates.<sup>157</sup> Yet OIRA reviews their regulations alongside those of the health-and-safety agencies,<sup>158</sup> unabashedly checking their alleged enthusiasm to impose large regulatory costs—even though the industry-group domination of these agencies makes it singularly unlikely that they ever would impose inordinate costs. If one purpose of OIRA review is to weed out pernicious interest-group influence, the existence of agencies like the Forest Service, FDA, and DOE—among others—should highlight how strange it is that OIRA devotes itself almost entirely to reducing regulatory costs.

In sum, the DeMuth-Ginsburg paradigm of an agency captured by pro-regulatory interests does not hold even when the benefits to be garnered by regulations are as salient as worker safety or environmental protection. It is even less apposite to those regulatory activities that have no obvious health-and-safety implications or to regulations from agencies that, if anything, are likely to be captured by anti-regulatory interests.

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<sup>155</sup> *Sierra Club v. Morton*, 405 U.S. 727, 748 (1972) (Douglas, J., dissenting). See also PERCIVAL ET AL., ENVIRONMENTAL REGULATION 923-24 (4th ed. 2003) (describing industry orientation of Forest Service).

<sup>156</sup> See, e.g., Gardiner Harris, *Regulation Redefined: The F.D.A. Shifts Focus; At F.D.A., Strong Drug Ties and Less Monitoring*, N.Y. TIMES, Dec. 6, 2004, at A1 (reporting that FDA has become “increasingly reliant on and bound by drug company money”).

<sup>157</sup> Dean Joseph Tomain has argued that DOE has diligently helped to further a “dominant energy policy” that “consists of large scale, capital intensive energy projects, significantly favoring fossil fuels such as oil, coal, and natural gas.” Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 464 (2002). Several commentators have moreover reported that FERC—an independent agency within DOE—at times appears to be “captured” by powerful industry groups. John Burritt McArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 AM. U. L. REV. 775, 923-32 (1998); Peter Navarro & Michael Shames, *Electricity Deregulation*, 24 ENERGY L.J. 33, 55 (2003). The relevant interest groups at FERC and DOE (i.e., energy interests) are likely to be similar. A robust political science literature on the capture of utility commissions bolsters the claim that DOE will, if anything, be captured by industry groups. See, e.g., Harold Demsetz, *Why Regulate Utilities?*, 11 J. L. & ECON. 55 (1968); George J. Stigler & Claire Friedland, *Why Can Regulators Regulate? The Case of Electricity*, 5 J. L. & ECON. 1 (1962).

<sup>158</sup> See, e.g., Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (Forest Service rule); Over-the-Counter Human Drugs; Proposed Labeling Requirements, 63 Fed. Reg. 7331 (Feb. 13, 1998) (FDA rule); Energy Conservation Program for Consumer Products; Proposed Withdrawal of Final Rule, Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 38,822 (July 25, 2001) (DOE rule).

## 2. *Regulatory Capture and Cartelization*

Proponents of centralized review occasionally advance a slightly more plausible public choice story to justify a one-way OIRA review process. On this account, well-organized industry groups will work to “capture” administrative agencies and procure not deregulation, but new regulations that act as barriers to entry to new firms.<sup>159</sup> Lloyd Cutler and David Johnson cited this demand-side model of regulatory outputs in 1975 to explain, in part, why “we regulate too much”<sup>160</sup> and to justify their call for a centralized executive review process.

Also known as “cartel theory,” this barriers-to-entry account effectively splits industry into two groups, existing firms and prospective firms, and posits that existing firms will work to secure regulations that will allow them to “become federal protectorates, living in the cozy world of cost-plus, safely protected from the ugly specters of competition, efficiency and innovation.”<sup>161</sup> If the dominant pathology of the administrative state is that agencies will systematically over-regulate in order to impose barriers to entry within a particular industry, an executive review process that acts as a check on agency rulemaking authority could well be appropriate.

This cartel story about bureaucratic behavior has only limited explanatory value, however, and has long ceased to carry much weight in the political science literature. For starters, the theory’s baseline assumption is that industries will normally exercise a high degree of control over the agencies that regulate them—in other words, that they will “capture” those agencies. Although adherents to capture theory take this as an article of faith, typically the “empirical analyses that [have] accompanied these theories relied heavily on historical commentaries and normative polemics, not on hard empirical evidence.”<sup>162</sup>

When tested in the real world, cartel theory has not fared well.<sup>163</sup> Richard Posner argued as early as 1974 that there are “significant weaknesses in both the theory and the empirical research that is alleged to support the theory.”<sup>164</sup> Barry Weingast sharpened that critique in 1981:

As we move into the 1980s, two seemingly incongruous trends in regulation are apparent. First, the remarkable growth in regulation, particularly in the social and environmental areas, has led to

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<sup>159</sup> Stigler, *supra* note [123425](#), at 5 (“every industry or occupation that has enough political power to utilize the state will seek to control entry”).

<sup>160</sup> Cutler & Johnson, *supra* note 7, at 1396.

<sup>161</sup> *Id.* (quoting FTC Chairman Lewis Engman).

<sup>162</sup> WOOD & WATERMAN, *supra* note [117449](#), at 19.

<sup>163</sup> *Id.*

<sup>164</sup> Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. OF ECON. & MGMT. SCI. 335, 336-37 (1974). *See also* RICHARD A. POSNER, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981).

unprecedented levels of federal intervention in the economy. Second . . . there exists a counter-trend of deregulation, particularly in the areas of direct economic regulation.<sup>165</sup>

These two trends—the deregulation movement begun in the 1970s, and the “movement away from narrow industry regulation (i.e., airlines, trucking, telecommunications, and so on) and toward economy-wide social regulation (i.e., health, safety, environmental)”<sup>166</sup>—together “challenged one of the theory’s basic premises, namely, that regulatory agencies serve the interests of the regulated clientele, not the public interest.”<sup>167</sup>

Even those industries that do seek barriers to entry will be plagued by collective action problems. Industries are not normally homogenous; firms within the industry may have different capacities to cope with new entrants and may be more or less willing to settle on an agenda for the industry group as a whole. Many industries are moreover quite large, raising the costs of coordination and giving individual firms an incentive to free-ride on the efforts of other firms to procure those barriers.<sup>168</sup> It is therefore by no means assured that even industries that would benefit from cartelization would be able to form the coalition groups necessary to push for the necessary regulation.

Finally, even if industry groups as a general rule *did* procure regulations that erected barriers to entry, it simply does not follow that the resulting regulations would be too stringent. Industries might procure regulations that acted as effective barriers to entry but which were nevertheless, overall, too lax in cost-benefit terms. To illustrate this point, imagine a case under the Clean Air Act in which existing polluters procured an emissions regulation that imposed costly pollution controls on any new plant but that exempted existing plants. This regulation would act as an effective barrier to entry even if the regulation permitted inefficiently high levels of pollution from new and old sources combined. Existing firms will care only that the regulation discriminates sufficiently in favor of existing firms so as to give that subset of the industry a competitive edge; it will be agnostic, however, as to the costs and benefits of the regulation it procures. Put another way, it does not follow from a simple diagnosis of this pathology that agencies will typically regulate over-zealously.

In short, “[n]o mechanistic theory of capture can do justice to what in

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<sup>165</sup> See Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 L. & CONTEMP. PROBS. 147, 148 (1981).

<sup>166</sup> See Pablo T. Spiller & John Ferejohn, *The Economics and Politics of Administrative Law Procedures: An Introduction*, 8 J. OF LAW, ECON., & ORG. 1, 3 (1995).

<sup>167</sup> WOOD & WATERMAN, *supra* note 117+19, at 19 (citing MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 91-92 (1985)).

<sup>168</sup> See Posner, *supra* note 164+66, at 345.

fact happen[s]” in governmental agencies.<sup>169</sup> Fears of over-regulation premised on an overly simplistic vision of regulatory capture thus fail to justify an asymmetrical OIRA review process.

### *B. Agency Empire-Building*

Another strand in the literature has advanced an alternative account that purportedly demonstrates an administrative proclivity for over-zealous regulation and hence justifies an anti-regulatory executive review process. William Niskanen, who chaired Reagan’s Council of Economic Advisers and worked as an assistant director at OIRA for two years, is the foremost expositor of the view that high-level agency administrators are utility maximizers bent on increasing the size of their agencies by demanding ever-larger budgets from the legislature. On Niskanen’s view, these larger budgets correlate positively with agencies that are heedless of imposing ever-larger costs on private actors—in essence, that they regulate “too much.”

Niskanen argues that empire-building administrators with informational monopolies on the real costs of regulatory outputs can generally leverage their informational advantage to hoodwink the legislature into providing an inefficiently large budget.<sup>170</sup> The implication of this “imperial model” of bureaucratic behavior is that the increased budgetary input will, in turn, result in a sub-optimally high level of regulatory output.<sup>171</sup> If the model is accurate, then an OIRA process that puts a thumb on the scale against regulation might check that behavior and lead to more rational regulation. John Graham has endorsed a version of the Niskanean claim, comparing his office’s review of regulations to OMB’s review of agencies’ budget requests: “regulatory expenditures, while off budget, require fiscal restraint *for the same reasons that the size of public budgets need to be restrained.*”<sup>172</sup>

As Daryl Levinson has convincingly argued, however, Niskanen’s imperial model of bureaucratic behavior is deeply flawed.<sup>173</sup> In his groundbreaking work refuting the widely accepted account of governmental empire-building, Levinson marshals the political science literature to refute two of Niskanen’s more problematic assumptions. He first attacks Niskanen’s blanket assumption that agency administrators will

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<sup>169</sup> JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 75 (1989).

<sup>170</sup> WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971).

<sup>171</sup> *Id.*

<sup>172</sup> GAO REPORT ON OIRA, *supra* note 3132, at 40 (citing John Graham) (emphasis added).

<sup>173</sup> See Daryl J. Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 932-34 (2004) (turning to political science literature to offer critique of Niskanean model).

seek to increase the size of their agencies' budgets. Citing to the work of social scientists, Levinson insists as an initial matter that "[e]ven if most bureaucrats were primarily interested in lining their own pockets, the relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous."<sup>174</sup> (As the political scientist James Q. Wilson once trenchantly noted, "One wonders why Niskanen thinks bureaucrats are so desirous of maximizing their budgets if they can enjoy so few of the fruits."<sup>175</sup>) More fundamentally, however, Levinson argues that even if we were to accept that bureaucrats were simple utility maximizers, it is child's play to identify different and "more charitabl[e]" assumptions about what bureaucrats maximize—say, "protecting the environment, enforcing civil rights, educating children, and the like."<sup>176</sup>

Levinson then takes aim at Niskanen's conclusion that agencies will run roughshod over the political branches in pursuing their budget-maximizing proclivities. Turning to a generation of political science literature that emphasizes the variety of ways in which Congress<sup>177</sup> and the President<sup>178</sup> exert considerable influence over administrative agencies, Levinson notes that "[t]he simple lesson . . . is that whatever other interests bureaucrats might have they will be highly responsive to the political pressures brought to bear by their elected principals and others."<sup>179</sup>

If Niskanen's aggrandizing theory were accurate, moreover, it would suggest that a regulatory agency would adopt as many standards as it could justify in order to command an ever-more inflated budget to implement and enforce those standards. On this view, EPA would be enthusiastic about regulating as many different pollutants as possible; after all, each new listing would require new scientific studies, new sets of standards, and new enforcement mechanisms—all of which Congress would have to fund.

EPA's experience, however, has been just the opposite. For example, the Clean Air Act (CAA) requires EPA to set emissions standards for

<sup>174</sup> *Id.* at 932. See also KENNETH J. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS 14 (1985) (pointing out that government bureaucrats cannot driven by a simple desire to maximize their incomes, which would after all be higher in the private sector).

<sup>175</sup> WILSON, *supra* note [Error! Bookmark not defined.](#)470, at 118.

<sup>176</sup> Levinson, *supra* note [173479](#), at 933.

<sup>177</sup> See, e.g., Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987). See also Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POLI. SCI. REV. 297 (1983) ("The most instructive and far-reaching criticism of Niskanen's work, however, is that it fails to integrate the legislature into its formal framework.").

<sup>178</sup> Terry M. Moe, *An Assessment of the Positive Theory of Congressional Dominance*, 12 LEGIS. STUD. Q. 475 (1987); WOOD & WATERMAN, *supra* note [117419](#).

<sup>179</sup> Levinson, *supra* note [173479](#), at 934.

“hazardous air pollutants” that are not criteria pollutants,<sup>180</sup> and mandates that the EPA “periodically review the list” of hazardous air pollutants and add new compounds which may present health risks.<sup>181</sup> “In light of the regulatory implications of the listing decision,” however, “the EPA has been extremely careful to study a pollutant extensively before listing it.”<sup>182</sup> In part because of EPA’s caution, in the first two decades of the CAA’s existence, EPA added only *seven* hazardous air pollutants to the list.<sup>183</sup> EPA’s manifest reluctance to add new pollutants led to a congressional rebuke in the 1990 amendment of the CAA when Congress laboriously listed 189 air pollutants that it required EPA to treat as hazardous.<sup>184</sup> If EPA had been concerned with regulating in order to justify larger congressional outlays, its unwillingness to classify additional pollutants would be inexplicable. Niskanen’s theory is not simply wrong about the EPA—it in fact predicts precisely the opposite of what actually occurred at the agency.

Even if Niskanen’s account were accurate, moreover, it would suggest that regulatory agencies would enact lots of standards—but not that the standards would be excessively stringent. For the purposes of inflating their budgets, agencies would focus on the number of regulations they could implement and enforce, but would be agnostic as to the relative stringency of those regulations. Why should EPA care whether a NAAQS holds the level of a particular pollutant to one part per million or one hundred parts per million? Fully consistent with the Niskanen story, one could well imagine an ever-expanding regulatory regime that nevertheless routinely failed to maximize net benefits out of a desire to minimize regulatory costs.

Indeed, a budget-maximizing agency might take precisely such a tack to blunt the political opposition that might otherwise accompany costly regulatory regimes. Jerry Mashaw and David Harfst detail one such case in their analysis of the National Highway Traffic Safety Administration (NHTSA).<sup>185</sup> Mashaw and Harfst argue that NHTSA, buckling under pressure from Congress and the threat of judicial review, abandoned its ambitious initial commitment to enacting meaningful safety regulations

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<sup>180</sup> 42 U.S.C. § 7412(d)(2).

<sup>181</sup> *Id.* § 7412(b)(2).

<sup>182</sup> Graham, *supra* note 6668, at 117.

<sup>183</sup> Wendy E. Wagner, *The Science Charade*, 95 COLUM. L. REV. 1613, 1678 n.240 (1995).

<sup>184</sup> 42 U.S.C. § 7412(b)(1).

<sup>185</sup> JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987).



sometimes in the mid-1970s and refocused its mission on vehicle recalls that had “no known effects on vehicle safety.”<sup>186</sup> The decline in rule promulgation accompanied a steep drop in the costs imposed on automobile manufacturers,<sup>187</sup> even though Mashaw and Harfst report that NHTSA never implemented dozens of regulations that offer substantially more benefits than costs.<sup>188</sup>

But even as NHTSA abnegated much of its responsibility to ensure motor vehicle safety during the late 1970s, “Congress happily funded the agency’s recall efforts.”<sup>189</sup> The agency’s staff was its largest in history during that period, topping 900, and NHTSA’s budget was at its inflation-adjusted peak.<sup>190</sup> This budgetary largesse came accompanied with restrictions on the uses to which NHTSA could put the funds, however, and Congress funneled money to promote the recall-oriented mission even as it slashed its research and rulemaking budgets.<sup>191</sup> The message from Congress was clear: NHTSA’s primary job was to recall cars, not to enact proven safety regulations.<sup>192</sup>

On the Niskanean view, NHTSA’s increased budget should have correlated with more stringent regulations and higher industry costs. In this case, however, the increased budget correlated precisely with less stringent regulations and less stringent enforcement. This is arguably predictable: members of Congress may be all too happy to take credit for aggressively funding an ostensibly public-regarding agency even as the agency fails to enact regulations that impose costs on favored constituents. But it surely cuts hard against a simple Niskanean vision of the administrative state.

### C. Excessive Regulatory Caution

DeMuth and Ginsburg offer another justification for an OIRA review process that operates as a one-way ratchet against excessively stringent regulation: “regulation tends to be excessively cautious (forcing investments in risk reduction far in excess of the value that individuals

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<sup>186</sup> Mashaw & Harfst, *Regulation and Legal Culture*, *supra* note [185491](#), at 263.

<sup>187</sup> *Id.* at 265 (“[N]inety-two percent of all price increases tied to NHTSA’s safety rules occurred over the period from 1967 to 1976. Only eight percent of net price increases were imposed from 1977 to 1986.”).

<sup>188</sup> *Id.* at 266 (“The regulatory record is littered with ideas and proposals of remarkably modest technological sophistication that have never found their way into regulatory form . . .”). *See also id.* at 266 n.27 (describing various proposed rules).

<sup>189</sup> Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, 66 L. & CONTEMP. PROBS. 135, 144 n.34 (2003) (citing an OIRA report “indicating a spike in congressional support of NHTSA in the 1970s, the heyday of recalls”).

<sup>190</sup> *Id.* at 149.

<sup>191</sup> *Id.* at 151.

<sup>192</sup> MASHAW & HARFST, *THE STRUGGLE FOR AUTO SAFETY*, *supra* note [185491](#), at 167-71.

place on avoiding the risks involved).<sup>193</sup> On this view, OIRA is seen as a level-headed re-calibrator of costs and benefits to assure that the regulatory state does not impose excessive costs on industry. But why precisely are agencies so risk-averse? Although DeMuth and Ginsburg assert it as fact, they offer little discussion. Still, the claim is facially plausible for at least three reasons—none of which are ultimately satisfactory.

First, agencies normally err on the side of safety when operating under conditions of scientific uncertainty. Numerous authors have detailed the “compounded conservatism” of agency risk assessments that results from numerous protective assumptions about risks.<sup>194</sup> Because agency risk assessments are themselves premised on “quasi-policy judgments that reflect values about how protective or conservative they should be,”<sup>195</sup> perhaps (the argument goes) OIRA should make another quasi-policy judgment and adjust the agencies’ numbers downwards to reflect more “realistic” risk assessments. Apparently OIRA has embraced this view: its most recent circular detailing how agencies should carry out cost-benefit analyses quite explicitly states that “conservative assumptions and defaults (whether motivated by science policy or precautionary instincts), will be incompatible with benefit analyses as they will result in benefit estimates that exceed the expected value.”<sup>196</sup>

But an effective centralized review procedure designed to curtail regulations based on overly cautious risk assessments would look very different from what is currently in place. Although OIRA could (and, as we explain later, should<sup>197</sup>) provide guidelines about what constitutes an appropriate level of regulatory caution, it currently says very little about how agencies should handle the uncertainty that is part and parcel of thoughtful risk assessments.<sup>198</sup> To be sure, OIRA has recently taken small steps to standardize risk assessments—for example, it requires agencies to use 95% upper-confidence limits in certain types of risk assessments<sup>199</sup>—but it remains the case that overseeing the uncertainty in risk assessments is largely outside its purview.

Also, many of the regulations that OIRA reviews come from agencies’ statutory mandates to err on the side of caution.<sup>200</sup> For example, virtually

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<sup>193</sup> DeMuth & Ginsburg, *supra* note 1, at 1080.

<sup>194</sup> See Alon Rosenthal et al., *Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*, 19 *ECOL. L. QUAR.* 269, 294 (1992); JOHN D. GRAHAM ET AL., *IN SEARCH OF SAFETY: CHEMICALS AND CANCER RISK* (1998).

<sup>195</sup> Rosenthal et al., *supra* note 194, at 287.

<sup>196</sup> CIRCULAR A-4, *supra* note 45, at 40.

<sup>197</sup> See *infra* Part IV.A.

<sup>198</sup> Elliott, *supra* note 17, at 169 (“fundamental issues are raised very late in the process, when it is virtually impossible to do anything productive about them”).

<sup>199</sup> CIRCULAR A-4, *supra* note 45, at 45.

<sup>200</sup> See Wendy E. Wagner, *The Bad Science Fiction*, 66 *L. & CONTEMP. PROBS.* 63, 113 (Fall

all of the statutes that EPA administers require the agency to adopt a “margin of safety” when it regulates a particular risk<sup>201</sup>—and OIRA reviews more rules from EPA than from any other agency.<sup>202</sup> Similar statutory requirements appear in the regulatory statutes of other agencies; for example, OSHA must promulgate regulations to ensure that “no employee will suffer material impairment of health or functional capacity.”<sup>203</sup> It would flout Congress for OIRA to combat “conservative” assumptions required by statute.

The second reason to perhaps be concerned about excessive regulatory caution is that, as Matthew McCubbins and Thomas Schwartz have argued, legislatures normally do not respond to individual agency actions (which in any case are too numerous to monitor effectively), but rather to “fire alarms” that go off when constituencies bring particular agency actions to their attention.<sup>204</sup> Agencies will naturally wish to avoid setting off fire alarms that focus unwanted congressional attention on their activities. They may thus adopt conservative and over-protective policies in order to ensure that they cannot be accused of failing to protect the public adequately. On this view, FDA will be overly cautious in its drug-approval process in order to avoid high-profile public relations disasters over the approval of drugs that turn out to be unsafe,<sup>205</sup> and EPA will force industries to spend enormous amounts of money to ensure that Superfund sites are so clean that no one can accuse it insensitivity to cancer risks.

The assumption, however, that fire alarms will always—or even usually—be set off by pro-regulatory groups is implausible. For the same reasons that well-funded, well-organized industry groups have an advantage over public-interest groups in “capturing” regulatory agencies, industry will have an advantage in monitoring agencies and in setting off these alarms when their interests are threatened.<sup>206</sup> If industry groups take

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2003) (“Public health and environmental mandates generally take a precautionary approach to regulation.”).

<sup>201</sup> See, e.g., 42 U.S.C. § 7409(b)(1) (Clean Air Act requires EPA to set maintain an “adequate margin of error” in setting ambient air standards); 33 U.S.C. § 1317(a)(4) (Clean Water Act requires EPA to set effluent limitations to provide an “ample margin of safety”); 42 U.S.C. § 300g-1(b)(4)(A) (Safe Drinking Water Act requires EPA to set maximum contaminant level goals at a level for which “no known or anticipated adverse effects on the health of person occurs and which allows an adequate margin of safety”).

<sup>202</sup> Croley, *supra* note 151+53, at 865.

<sup>203</sup> 29 U.S.C. § 655(b)(5).

<sup>204</sup> Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrol versus Fire Alarms*, 28 AM. J. POLI. SCI. 165 (1984) (arguing that Congress has a rational preference for fire-alarm oversight).

<sup>205</sup> See Susanne Lohman & Hugo Hopenhayn, *Deregulation and the Regulation of Risk*, 23 GAMES & ECON. BEHAVIOR 222 (1998).

<sup>206</sup> McCubbins & Schwartz, *supra* note 204+40, at 173-73 (recognizing that fire-alarm oversight may well be biased in favor of the groups most able to set off those alarms).

their grievances to Congress, they should have a similar resource advantage in wooing legislators.

Industry's advantage in setting off fire alarms is likely to be even more pronounced in health and safety arena because many (if not most) of the public health consequences of agency action will be delayed and difficult to trace. An individual who, for example, is exposed to a carcinogen that an agency should have regulated, or regulated more stringently, is likely to be wholly unaware either of her exposure or of her slightly increased risk of cancer. Even if she does develop cancer—usually years or decades later—she will almost certainly not link her cancer to the exposure. And even if she does link it to the exposure, the likelihood that she will accurately blame the agency for its lack of regulatory zeal and therefore ring fire alarms to call the agency to task (assuming that the agency has not yet regulated the substance, or even that the agency still exists) is more remote still.

In contrast, a regulation's economic cost is clear and immediate. Industry will therefore ring every fire alarm at its disposal as soon as it catches wind of an adverse regulation. The concreteness of the economic harms that industries face will give them a distinct advantage over groups arguing, normally in the face of substantial scientific uncertainty, that the public-health consequences of regulatory inaction are profound.

We do not want to overdraw this story. Public-interest groups will of course bring some latent health risks to the attention of regulators and Congress, and they have been and will continue to be successful on occasion. And industry groups may pull fire alarms to no avail. But, far from supporting a conclusion of regulatory over-zealousness, the fire alarm story normally cuts in the direction of under-regulation.

The third reason that agencies might be overly cautious is that, as Stephen Breyer and others have noted, public perceptions of risk can differ materially from expert assessments. Thus, people tend to give greater prominence to unusual risks than to everyday risks, to have a greater moral obligation towards family members and friends than to strangers, to distrust experts, to be reluctant to change their minds, and to have difficulty understanding the mathematical probabilities involving risk.<sup>207</sup> On this account, agencies, responding to public paranoia, will zealously work to avert certain highly prominent risks, thereby imposing greater costs on industry than would be justified on strict cost-benefit grounds. The paradigm case on this view is nuclear power, which experts regard as peculiarly safe and yet which the public greatly distrusts.<sup>208</sup> A biased OIRA review process that could temper regulatory responses to

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<sup>207</sup> See BREYER, *supra* note 116448, at 35-37.

<sup>208</sup> See *id.* at 34.

unwarranted public fears might therefore be appropriate.

Underlying this story, however, is an unsubstantiated assumption that heuristics only serve to magnify public fears of highly prominent risks. But heuristics also serve to dampen fears about risks that perhaps ought to be regulated more stringently. Although people are generally not concerned about the risks of indoor radon, for example, it is abundantly clear to experts that they should be.<sup>209</sup> If public perceptions do correlate with agency regulations—and there is some reason to believe that they do<sup>210</sup>—then we would expect that a lack of public pressure would correlate with a lack of agency regulation. Hence radon regulation is an area “of relatively high risk but low EPA effort.”<sup>211</sup> A centralized review process that ensures that agencies are not shirking their duties to regulate low-salience risks is every bit as appropriate as OIRA review to ensure that agencies do not over-zealously enact regulations that cater to public fears. Asymmetrically reviewing regulations only for perceived over-zealousness in an effort to adjust for irrational heuristics is consequently unjustifiable.

#### *D. Mission Identification and “Going Native”*

Perhaps the fear of regulatory overzealousness reflects a different unarticulated stereotype about bureaucratic behavior. Perhaps “a government agency . . . will invariably wish to spend ‘too much’ on its goals” not because of public-choice theory, or because of some misguided adherence to the precautionary principle, but simply because *it is the nature* of regulators to regulate. On this view, it would be appropriate for OIRA to check the pro-regulatory impulses of well-intentioned but misguided governmental employees.

##### *1. Mission Identification*

This theory can be articulated most convincingly with reference to a theory of mission identification, whereby government administrators will take positions within an agency because of an ideological identification with that agency’s mission.<sup>212</sup> Thus ardent environmentalists will apply to work at the EPA; labor supporters will go to OSHA; and consumer-protection advocates will seek refuge at the Consumer Product Safety Commission (CPSC). The unabashedly “pro-regulation” ideologies of

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<sup>209</sup> *See id.* at 21.

<sup>210</sup> *See* UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS xv (1987) (“EPA’s priorities appear more closely aligned with public opinion than with our estimated risk”).

<sup>211</sup> *Id.* at 95.

<sup>212</sup> *See, e.g.*, David B. Spence, *Administrative Law and Agency Policy-Making*, 14 YALE J. REG. 407, 424 (1997) (arguing that an “agency with a well-defined mission will tend to attract bureaucrats whose goals are sympathetic to that mission”).

those civil servants (so the story goes) will lead to ever-broader and more-intrusive regulations. Although there is no systematic empirical support for the view that pro-regulatory ideology biases agency outputs, neither is there evidence to the contrary<sup>213</sup>—so commentators rely on proxies, pointing to studies showing that a large majority of civil servants self-identify as Democrats.<sup>214</sup>

The main virtues of this ideology story are its simplicity, the difficulty of disproving it, and its adaptability. Any adverse regulatory decision can be explained away as the result of bureaucratic bias, and such complaints are likely to be taken quite seriously by both politicians and the public.<sup>215</sup> But the account does not stand up to serious scrutiny. To begin with, it is premised on the implausible assumption that ideology is the dominant motivator of agency bureaucrats. As Wilson has argued, however, the psychological literature undercuts the view that ideology or beliefs or attitudes explain much about how bureaucrats in the trenches actually operate.<sup>216</sup> This is only natural: the factors that motivate bureaucrats on a day-to-day basis are not normally so abstract as “ideology,” but are more often the mundane (and personally more salient) concerns relating to career advancement, producing a quality work product, and abiding by professional and ethical norms. “When we realize that attitudes must compete with incentives for influence over our behavior, it is not surprising that attitudes often lose out to the rewards we seek or the penalties we try to avoid.”<sup>217</sup> Ideology enters, if at all, on the margins.

Moreover, career civil servants presumably understand that the quality and efficacy of whatever regulations they implement will turn on the level of cooperation they receive, both pre- and post-implementation, from the regulated industry—and that they are likely to lose political allies rapidly if they are seen as imposing improvidently high costs. For this reason, an ardent environmentalist might still be quite careful to strike a fair balance between costs and benefits; her ideological leanings may influence, but are unlikely to dictate, her eventual policy decision.

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<sup>213</sup> WILSON, *supra* note [Error! Bookmark not defined.](#), at 66 (“Does ideology determine [bureaucratic] behavior? There is no systematic evidence bearing on the question.”).

<sup>214</sup> *Id.* at 65 (citing Stanley Rothman & S. Robert Lichter, *How Liberal Are Bureaucrats?*, REGULATION 18 (November-December 1983); Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration*, 70 AM. POL. SCI. REV. 446 (1976)).

<sup>215</sup> *Id.* at 50 (noting that bureaucrats’ attitudes will determine their decisions “will strike most people as reasonable”).

<sup>216</sup> *Id.* at 51 (citing Icek Ajzen & Martin Fishbein, *Attitude-Behavior Relations: A Theoretical Analysis and Review of the Empirical Research*, 84 PSYCHOLOGICAL BULLETIN 888 (1977); Allan W. Wicker, *Attitudes versus Actions: The Relationship of Verbal and Overt Behavioral Responses to Attitude Objects*, 25 J. SOC. ISSUES 75 (1969)).

<sup>217</sup> *Id.* at 51.

Even assuming the ideology of career civil servants plays a powerful role in most government agencies, it is not the case that this would inevitably lead to over-regulation. Agency bureaucrats might also have ideological proclivities towards less stringent regulations; civil servants at the Forest Service or DOE might plausibly have such leanings.<sup>218</sup> Other agencies might be staffed by bureaucrats whose ideological alignment will play little role in its activities—“[t]here is no liberal or conservative way to deliver the mail or issue a driver’s license.”<sup>219</sup> On top of that, we can safely predict that ideologically driven agencies will come into conflict with *other* ideologically driven agencies—as would happen if, for instance, HUD zealously pursued its housing goals while giving short shrift to the environmental consequences.<sup>220</sup> It is far from obvious that the outcome of these conflicts will result in regulation that is systematically too stringent.

Again, we do not want to overstate our claim. It is undoubtedly true that most of EPA’s employees identify strongly with the environmental mission of the agency, and the same can be said of many of the health-and-safety agencies that impose large costs on the private sector. But the ideological leanings of bureaucrats are likely to be tempered by professional norms and agency culture, and it is not the case (as some critics appear to assume) that their political beliefs will translate cleanly into regulatory policy.

## 2. “Going Native”: Two Types of Principal-Agent Problems

This view of regulatory policymaking is moreover vulnerable to the critique that, whatever the ideology of an agency’s staff, the political commitment of the agency’s administrator will exert far more influence over agency outputs. Numerous studies have canvassed how presidents exert considerable power over agency action through their power to appoint loyalists to influential administrative posts.<sup>221</sup> The influence of political appointees is why President Reagan, “perhaps more successfully than any other modern President,” flexed his appointment power “to staff the agencies with officials remarkable for their personal loyalty and ideological commitment, who would subscribe to his (obligingly clear) policy agenda

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<sup>218</sup> See Spence, *supra* note 212248, at 424 (noting that EPA’s “Office of Water tends to attract people who place a high value on protecting water quality, while FERC’s Office of Hydropower Licensing tends to attract people who place a high value on encouraging the development of hydroelectric power,” presumably at the expense of environmental interests).

<sup>219</sup> WILSON, *supra* note [Error! Bookmark not defined.](#)470, at 66.

<sup>220</sup> See, e.g., *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (involving such a conflict).

<sup>221</sup> See, e.g., Matthew C. Stevenson, 56 ADMIN. L. REV. 657, 667 (2004) (reporting “strong evidence of presidential influence over agency policy”).

even in the face of competing bureaucratic pressures”<sup>222</sup> Clinton’s well-documented wrangling of the administrative apparatus for his own purposes<sup>223</sup> lends further support to the view that long-term Washington bureaucrats don’t drive regulatory policy—their political masters do.

For the ideology story to ring true, then, some explanation needs to be given for why politically appointed administrators will fall victim to the pro-regulatory proclivities of their civil-servant employees. Ready at hand is another common story. Thus, E. Donald Elliott describes that, “in most administrations, after a few years, the OIRA and White House ‘managers’ generally come to hold in contempt their erstwhile colleagues in the agencies, believing they have ‘gone native’ and adopted the characteristic values of their agencies.”<sup>224</sup> Similarly, Bruce Ackerman points to the “great danger” that the president’s appointees will “succumb to the pressures of the entrenched ideologues to sustain the preexisting mission of the agency even when it deviates from ‘the administration’s agenda.’”<sup>225</sup>

This argument breaks down into a set of two principal-agent problems. The first—and weaker—of these problems assumes that the appointee’s policy preferences of will, over time, diverge from the policy preferences of the President. This view fails to acknowledge, however, that any disagreements between the President and his appointee are likely to arise not because of a divergence in preferences, but because an agency administrator will operate under a set of constraints that the executive is likely to be only dimly aware of.<sup>226</sup> A competent administrator, for example, may “push back” on certain executive proposals because she understands the difficulty of implementing the proposal with her agency’s current level of resources. Or she may think that the proposal will inadvertently produce fierce resistance from groups that the administration can ill afford to alienate. Or she may disagree with the administration in light of her greater knowledge of her regulatory arena.

But it would be quite surprising if the disagreement between the President and his political appointee was primarily ideological. Indeed, agency administrators are political operatives who are entrusted with, and rewarded for, advancing the administration’s agenda. Even when closeted within agencies staffed by civil servants with radically different ideological agendas, and even when hostage to information fed to them by civil

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<sup>222</sup> Kagan, *supra* note 5, at 2277. Reagan was, of course, largely successful. See MEIER, *supra* note 174180, at 5 (“Regulators appointed by Reagan have been able to change the regulatory priorities of a great many regulatory agencies. . . . Clearly, if regulatory agencies are out of control, this would not have been possible.”).

<sup>223</sup> Kagan, *supra* note 5.

<sup>224</sup> Elliott, *supra* note 17, at 176.

<sup>225</sup> Bruce A. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 701 (2001).

<sup>226</sup> See WILSON, *supra* note [Error! Bookmark not defined.](#)170, at 113-36.



servants with a different political or ideological persuasion, political appointees are quite mindful that they will not be rewarded for betraying that trust.

A second, and more troubling, principal-agent problem can arise between the heads of agencies and their employees. Bureaucracies are not finely tuned machines that can easily be re-directed from the top down, and administrators will invariably struggle to shift agency culture in the direction of the President's agenda.<sup>227</sup> Loyal administrators may be unable to implement that agenda because they must rely on employees with divergent ideological and political agendas.<sup>228</sup> Those administrators will moreover only have a rough sense of the work that their subordinates are doing; in lower-profile cases, at least, staffers can pursue their own agendas at the expense of the administration's. Ackerman colorfully characterizes this tension as "the ongoing struggle between the president's loyalists at the center and the entrenched ideological entrepreneurs in the sprawling periphery,"<sup>229</sup> and it is undoubtedly a serious problem for administrators.

This account, however, should not be overdrawn. As noted above, it runs counter to voluminous empirical support for the position that political appointees quite effectively shape outputs at regulatory agencies.<sup>230</sup> Although that data does not tell us whether administrators would have been *more* successful at shaping administrative outputs if they faced a less recalcitrant bureaucracy, it at the very least suggests that civil servants' policy preferences do not invariably (or even usually) dictate regulatory policy. Moreover, while administrators will receive much of their information from their staff, they need not rely wholly on that information. A political appointee has many avenues to procure necessary information from groups with an incentive to influence her ultimate decision. Over the course of an important rulemaking, for example, administrators will receive information from industry sources, advocacy groups, and politicians with an interest in the regulation at hand. Moreover, even if it were the case that the political appointee were wholly reliant on her staff, an agency staff will not invariably have pro-regulatory proclivities. While it may be the case that some agency staffers will lean in a pro-regulatory direction, there may well be others—perhaps at DOE, or the Forest Service—who lean in an anti-regulatory direction.<sup>231</sup>

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<sup>227</sup> See *id.* at 91.

<sup>228</sup> See Strauss & Sunstein, *supra* note [114146](#), at 187 (noting the "perception that agency heads are, to an undesirable degree, the captives of their own staffs rather than politically powerful managers of agency business").

<sup>229</sup> Ackerman, *supra* note [225231](#), at 701.

<sup>230</sup> See *supra* note [221227](#).

<sup>231</sup> See *supra* notes [155457-158460](#) and accompanying text (describing possible capture by industry of Forest Service and DOE); Spence, *supra* note [212218](#), at 424.

In sum, no simplistic account of bureaucratic behavior—whether based on public-choice pressures, empire-building administrators, over-cautious risk managers, or zealous bureaucrats—justifies the conclusion that agencies will always, or even usually, regulate “too much.” This is hardly a surprise: “Government agencies are at least as complex and hard to understand as an exotic and distant native culture that a traveler has entered for the first time.”<sup>232</sup> Making a caricature of government agencies and the civil servants who work there to justify a review process that puts its thumb on the scales against regulation is wrong-headed and will, predictably, lead to socially undesirable results.

### III.

#### UNDERSTANDING OIRA

In this Section, we move away from analyzing the pathologies of regulatory agencies and turn our attention to OIRA itself. In particular, we challenge the view that OIRA, unlike these agencies, is a neutral decisionmaker that can accurately assess costs and benefits in an unbiased way. Thus, the role of OIRA in the administrative state cannot be justified by reference to the checking function—the one-way ratchet against regulation—that has been its hallmark since its inception.

##### *A. The Conventional Account*

The most prevalent argument in the literature is that OIRA can check whatever public-choice infirmities exist because it is firmly under the control of a nationally accountable chief executive who is less sensitive to the kinds of parochial preferences that dominate single-mission agencies.<sup>233</sup> The basic intuition is that it costs more to capture the president than it does a single-mission agency: the President, because he must satisfy a wide array of stakeholders, requires a sufficiently large temptation to cater to one group’s narrow interests at the expense of other groups or the public. An agency, in contrast, is more narrowly responsive and can be effectively bought off by showering fewer resources on a few important legislators and bureaucrats.<sup>234</sup> The high costs of presidential capture, reason OIRA’s

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<sup>232</sup> WILSON, *supra* note [Error! Bookmark not defined.](#), at 293.

<sup>233</sup> DeMuth & Ginsburg, *supra* note 1, at 1082 (“In any administration, the president is more likely to take a broad view of the nation’s economic interest in a given rulemaking controversy than are any of his agency heads . . . .”); Kagan, *supra* note 5, at 2361 (“[T]he President’s concern for maintaining the support of a national constituency, a concern not shared by any agency, should curb the extent to which he attends only to narrow interests.”). For similar views, see Croley, *supra* note [151453](#), at 831.

<sup>234</sup> See Kagan, *supra* note 5, at 2264 (“The president’s participation in rulemaking . . . seems more likely to broaden than to inhibit the informal communication of information from affected interests on which sound policymaking often depends.”).

advocates, will stymie interest-group efforts to exert undue influence on an agency within the Executive Office of the President.<sup>235</sup> As a consequence, OIRA can rely on its relative insulation from the factional politicking that characterizes single-mission agencies to check bureaucratic capture.

Public-choice theory, however, does not provide support for this conclusion. As an initial matter, it would be naïve to assume that the president is immune to public-choice pressures. He is not. Like any elected official, the president will be particularly attentive to those groups who can provide him with the resources, support, or the votes to win elections or promote his political agenda.<sup>236</sup> This is hardly controversial: DeMuth and Ginsburg note that “presidents and legislatures are themselves vulnerable to pressure from politically influential groups.”<sup>237</sup> The two former OIRA administrators nevertheless argue that “the rulemaking process—operating in relative obscurity from public view but lavishly attended by interest groups—is even more vulnerable.”<sup>238</sup>

But why should this be so? Public-choice theory predicts that most policy issues—particularly low-salience regulatory issues—will garner little public attention because members of a diffuse public do not have a sufficient personal stake in the outcome of a decision to justify forming lobbying groups.<sup>239</sup> Whether the President or an agency resolves the issue is not at all relevant to this Olsonian calculus. Put another way, the parties that are willing and able to bid effectively for regulatory outputs at the agency level will be as eager to bid for those same outputs at the presidential level; they will not be deterred simply because the President sits atop the regulatory hierarchy on a flow-chart.<sup>240</sup>

Standard public-choice accounts moreover hold that success in the legislative process goes to the highest bidder, where “bidding” is taken as a shorthand for the multiplicity of ways (both overt and covert) that interest groups shape outputs.<sup>241</sup> Whether the President or an agency makes the ultimate decision, well-financed industry groups will still be in a relatively

<sup>235</sup> See FirstGov.gov, Executive Office of the President, at <http://www.firstgov.gov/Agencies/Federal/Executive/EOP.shtml>.

<sup>236</sup> See DeMuth & Ginsburg, *supra* note 1, at 1081.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* See also Kagan, *supra* note 5, at 2361.

<sup>239</sup> See OLSON, *supra* note ~~122~~<sup>124</sup>, at 9-16.

<sup>240</sup> On a related note, Dean Shane calls “a red herring” the idea that transparency in decisionmaking will be furthered by presidential policy control. “[E]ven the vesting of ultimate decisional authority in the President will not undo the ubiquitous possibilities that a complex bureaucracy affords to disavow responsibility for unpopular choices and to claim the chief credit for successes.” Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 209 (1995).

<sup>241</sup> See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 567-68 (2001) (citing Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976); Stigler, *supra* note ~~123~~<sup>125</sup>, at 12-13)).

better position than their more diffuse public interest counterparts to provide the relevant governmental actors with needed resources and support. As a consequence, in the face of lingering public apathy, public-choice theory would suggest that *both* the President and regulatory agencies will be attentive to narrow interests so long as other, better-financed interest groups do not have cross-cutting priorities.

Unsurprisingly, the available evidence supports the view that the mix of participants active in the OIRA review process heavily favors industry, suggesting that OIRA fares little better than single-mission agencies at hearing from all affected parties.<sup>242</sup> Erik Olson reported as early as 1984 that “comments from industry come pouring into OMB offices . . . [reflecting] the lobbying power of the parties involved in rulemaking,” and that the available evidence provided solid support for the claim that OIRA was a “conduit” for industry views.<sup>243</sup> This imbalance persists two decades later: in its 2003 report on OIRA, the GAO collected hard data and found that the outside parties who contacted OIRA were “most commonly representatives of regulated entities.”<sup>244</sup> Croley’s analysis of OIRA’s records covering the period from 1993-2000 makes a similar finding—namely, that fully 56% of the meetings that OIRA held to discuss proposed or final agency rulemakings involved only “narrow interests” (i.e., industry groups), as compared to only 10% that involved only “broad interests” (i.e., non-profit public-interest groups). (Another 28% of the meetings involved both narrow and broad interests in some capacity, but it is impossible to disaggregate the relative representation of broad and narrow interest groups at those meetings.<sup>245</sup>) These ratios are roughly comparable to the participation rates of industry and public-interest groups at EPA that we discussed in Part II—recall, for example, Coglianesi’s finding that 67% of the comments received on a series of hazardous waste regulations came from private industry, while only 2% came from public-interest groups.<sup>246</sup>

Drawing firm conclusions about influence from participation rates is tricky,<sup>247</sup> but GAO’s data are suggestive: of the twenty-five rules that OIRA “significantly affected” in 2002, outside parties commented on eleven of them—and for seven of those eleven rules, “at least some of the actions that OIRA recommended were similar to those suggested” by the industry groups.<sup>248</sup> Similarly, Croley documented a correlation between rules that

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<sup>242</sup> For statistics on industry domination at the agency level, see *supra* Part II.A.1.

<sup>243</sup> Olson, *supra* note 3, at 56-57.

<sup>244</sup> GAO REPORT ON OIRA, *supra* note 3132, at 11.

<sup>245</sup> Croley, *supra* note 151453, at 858. See also Seidenfeld, *supra* note 5, at 1073 (“industry often has greater access to OMB and the White House than more diffuse public interest groups”).

<sup>246</sup> See *supra* notes 140442-150452 and accompanying text.

<sup>247</sup> Croley, *supra* note 151453, at 879.

<sup>248</sup> GAO REPORT ON OIRA, *supra* note 3132, at 11.

prompted meetings at OIRA and rules that changed during the OIRA review process. This correlation suggests that “a meeting reflects some underlying [political] dynamic that leads to a change in a rule,” a view that “is consistent with fears that White House review constitutes a forum for interest groups who object to aspect of a rule to enlist the White House to change it.”<sup>249</sup>

In sum, the replication of lopsided interest-group participation at OIRA suggests that OIRA’s proximity to the President does not by itself smooth public-choice imbalances in the regulatory process. The President is himself susceptible to his own set of public-choice pressures, and there is no reason to believe that his involvement corrects public choice pathologies at the agency level.

### B. *OIRA Is Not the President*

Even if we accept the premise that the President will is largely immune to public-choice pressures, however, *OIRA is not the President*.<sup>250</sup> OIRA is simply an agency within the executive branch, and this agency, like other agencies, will face public-choice pressures.<sup>251</sup>

To begin with, any “notion of national political accountability needs to be tempered by the reality that the president is generally not the person doing the overseeing.”<sup>252</sup> The White House has limited resources to expend on regulatory oversight—including OIRA oversight—and only the most salient or politically consequential regulations will invite explicit White House attention.<sup>253</sup> As a consequence, OIRA will in general have free rein to manage the regulatory state without the kind of robust White House oversight that advocates like DeMuth and Ginsburg claim will blunt the effect of public-choice imbalances.

Recognizing this problem, Dean Kagan hedges her conclusion about the benefits of presidential control over agency rulemaking with an important caveat that is highly relevant to OIRA review: “[A]t least to the extent that presidential involvement in rulemaking has a substantial public dimension, the President’s concern for maintaining the support of a national constituency, a concern not shared by any agency, should curb the extent to which he attends only to narrow interests.”<sup>254</sup> But the whole point of

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<sup>249</sup> Croley, *supra* note 151+53, at 877.

<sup>250</sup> Strauss & Sunstein, *supra* note 114+16, at 190 (“[T]here is not an identity between the President and officials in OMB.”).

<sup>251</sup> *Contra* Houck, *supra* note 43+45, at 535 (quoting an OMB official saying that “We are the president, that’s what we are.”).

<sup>252</sup> Thomas O. Sargentich, *Normative Tensions in the Theory of Presidential Oversight of Agency Rulemaking*, 7 ADMIN. L.J. AM. U. 325, 326 (1993).

<sup>253</sup> See Kagan, *supra* note 5, at 2250; Seidenfeld, *supra* note 5, at 1074.

<sup>254</sup> Kagan, *supra* note 5, at 2361 (emphasis added).

regulatory review at OIRA is that rulemaking does *not* generally have a substantial public dimension—if it did, then OIRA’s role as a counterweight to public-choice pathologies would be superfluous.

It is true that political appointees at OIRA will share the President’s general outlook towards regulation, and can in any event “get the message” about the White House’s priorities over time, reducing the need for overt White House monitoring. Perhaps this explains why DeMuth and Ginsburg (among others) believe that OIRA will normally be better-insulated than single-mission agencies from public-choice pressures. But political appointees at single-mission agencies similarly share the president’s agenda, and are equally capable of “getting the message” about the White House’s priorities. Because OIRA’s relationship to the White House is not unique, the assumption is that agencies will be routinely plagued by regulatory capture, but that OIRA will never be, is not very plausible.<sup>255</sup>

For at least two reasons, OIRA may have particular susceptibilities to public-choice pressures. First, OIRA is not covered by the APA.<sup>256</sup> The absence of judicial review makes it more difficult for aggrieved groups with disproportionately little influence over political or regulatory processes to challenge OIRA’s actions.<sup>257</sup> Indeed, transferring regulatory authority to an APA-insulated agency operates as a back-door way to cut the federal judiciary out of an increasingly important stage of the rulemaking process.<sup>258</sup> The predictable result is that OIRA is far less careful than the regulatory agencies in documenting its meetings with interested parties, leaving it open to the charge that it devotes undue attention to the complaints of regulated entities.<sup>259</sup> In short, OIRA’s exemption from the APA suggests it is poorly designed to correct for public-choice imbalances.

Second, OIRA has a long and well-documented history of secrecy.<sup>260</sup> Although sustained criticism in the 1980’s led to reforms that made the review process more transparent,<sup>261</sup> it remains remarkably difficult today

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<sup>255</sup> Cf. Olson, *supra* note 3, at 13 (noting implicit assumption that “the President’s reviewers are not locked into the ‘old way of thinking,’ nor are they captured by the ‘iron triangle’ comprising agency policymakers, congressional overseers, and the agency’s constituency”).

<sup>256</sup> See *supra* note 101403.

<sup>257</sup> See BREYER ET AL., *supra* note 2829 (noting that availability of judicial review may operate to level public-choice pathologies).

<sup>258</sup> See Kagan, *supra* note 5, at 2265; Stewart, *supra* note 118420, at 1715.

<sup>259</sup> See GAO REPORT ON OIRA, *supra* note 3132, at 55.

<sup>260</sup> See *id.* at 113 (noting “the culture of secrecy and mystery that has surrounded OIRA for more than 20 years”) (internal quotes removed); see also Morrison, *supra* note 4, at 1067-68 (reporting on extensive secrecy at OIRA); Olson, *supra* note 3, at 55-73 (same).

<sup>261</sup> E.O. 12,866 § 6. See also Pildes & Sunstein, *supra* note 12, at 22-24 (discussing transparency reforms).

for outsiders to get a strong grasp of what OIRA review entails.<sup>262</sup> Expressing uncharacteristic frustration with OIRA, GAO explained that “difficulties [its staff] experienced during [its] review [in 2003] clearly demonstrated that OIRA’s reviews are not always transparent to the public.”<sup>263</sup>

For example, neither OIRA nor the agencies are required to disclose why rules are withdrawn from review, and the descriptions that OIRA discloses about its contacts with outside parties is often not very helpful. In particular, OIRA representatives said neither they nor the rulemaking agencies are required to disclose the changes made to rules while they are under informal review—the period in which OIRA said it can have its greatest effect.<sup>264</sup>

Croley’s review of OIRA records was similarly hamstrung by transparency problems. He examined OIRA’s files in an effort to determine whether a rule passed through OIRA review without change or whether those rules were issued “consistent with change,” a designation given to a rule that was changed at some point of the OIRA review process.<sup>265</sup> Although that terse phrase, “consistent with change,” is the *only* information that the public record reveals about the role that OIRA played in the review process, it could cover anything from editorial changes in the form of the rule to important substantive shifts in regulatory policy.<sup>266</sup> The increasing frequency of informal pre-proposal agency-OIRA negotiations only heightens OIRA’s unseen effect on regulatory decision-making.<sup>267</sup> Yet OIRA steadfastly refuses to institute any transparency reforms, claiming (with some gall) that GAO’s report “had not demonstrated the need or desirability of changing the agency’s ‘unprecedented’ level of transparency.”<sup>268</sup> It is frankly difficult to understand how an agency committed to operating in the shadows could be well-positioned to minimize public-choice pathologies.

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<sup>262</sup> See GAO REPORT ON OIRA, *supra* note 3132, at 110 (“[T]he OIRA regulatory review process is not well understood or documented, and the effect that OIRA’s reviews have on individual rules is not always easy to determine.”).

<sup>263</sup> *Id.* at 16.

<sup>264</sup> *Id.* at 7.

<sup>265</sup> Croley, *supra* note 151453, at 843-45.

<sup>266</sup> See GAO REPORT ON OIRA, *supra* note 3132, at 14 (“The ‘consistent with change’ category in OIRA’s public database does not indicate whether the changes made to agencies’ rules during the formal review process had been suggested by OIRA or the agencies, or whether the changes were substantive or editorial in nature.”).

<sup>267</sup> *Id.* at 14. See also *id.* at 114 (“[I]t is not clear why OIRA believes that the executive order’s transparency requirements should not cover the part of the review period when the most important changes can occur.”).

<sup>268</sup> *Id.* at 16.

### C. Experience with Presidential Review

Experience with presidential review of agency rulemaking suggests that fears that OIRA is prone to industry-group domination are not academic. The Council on Competitiveness offers one egregious and high-profile example of industry-group capture of an entity exercising presidential oversight over agency rulemakings, and it is by no means the only example. The Council came to prominence in 1989 when Congress refused to reauthorize funding for OIRA or confirm the first President Bush's nominee to head the agency.<sup>269</sup> During a hiatus in robust OIRA review, the Council "stepped in to fill the political void and to set the tone of regulatory review."<sup>270</sup> Although separate from OIRA and not part of the regular channels of presidential review of rulemaking, the Council arrogated to itself increasing oversight power over controversial and costly regulations.<sup>271</sup>

Chaired by then-Vice President Dan Quayle, "a self-proclaimed 'zealot when it comes to deregulation,'"<sup>272</sup> the Council was sharply critical of any regulation and deeply solicitous of vested business interests.<sup>273</sup> Staffed by free-market enthusiasts with an open contempt for regulatory agencies (the Council's executive director, Allan Hubbard, asserted that policy should not be set by "some green eye-shade type in the bowels of the bureaucracy"<sup>274</sup>), the Council watered down or killed "regulations on federal rules relating to commercial aircraft noise, bank liability on property loans, housing accessibility for the disabled, clothing makers' right to work at home, disclosure requirements on pensions, protection of underground water from landfill runoff, reporting requirements for child-care facilities located in religious institutions, and fees for real estate settlements"<sup>275</sup>—not to mention various EPA regulations aimed at limiting pollution from municipal incinerators, protecting wetlands, or preventing air-quality degradation.<sup>276</sup>

The Council's modus operandi was to intervene quietly in

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<sup>269</sup> See Shane, *supra* note 240246, at 168.

<sup>270</sup> Bob Woodward & David S. Broder, *Quayle's Quest: Curb Rules, Leave 'No Fingerprints'*, WASH. POST, Jan. 9, 1992, at A1.

<sup>271</sup> See Kagan, *supra* note 5, at 2281.

<sup>272</sup> Woodward & Broder, *supra* note 270276, at A1.

<sup>273</sup> See Susan Reed, *Enemies of the Earth*, PEOPLE, April, 1992 (reporting that environmental groups saw the Council "a backdoor through which industry has entered to water down regulations it finds too costly"); Shane, *supra* note 240246 (detailing pro-business and anti-regulation bent of Council); Caroline De Witt, Comment, *The President's Council on Competitiveness*, 6 ADMIN. L.J. AM. U. 759 (1993) (same); Woodward & Broder, *supra* note 270276, at A1 (same).

<sup>274</sup> Sargentich, *supra* note 252258, at 325 (citing OMB Watch report).

<sup>275</sup> Woodward & Broder, *supra* note 270276, at A1.

<sup>276</sup> See Shane, *supra* note 240246, at 169-72.



rulemakings in an effort to persuade or coerce agencies to relax regulatory burdens on American businesses while “leaving . . . ‘no fingerprints’ on the results of its interventions.”<sup>277</sup> The secrecy was necessary, reasoned Quayle’s aides, because many of these issues were “political loser[s]”—a strong indication that the primary purpose of the Council’s efforts was not to assure fidelity to some broadly conceived national interest.<sup>278</sup> More disturbing still from the perspective of public-choice theory, “[i]n almost every city he visits as a campaigner, Quayle holds closed-door round tables with business people who have made sizable contributions to the local or national GOP. Hubbard [the Council’s executive director], . . . often travels with Quayle and sits in on these sessions.”<sup>279</sup> The implication that the Council parlayed deregulatory initiatives in exchange for campaign contributions is difficult to avoid.

At least in the case of the Council on Competitiveness, decisional proximity to the President did nothing to prevent a quintessential instance of agency capture. Its example cuts hard into the optimistic view that centralizing review authority in the President’s office will generally serve to mitigate public choice pressures. There is moreover little reason to think that it is merely an isolated instance. As a theoretical matter and as a matter of historical record, the president shares with other governmental actors similar vulnerabilities to interest-group pressures. Solidifying his already-substantial control over the administrative state will therefore have the perverse result of amplifying the power of those groups that are in a position to exert undue influence of the President while doing nothing to minimize industry group influence at the administrative level.

#### IV.

##### RETHINKING CENTRALIZED REVIEW

Having shown that the checking function rests on implausible analytical foundations, we can safely conclude that OIRA’s single-minded focus on preventing over-regulation is far too narrow.<sup>280</sup> In this Section, we go one step further. We contend that, while an invigorated commitment to even-handed cost-benefit analysis would be a salutary development, OIRA could and should do far more to embrace its role as a harmonizing influence in the cacophonous regulatory state. Indeed, it would be astonishing if cost-benefit analysis were the only regulatory dimension ripe

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<sup>277</sup> Woodward & Broder, *supra* note 270276, at A1.

<sup>278</sup> *Id.* See also Shane, *supra* note 240246, at 197 (reporting that the public supported the same amount or more environmental regulation through the period of the Council’s activities).

<sup>279</sup> Woodward & Broder, *supra* note 270276, at A1.

<sup>280</sup> See CARNEGIE COMMISSION, *supra* note 2829, at [x] (“The report recommends that case-by-case [centralized] review be deemphasized in favor of broad forward-looking guidance by the Executive Office.”).

for centralization; other issues that OIRA has largely ignored must be equally amenable to centralized review.<sup>281</sup>

A note of caution is in order, however. The range of issues that could in principle be centralized is of course limitless, and the relative merits of centralization in any particular case will turn on a host of context-specific considerations. What are the relative aptitudes (e.g., scientific, economic, technical) of the single-mission and centralizing agencies? Is there value in promoting experimentation with regulatory alternatives at single-mission agencies?<sup>282</sup> Will centralization further economies of scale or create a bureaucratic morass? Is there a particular need for uniformity? Ascertaining whether an issue is amenable to regulatory centralization is thus at least as difficult as figuring out whether the federal government or states should accept responsibility for various governmental functions.<sup>283</sup> While the wholesale resolution of these difficult questions is beyond the scope of this article, however, we submit that, just as it is plainly not the case that neither the federal nor the state governments should have a policy-making monopoly, so too is it plain that the centralization of at least some regulatory functions would promote rational decision-making.

We therefore offer in this Section a sketch of two areas in which centralization would appear to be uniquely appropriate. In neither case would centralization preempt vigorous inter-agency innovation; both involve agency functions that are uniquely amenable to centralized oversight; and uniformity in both would confer significant regulatory advantages, as we explain more thoroughly below. While we shelve an in-depth theoretical consideration of the virtues and drawbacks of centralization, we offer these two concrete suggestions as useful starting points for a reinvigorated discussion of the merits of centralized regulatory review.

First, a centralized agency should provide standardized scientific guidelines to the regulatory agencies to aid them in undertaking risk

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<sup>281</sup> Cf. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 136 (2003) ("the procedural mechanism of regulatory review has been unnecessarily tied to the substantive technique of cost-benefit analysis, reducing the range of the technique and tinting it with an antiregulatory tone that is not always either intended or justified").

<sup>282</sup> Cf. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997) (discussing importance of state innovation in a federal system).

<sup>283</sup> See, e.g., Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (debunking one primary justification for federal regulation); David Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005) (elaborating on difficulties of applying federalism theories to fiscal cooperation between federal government and states).

assessments, particularly with respect to carcinogens. Although OIRA has recently taken some limited steps in this direction, most prominently in its aggressive promotion of the use of peer-reviewed studies in agency risk assessments, it has for the most part not embraced the salutary role that it could play in harmonizing the manner in which regulatory agencies approach quantitative risk assessment for carcinogenic risks. Government-wide cancer guidelines promulgated by a centralized agency with the power to ensure that agencies took them seriously would promote consistency, increase transparency, and vest in one agency the responsibility for ensuring that advances in cancer research were folded quickly into the regulatory apparatus.

Second, centralized review should involve a consideration of the distributional consequences of all regulations. Commentators normally say that individual agencies should not worry about large-scale distributional consequences because tax-and-transfer policy can minimize any distributional problems in light of the cumulative impact of regulatory policy. But OIRA does not scrutinize the distributional consequences of regulation, nor does it have protocols on how to determine them. By determining which groups are unduly burdened or unfairly compensated overall, a centralized reviewing agency could provide critical information to the political branches and aid them in smoothing regulatory inequities.<sup>284</sup>

#### *A. Science*

A centralized agency armed with substantial scientific expertise might in many cases be better-situated than the single-mission agencies to set generic guidelines as to how science should be employed in agency risk assessments. Indeed, Executive Order 12,866 contemplates some degree of centralized control over the use of science when it mandates that “[e]ach agency base its decisions on the best reasonably obtainable scientific, technical, economic, or other information concerning the need for, and consequences of, the intended regulation.”<sup>285</sup> We begin in this section by examining two recent (and related) OIRA efforts to improve the quality of the scientific data upon which agencies rely in undertaking risk assessments. We then turn our attention to one area in which a centralized agency could make a substantial and positive difference: namely, in laying out uniform, government-wide standards to guide in carcinogenic risk assessment.

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<sup>284</sup> Our proposal for a reconceptualized oversight process bears a family relationship to Justice Breyer’s call for the establishment within OMB of an elite cadre of non-political regulators with inter-agency jurisdiction charged with the task of rationalizing the regulatory state. BREYER, *supra* note 116448, at 59-72.

<sup>285</sup> E.O. 12,866 § 1(b)(7).

### 1. *Information Quality and Peer Review*

Prodded by Congress, OIRA has recently taken steps to standardize and improve the quality of the science upon which regulatory agencies rely in making their risk assessments.

In 2001, Congress enacted without any hearings or debate what has become known as the Information Quality Act (IQA).<sup>286</sup> The IQA's ostensible purpose—or at least the purpose that can be gleaned from its rather spare language, since legislative history is completely lacking—is to cure a perceived agency reliance on “bad science” in crafting regulatory policy.<sup>287</sup> Introduced as a rider to a appropriations bill at the behest of Jim Tozzi, a former Reagan-era director of OIRA,<sup>288</sup> the IQA mandates that OIRA “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”<sup>289</sup> The IQA's bite comes from its requirement that all federal agencies establish a formal mechanism to allow private parties to petition for the correction of information they allege fails to meet those new OIRA guidelines.<sup>290</sup>

OIRA released final guidelines in January 2002, explaining that it would hold agencies to a high standard of informational “objectivity”—a term that OIRA defines broadly to “involv[e] a focus on ensuring accurate, reliable, and unbiased information.”<sup>291</sup> More important still, in December 2004, OIRA drew on its authority under the IQA as well as its general oversight powers to issue an “information quality bulletin” (also known as its “peer review guidelines”)<sup>292</sup> in which it stated on no uncertain terms that

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<sup>286</sup> Treasury and General Gov't Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 144 Stat. 2763 (2000), codified at 44 U.S.C. 3516 [hereinafter Information Quality Act]. The IQA is sometimes also known as the Data Quality Act.

<sup>287</sup> See Wagner, *supra* note 200206.

<sup>288</sup> See Rick Weiss, “Data Quality Law” Is Nemesis of Regulation, WASH. POST, Aug. 16, 2004, at A01 (“We sandwiched [the IQA] in between Jerry Ford’s library and something else. . . . Was it something that did not have hearings? Yes. Is it something that keeps me awake at night? No. Is it something I would do again, exactly? Yes, you bet your ass I would. I would not even think about it, okay? Sometimes you get the monkey, sometimes the monkey gets you.”) (quoting Jim Tozzi).

<sup>289</sup> Information Quality Act § 515(a). In an expansion of OIRA control over the bureaucracy, the IQA applies equally to executive and independent agencies. *Id.* (applying IQA to agencies subject to Paperwork Reduction Act, 44 U.S.C. § 3502(1), which includes “any executive department . . . or any independent regulatory agency”).

<sup>290</sup> Information Quality Act § 515(b).

<sup>291</sup> Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) [hereinafter Information Quality Guidelines].

<sup>292</sup> Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2666 (Dec. 16, 2004) [hereinafter Peer Review Guidelines].

“[t]o the extent permitted by law, each agency shall conduct a peer review on *all influential scientific information* that the agency intends to disseminate.”<sup>293</sup> The agencies have substantial discretion in choosing the mechanism of peer review (e.g., in specifying the number of peer reviewers, or their level of expertise<sup>294</sup>), and are instructed to “weigh the benefits and costs of using a particular peer review mechanism for a specific information product.”<sup>295</sup> For *highly* influential information, however—defined as scientific assessments that “could have a potential impact of \$500 million in any year, or . . . [are] novel, controversial, or precedent-setting or ha[ve] significant interagency contact”—OIRA limits that discretion and imposes certain minimum requirements to ensure the expertise of the peer reviewers, disclose their conflicts of interest, and enforce a high level of transparency.<sup>296</sup>

The peer review and data quality guidelines reflect *ex ante* and *ex post* efforts, respectively, to rid the bureaucracy of its reliance on “bad science.”<sup>297</sup> In order to catch that “bad science” before it gets out the door, OIRA’s uniform peer review guidelines “engage the scientific community in the regulatory process” and thereby “make regulatory science more competent and credible.”<sup>298</sup> And in case any “bad science” slips through, the IQA provides interested parties with an after-the-fact opportunity to challenge that information as insufficiently “objective.”

There have been numerous suggestions that both initiatives reflect efforts to inject industry further into the rulemaking process, and particularly that the IQA’s petition requirements will interfere with notice-and-comment rulemaking, impose delay, and have a sharp anti-regulatory impact.<sup>299</sup> The merits of this debate is beyond the scope of this article. We merely offer the data quality and peer review guidelines as examples of the centralization of scientific methods used by regulatory agencies—a development that in general we regard as salutary, the appropriateness of these particular efforts notwithstanding.

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<sup>293</sup> *Id.* at 2675 (emphasis added).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 2665; see also Anderson et al., *supra* note [101403](#), at 130 (“flexibility allows an agency to calibrate the scope and intensity of peer review in the risk assessment process”).

<sup>296</sup> Peer Review Guidelines, 70 Fed. Reg. at 2676.

<sup>297</sup> See Wagner, *supra* note [200206](#), at 72.

<sup>298</sup> Jeffrey S. Lubbers, *OMB to Require Peer Review for Regulatory Science Documents*, 29 ADMIN. & REG. L. NEWS 3 (2003) (quoting John Graham).

<sup>299</sup> See Wagner, *supra* note [200206](#), at 63 (noting lack of evidence for pervasive “bad science” problem, and questioning whether the IQA is a solution to a nonexistent problem); OMB WATCH, THE REALITY OF DATA QUALITY ACT’S FIRST YEAR: A CORRECTION OF OMB’S REPORT TO CONGRESS (2004), available at <http://www.ombwatch.org/info/dataqualityreport.pdf> (contesting OIRA’s conclusions that the impact of the IQA on the promulgation of rules was minimal).

## 2. Cancer Guidelines

It is a truism that the science upon which regulatory agencies must rely in setting health-and-safety standards is inadequate to ground clear conclusions about the scope of actual risks,<sup>300</sup> particularly with respect to low-dose human exposure to carcinogenic substances.<sup>301</sup> Whether the data are drawn from epidemiological studies, animal assays, or *in vitro* mutagenicity tests, regulators must invariably make a number of strong assumptions (also known as “science-policy judgments”) in order to develop what is, essentially, their best guess as to the “real” risk that a carcinogen poses to the general public.<sup>302</sup>

In undertaking carcinogenic risk assessment, different agencies currently rely on different assumptions. The result can be widely divergent risk assessments for the same carcinogen, with potentially enormous impacts on the stringency of regulation.<sup>303</sup> Such determinations, therefore, are particularly good candidates for a centralizing influence.

### a. A Concise History of Inference Guidelines

In a highly influential 1983 report, the National Research Council (NRC) trained its attention on the problems posed by the necessity of making science-policy judgments.<sup>304</sup> Colloquially known as the Red Book, the NRC publication advocated for the use of “inference guidelines”—which it defined as “explicit statement[s] of a predetermined choice among the options that arise in inferring human risk that are not fully adequate or not drawn directly from human experience”<sup>305</sup>—to guide carcinogenic risk assessments within the various federal agencies. The Red Book provided several justifications for its support of inference guidelines: to make it easier for risk assessors to justify their decisions to courts, regulated entities, and the general public; to make a particularly knotty science-policy decision once so as to avoid making the same decision in every individual risk assessment; to diminish the influence of perceived or actual political biases; to ensure that a centralized team within the agency, operating in

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<sup>300</sup> See, e.g., CARNEGIE COMMISSION, *supra* note 2829, at [x] (“[T]he scientific basis for regulation is riddled with uncertainties, and like economic analysis, even at its best science fails to answer most of the hard questions in regulation.”).

<sup>301</sup> GRAHAM ET AL., *supra* note 194200, at 153 (noting “the lack of information about human dose-response curves at the doses that are important to regulatory policy”).

<sup>302</sup> For an extensive list of science-policy judgments that must be made with respect to different forms of data, see NATIONAL RESEARCH COUNCIL, COMMITTEE ON THE INSTITUTIONAL MEANS FOR ASSESSMENT OF RISKS TO PUBLIC HEALTH, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 29-33 (1983) [hereinafter RED BOOK].

<sup>303</sup> See GRAHAM ET AL., *supra* note 194200 (offering two case studies of the use of scientific evidence in decision making).

<sup>304</sup> See RED BOOK, *supra* note 302342.

<sup>305</sup> *Id.* at 51.

close contact with the scientific community, can fold the latest in carcinogenic research into risk assessments; and to impose some measure of uniformity among agency cancer-reduction efforts among chemicals, thereby promoting rational priority-setting.<sup>306</sup>

The Red Book wanted more than agency-specific guidelines, however. It also staunchly supported the development of cancer guidelines that would apply to *all* regulatory agencies.<sup>307</sup> With respect to the four agencies that deal regularly with carcinogenic risks—EPA, OSHA, CPSC, and the FDA—the NRC reasoned that all of the arguments in favor of agency-wide carcinogen guidelines applied with at least equal force to the adoption of guidelines with broader application. “The use of different guidelines by the agencies could undermine the credibility of [agency] risk assessments,” reducing public faith in the regulatory process, providing strategic opportunities for private interests to derail public-serving regulatory efforts,<sup>308</sup> and—most importantly—making it more difficult to set priorities among cancer-reduction efforts at the various agencies.<sup>309</sup>

The idea that the regulatory agencies should operate under a common framework for assessing carcinogenic risks was not entirely new, even in 1983. During President Carter’s administration, the Interagency Regulatory Liaison Group (IRLG),<sup>310</sup> made up of representatives from EPA, OSHA, FDA, and CPSC, attempted to cobble together a uniform cancer policy “to ensure that the regulatory agencies evaluate carcinogenic risk consistently.”<sup>311</sup> Although IRLG did eventually come up with a generic cancer policy that it published in both the federal register and in a peer-reviewed journal,<sup>312</sup> inter-agency wrangling over its substantive content resulted in broad, “treatylike”<sup>313</sup> language that did little to provide meaningful guidance to the regulatory agencies.<sup>314</sup> Even that bland policy

<sup>306</sup> See *id.* at 69-82.

<sup>307</sup> See *id.*; see also Rosenthal et al., *supra* note 194200, at 272 (“Although risk assessments are now commonplace at many federal and state agencies, there are no uniform guidelines that specify how regulatory officials should calculate chemical risks.”).

<sup>308</sup> See RED BOOK, *supra* note 302342, at 80.

<sup>309</sup> See *id.* at 80; see also *id.* at 79 (concluding that “[a]gency [carcinogen] guidelines have varied markedly in form and content,” and predicting that “[w]ithout a deliberate coordinating effort, there is no reason to assume that guidelines will become more nearly uniform.”).

<sup>310</sup> For a comprehensive history of IRLG’s cancer policy efforts, see MARK K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING ALL THE WRONG QUESTIONS 172-203 (1990).

<sup>311</sup> RED BOOK, *supra* note 302342, at 60-62.

<sup>312</sup> Scientific Bases for Identification of Potential Carcinogens and Estimation of Risks, 44 Fed. Reg. 39858 (1979); Work Group on Risk Assessment, *Scientific Bases for Identification of Potential Carcinogens and Estimation of Risks*, 63 J. Nat’l Cancer Inst. 242 (1979).

<sup>313</sup> CARNEGIE COMMISSION, *supra* note 2829, at [x].

<sup>314</sup> LANDY ET AL., *supra* note 310322, at 199 (“much interagency inconsistency remained”).

statement failed to garner support from OSHA.<sup>315</sup> More importantly, without a centralized authority to bind the agencies, the generic policy had “no official legal status”<sup>316</sup> and did little to promote consistency.<sup>317</sup> President Reagan disbanded the IRLG in 1981—ironically, at about the same time that he was ramping up efforts to centralize other aspects of regulatory decision-making.

The Red Book brought the issue back to the foreground of the debate over regulatory reform, and during the 1980s some halting steps were made towards the formulation and implementation of uniform cancer guidelines. The Office of Science and Technology Policy (OSTP) took the first of those steps in 1985 when it issued a set of “general principles that can be used [by federal agencies] to establish guidelines for assessing carcinogenic risk.”<sup>318</sup> The OSTP report largely concerned itself with articulating the current state of scientific understanding with respect to cancer risk, however, and shied away from weighing in on the controversial assumptions that agencies must make when using gap-ridden science to form cancer policies.<sup>319</sup>

William Ruckelshaus, the well-respected head of EPA from 1983-85, took the next step. Relying heavily on both the Red Book and the OSTP report,<sup>320</sup> he pushed EPA to formulate a set of agency-specific generic cancer guidelines in 1986<sup>321</sup> and announced his support for the standardization of a broader set of science-policy assumptions across the regulatory state:

The explicit and open codification suggested by the NRC will . . . ensure that the assumptions used in risk assessment will at least be uniform among all agencies that adopt them, will be plausible scientifically, and will reflect a predictable and relatively constant policy amid this complex and chaotic hybrid discipline. It also offers the possibility that

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<sup>315</sup> *See id.* at 194-96.

<sup>316</sup> *See* RED BOOK, *supra* note 302342, at 61. *See also* LANDY ET AL., *supra* note 310322, at 195 (“[T]he status of the IRLG document was ambiguous.”).

<sup>317</sup> *See* CARNEGIE COMMISSION, *supra* note 2829, at [x] (noting that agency staff “did not feel bound by the final agreement” and that “considerable inconsistency remained in the risk assessment practices in the various agencies”).

<sup>318</sup> Chemical Carcinogens; Review of the Science and its Associated Principles, 50 Fed. Reg. 10,372, 10,374 (Mar. 14, 1985).

<sup>319</sup> *Id.* at 10375 (“This document attempts to leave the majority of these necessary scientific inferences [science-policy judgments] to the scientific regulatory agencies.”); *see* CARNEGIE COMMISSION, *supra* note 2829, at [x] (“OSTP recognized in 1985 that a distinction existed between science and science policy and strove to deal only with the former.”).

<sup>320</sup> NATIONAL RESEARCH COUNCIL, SCIENCE AND JUDGMENT IN RISK ASSESSMENT 5 (1994) (“In 1986, EPA issued risk-assessment guidelines that were generally consistent with the Red Book recommendations.”); CARNEGIE COMMISSION, *supra* note 2829, at [x] (reporting that EPA guidelines “drew heavily on the background provided by the OSTP principles”).

<sup>321</sup> William D. Ruckelshaus, *Risk, Science, and Democracy*, in NATIONAL ACADEMY OF SCIENCES, ISSUES IN SCIENCE AND TECHNOLOGY (1985).



one day all the protective agencies of government will speak with one voice when they address risks, so that estimates of risk will be comparable among agencies and the public at last will be able to make a fair comparison of the individual risk-management decisions of separate agencies.<sup>322</sup>

While Ruckelshaus eventually succeeded in setting cancer guidelines at EPA, he failed to establish uniform inter-agency standards. His creation of the Interagency Risk Management Council (IRMC) proved fruitless; the agency “did not last long enough to make much of an impact” and was disbanded in 1984.<sup>323</sup> OIRA, enchanted with its deregulatory mission, had no appetite for taking on any coordinating role. Standardization efforts have stalled ever since.

The calls for centralization have persisted, however. In 1993, Justice Breyer called for the creation of a reinvigorated centralized oversight process that would “try to make explicit, and more uniform, controversial assumptions that agencies now, implicitly and often inconsistently, use in reaching their decisions.”<sup>324</sup> In 1995, a distinguished panel of regulatory commentators pulled together under the auspices of the Carnegie Commission criticized EPA, OSHA, FDA, and CPSC for “employ[ing] their own sets of assumptions to assess risks,” and recommended the creation of a “new coordination body” to help align several features of regulatory decision-making, including agencies’ cancer policies.<sup>325</sup> And in 1997, the Presidential / Congressional Commission reported that “[r]isk assessment practices are poorly coordinated among and often within regulatory agencies and programs, even among those with overlapping interests and jurisdictions,” and called for agencies to “coordinate their risk assessment methods and assumptions” whenever regulating for similar health risks associated with chronic exposure.<sup>326</sup> Even John Graham,

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<sup>322</sup> *Id.* at [x].

<sup>323</sup> MARK E. RUSHEFSKY, MAKING CANCER POLICY 148 (1986).

<sup>324</sup> BREYER, *supra* note 116+18, at 65.

<sup>325</sup> CARNEGIE COMMISSION, *supra* note 2829, at [x] (Chapter 5). *See also id.* at [x] (“[I]t would be highly beneficial if White House offices worked more closely in developing guidelines for evaluating risk . . .”).

<sup>326</sup> PRESIDENTIAL / CONGRESSIONAL COMMISSION ON RISK ASSESSMENT AND RISK MANAGEMENT, RISK ASSESSMENT RISK MANAGEMENT IN REGULATORY DECISION-MAKING, Vol. 2, at 107 (1997) [hereinafter PRESIDENTIAL / CONGRESSIONAL COMMISSION]. In addition, in 1993, the Office of Technology Assessment (OTA) issued a report calling for the creation of a “national leader in the White House in a position equivalent to the ‘Drug Czar’ or ‘AIDS Czar,’ [who] could bring national visibility and unify and coordinate [risk assessment] research activities across agencies.” Although more concerned with ensuring the appropriate allocation of scientific resources than with establishing cancer guidelines, the tone of the report reflects a frustration with the balkanization of risk assessment efforts and bemoans “[t]he absence of an identified central leader in risk assessment research.” OFFICE OF TECHNOLOGY ASSESSMENT, RESEARCHING HEALTH RISKS 11-12 (1993).

together with two associates, Alon Rosenthal and Gray, has argued that “[a] strong White House role coordinating agency activities offers the hope of resolving some of the current inconsistencies in risk assessment practices.”<sup>327</sup>

b. Variation in Carcinogenic Risk Assessment Practices

Despite these repeated calls for the establishment of uniform cancer guidelines, considerable variability among the cancer policies of regulatory agencies persists. For starters, not all agencies have issued written guidelines. FDA has never done so,<sup>328</sup> and OSHA’s “cancer policy” document—first published in 1980 and never revised—was rendered immediately obsolete by the *Benzene* decision.<sup>329</sup>

With or without written guidelines, however, EPA, FDA, OSHA, and CPSC all rely on default assumptions to guide them in their risk assessments.<sup>330</sup> And although there are many areas of substantive agreement among the agencies—for example, the agencies normally assume that there is no safe threshold level below which a carcinogen poses zero risk<sup>331</sup>—the most exhaustive survey of the different risk assessment practices at EPA, FDA, OSHA, and CPSC, conducted by Lorenz Rhomberg in 1993 under the auspices of the Presidential / Congressional Commission, concluded unequivocally that “current practices in these areas vary among Federal agencies and even among regulatory programs within the EPA.”<sup>332</sup> A 2001 GAO report on EPA, FDA, and OSHA confirmed Rhomberg’s findings, reporting that “[a]lthough there were more similarities than differences in the general risk assessment procedures,

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<sup>327</sup> Rosenthal et al., *supra* note [194200](#) at 358. *See also id.* at 362 (“We support the concept of an executive order to strengthen the role of the White House Office of Science and Technology Policy in harmonizing risk assessment practice.”). *But see* GRAHAM ET AL., *supra* note [194200](#), at 208-11 (1988) (arguing against the use of standardized guidelines).

<sup>328</sup> *See* GENERAL ACCOUNTING OFFICE, CHEMICAL RISK ASSESSMENT: SELECTED FEDERAL AGENCIES’ PROCEDURES, ASSUMPTIONS, AND POLICIES 158-59 (2001) [hereinafter GAO REPORT ON RISK ASSESSMENT].

<sup>329</sup> *Industrial Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *see* Lorenz Rhomberg, *A Survey of Methods for Chemical Health Risk Assessment Among Federal Regulatory Agencies*, at 32 (“Although the agency has published a ‘cancer policy’ document, much of its content has been affected by the benzene decision.”); GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 186 (reporting that “OSHA currently has no formal internal risk assessment guidance.”).

<sup>330</sup> *See, e.g., id.* at 170 (“FDA officials said that their agency does not require the use of specific default assumptions or risk assessment methods, but there are assumptions and methods that typically have been used as standard choices in FDA risk assessments.”). For a discussion of FDA risk assessment practices, *see* D.W. Gaylor et al., *Health Risk Assessment Practices in the U.S. Food and Drug Administration*, REGULATORY TOXICOLOGY & PHARMACOLOGY 26 (1997).

<sup>331</sup> GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 40.

<sup>332</sup> Rhomberg (from shortened version of article in Presidential / Congressional Commission Appendix), at 2.

there were also some notable differences in the agencies' specific approaches, methods, and assumptions."<sup>333</sup>

A few examples are revealing. First, as EPA's and CPSC's guidelines demonstrate, regulatory agencies show remarkable diversity in the sophistication with which they approach carcinogenic risk assessment. As the Presidential / Congressional Commission, relying on Rhomberg's study, noted

EPA relies on the "maximally exposed individual" or, now, other upper-end exposure estimates while CPSC uses the average population exposure; EPA uses upper-bound risk estimates while CPSC uses maximum-likelihood estimates; EPA uses pharmacokinetics information for cross-species extrapolation, but CPSC declines doing so.<sup>334</sup>

Second, consider the variations in agencies' default choice of low-dose response extrapolation method. Risk assessors use various methodologies to translate the high-dose results of their animal bioassays into best guesses as to how the particular carcinogen will affect humans at the lower doses prevalent in the surrounding environment. FDA uses a linear model;<sup>335</sup> OSHA uses "a particular no-threshold linear approach known as the maximum likelihood estimate in the Crump-Howe reparametrization of the multistage model;"<sup>336</sup> and CPSC uses a linearized multistage model.<sup>337</sup> EPA's more-flexible methodology recommends a linear model but allows the use of a non-linear model when the available evidence on a carcinogen's mode of action indicates that it would be appropriate.<sup>338</sup> Concededly, in any particular case the difference between a linear model and a linear multistage model is likely to be small (although if EPA chooses to employ a non-linear model, the difference will be substantial).<sup>339</sup> But if these distinctions in methodology seem insignificant, consider that the choice of low-dose response extrapolation method is just one out of *fifty* important "trans-scientific" choices that the Red Book identified.<sup>340</sup> Slight variations along a number of dimensions compound differences in risk assessment,<sup>341</sup> resulting in "the wildly different

<sup>333</sup> GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 46. The GAO report also examined the Research and Special Programs Administration (RSPA), a regulatory arm of DOT.

<sup>334</sup> PRESIDENTIAL / CONGRESSIONAL COMMISSION, *supra* note [326338](#), at 107-08. *See also* Guidelines for Determining Chronic Toxicity of Products Subject to the FHSA, 57 Fed. Reg. 46,626 (Oct. 9, 1992) [hereinafter CPSC Guidelines] (detailing differences with EPA's 1986 guidelines).

<sup>335</sup> *See* GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 41.

<sup>336</sup> *Id.*

<sup>337</sup> CPSC Guidelines, 57 Fed. Reg. at 46,654.

<sup>338</sup> *See* GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 41.

<sup>339</sup> *See id.* at 73.

<sup>340</sup> RED BOOK, *supra* note [302342](#).

<sup>341</sup> CARNEGIE COMMISSION, *supra* note [2829](#), at [x] ("Worse probably than the occasional

‘scientific conclusions’ reached by sister agencies or even sister departments of the same agency at the same time under the same administration concerning the carcinogenic potential of the same toxic substance.”<sup>342</sup>

Third, variations in the choice of inter-species scaling factors have historically been a source of dramatic differences in risk assessment outcomes, although some steps towards uniformity have recently been taken. Agencies rely on scaling factors when taking the dosage administered to an animal (typically a rat) in a bioassay and extrapolating from that the dosage that would have the equivalent effect in a human. Traditionally, FDA and OSHA assumed that the relationship between the potency of a carcinogen in rats and its potency in humans should be scaled based on body weight, whereas EPA and CPSC assumed that the scaling factor should be based on surface area.<sup>343</sup> Body-weight scaling is a less-protective assumption, and projects risks in rat assays that are between four and six times lower than the surface-area calculation.<sup>344</sup> Despite the fact that “[t]his variation stands among the chief causes of variation among estimates of a chemical’s potential human risk, even when assessments are based on the same data,” neither assumption was clearly preferable on scientific grounds.<sup>345</sup> The “awkward result [was] that different agencies [could] arrive at different characterizations of an agent’s carcinogenic potency from the same set of data, based only on differences in preferred methods and precedents from earlier analyses.”<sup>346</sup>

Without a centralized coordinating body with the power to impose a particular assumption on the agencies, it has proven difficult for the agencies to cooperate to iron out their differences. EPA, FDA, and CPSC did begin in the late 1980s to collaborate, under the auspices of the Habicht Committee, on an inter-agency draft document laying out a middle-range default assumption that body mass to the  $3/4$  power should be used as the cross-species scaling factor.<sup>347</sup> That draft was never adopted by the three agencies involved, however—although it appears that they normally abide

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high-profile mistake is the sum of the myriad inefficiencies and inconsistencies that result from lack of interagency communication, *any one of which by itself might be considered minor.*”) (emphasis added).

<sup>342</sup> Wagner, *supra* note [183489](#), at 1639.

<sup>343</sup> See Rhomberg, *supra* note [329344](#), at 75.

<sup>344</sup> See *id.* That ratio is even more pronounced with respect to mice studies. *Id.*

<sup>345</sup> Draft Report: A Cross-Species Scaling Factor for Carcinogen Risk Assessment Based on Equivalence of mg/kg<sup>3/4</sup>/Day, 57 Fed. Reg. 24,152, 24,153 (June 5, 1992).

<sup>346</sup> Rhomberg, *supra* note [329344](#), at 152.

<sup>347</sup> Draft Report: A Cross-Species Scaling Factor for Carcinogen Risk Assessment Based on Equivalence of mg/kg<sup>3/4</sup>/Day, 57 Fed. Reg. 24152 (June 5, 1992). For a brief discussion of the Habicht Committee, see Rosenthal et al., *supra* note [194200](#), at 358.

by it—and OSHA continues to rely on linear body-weight scaling.<sup>348</sup> As Justice Breyer points out, interagency coordination efforts “typically suffer from their ad hoc status . . . [and] rarely exist long enough, or have sufficient authority, to see that their recommendations are implemented.”<sup>349</sup>

Without a centralized body overseeing both the promulgation and implementation of guidelines, standardizing the assumptions employed in carcinogenic risk assessments across agencies are unlikely to occur. Guidelines could reduce the appearance of regulatory arbitrariness,<sup>350</sup> improve regulatory accountability,<sup>351</sup> mitigate parochial agency-specific tendencies to systematically under- or over-estimate risk, provide a clearinghouse for regulators and cancer researchers to ensure that risk assessments are in line with the latest advances, and allow for the meaningful comparison of risk-reduction programs across agencies.<sup>352</sup>

There are undoubtedly facets of risk assessments that are not amenable to centralization. The Red Book, for example, counsels against centralizing exposure assessment standards because the agencies could bring their expertise to bear on the likelihood of exposure in different settings.<sup>353</sup> It is nevertheless the case that “harmonization of [risk assessment] methods to the extent achievable would be beneficial.”<sup>354</sup>

### B. Distribution

Regulatory policies that maximize net benefits across the whole population often impose disproportionate costs on a subset of that

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<sup>348</sup> See GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 190.

<sup>349</sup> BREYER, *supra* note [116448](#), at 70.

<sup>350</sup> This is a major concern for Justice Breyer, who argues that the lack of public faith in regulatory decision-making is an important component of the vicious circle. *Id.* at 50. See also Rosenthal et al., *supra* note [194200](#), at 356-57 (noting that inconsistency in risk assessment is problematic because it calls into question the credibility of EPA’s decisions and undermines the legitimacy of the federal government’s risk assessment process”).

<sup>351</sup> See BREYER, *supra* note [116448](#), at 49 (“Their choices of default assumptions, to a degree, can respond to the desire of the President, Congress, Congressional staffs, interest groups, or the agencies themselves to appear especially careful to err on the safe side or alternatively to show sensitivity to economic costs.”).

<sup>352</sup> See *id.* at 65-66.

<sup>353</sup> See RED BOOK, *supra* note [302342](#), at 80. Consistent with this approach, “EPA program offices usually perform the exposure assessment step” of the risk assessment process. GAO REPORT ON RISK ASSESSMENT, *supra* note [328340](#), at 79.

<sup>354</sup> Rhomberg, *supra* note [329344](#), at 152 (emphasis added). John Graham, together with Laura Green and Marc Roberts, has made the most sustained academic critique of the use of guidelines, both within agencies and across agencies. GRAHAM ET AL., *supra* note [194200](#), at 208-11 (1988). Their argument is essentially that the implementation of uniform guidelines would hamper efforts at accountability: “When scientists don’t know much about cancer risks at low doses, making up some socially sanctioned number through an elaborate ritual only impairs our society’s capacity to hold regulators accountable for their policy judgments.” *Id.* at 211.

population.<sup>355</sup> As a result, regulations that appear attractive on cost-benefit grounds may be more difficult to justify on grounds of equity. Although Reagan's executive order did not include any reference to distribution,<sup>356</sup> recognition of distributional disparities led President Clinton to include in Executive Order 12,866 a directive requiring agencies to consider "distributive impacts" and "equity" as potential "costs" of regulations for cost-benefit purposes.<sup>357</sup> To that same end, Clinton also issued Executive Order 12,898 on environmental justice, which requires each agency to "identif[y] and addres[s] disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>358</sup> The ostensible hope was that agency consideration of distributional consequences would smooth some of the inequities generated by regulatory policymaking.

It has not worked out like that. Executive Order 12,866's admonition to quantify distributional effects as a "cost" of regulation borders on the incoherent,<sup>359</sup> and indeed OIRA takes the position that cost-benefit analysis should "ignor[e] distributional effects" in order to provide meaningful guidance to regulators.<sup>360</sup> Its position is fully consistent with the conventional view that cost-benefit analysis should "separate out the distributional issues and isolate the efficiency issue."<sup>361</sup> OIRA therefore requires agencies to consider distributional consequences separately from cost-benefit analysis.<sup>362</sup>

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<sup>355</sup> See Richard L. Revesz & Robert N. Stavins, *Environmental Law & Policy*, in THE HANDBOOK OF LAW AND ECONOMICS 24 (2005) (A. Mitchell Polinsky & Steven Shavell, eds.) ("Distributional issues arise . . . on both the benefit and cost sides of the ledger, and appear along a number of dimensions, including: cross-sectional (such as geographic, income, race, sector, and firm characteristics) and intertemporal (such as seasonal, annual, long term, and inter-generational).").

<sup>356</sup> See Hahn & Sunstein, *supra* note 2829, at 1525.

<sup>357</sup> E.O. 12,866 § 1(a).

<sup>358</sup> E.O. 12,898 (1994).

<sup>359</sup> It is not plausible that the Executive Order contemplated undertaking cost-benefit analysis using a system of distributional weights in which differences in wealth, and consequently differences in willingness to pay, would be taken into account in determining the benefits of a regulation. Although theoretically sound, there is a consensus that weighted cost-benefit analysis is too ethically freighted and complex to guide regulatory decision-making. See Revesz & Stavins, *supra* note 355367, at 24.

<sup>360</sup> CIRCULAR A-4, *supra* note 4547, at 2.

<sup>361</sup> Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 186 (2000). An absolutely rigid separation of efficiency and distributional concerns is in most circumstances impossible, however. When a consumer's demand for a good varies with income, a change in distribution will change the degree to which that consumer values some goods relative to other goods. *Id.*

<sup>362</sup> See CIRCULAR A-4, *supra* note 4547, at 14 ("Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency.").

Executive Order 12,898 is similarly ineffective as a mechanism for taking distribution seriously. Its language is wholly precatory and it is not a prominent feature of regulatory decision-making.<sup>363</sup> A number of congressional efforts to require meaningful consideration of the distributional consequences of regulations have stalled so far.<sup>364</sup>

The traditional economic perspective counsels that any undesirable distributional consequences of regulations should be allayed through tax-and-transfer policy.<sup>365</sup> So long as agencies maximize net benefits, more efficient mechanisms of redistribution than cumbersome regulatory recalibration are available to ensure that one group does not bear disproportionate regulatory costs.<sup>366</sup> This is particularly so because regulations are cumulative; one agency's efforts to shift a disproportionate regulatory burden from Group A to Group B may be offset by another agency's efforts to shift costs in precisely the opposite direction.<sup>367</sup> On this view, agencies should be insensitive to distributional consequences that can be better addressed centrally in light of the cumulative effect of regulations.<sup>368</sup>

The often-unspoken predicate to redistributive tax-and-transfer policies, however, is some analytically rigorous understanding of which groups bear the cumulative costs and benefits of regulations.<sup>369</sup> Put more succinctly, before the government can correct for distributional inequities it has to know what those inequities *are*.<sup>370</sup>

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<sup>363</sup> Matthew D. Adler, *Risk, Death, and Harm*, 87 MINN. L. REV. 1293, 1427 (2003) (“A consensus methodology for . . . measuring the degree of distributional skews with respect to health and safety, has yet to emerge.”).

<sup>364</sup> See, e.g., Environmental Justice Act, H.R. 2105, 103d Cong., 1st Sess. (1993); Environmental Equal Rights Act, H.R. 1924, 103d Cong., 1st Sess. (1993).

<sup>365</sup> See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); A. Hylland & Richard J. Zeckhauser, *Distributional Objectives Should Affect Taxes But Not Program Choice or Design*, 81 SCAND. J. OF ECON. 264 (1979).

<sup>366</sup> See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994 (2001) (noting that, in addition to the economic distortion of legal rules, “particular legal rules affect only relatively small fractions of the population and ordinarily constitute relatively crude means of redistribution”).

<sup>367</sup> See Adler & Posner, *supra* note 361-373, at 186 (“If wealth should be redistributed, independent efforts to do so by uncoordinated agencies seem less likely to succeed than adjustment of taxes and welfare benefits by Congress.”).

<sup>368</sup> This contrasts with the position of Robert Hahn and Cass Sunstein, who would allow agencies to proceed with rules that impose net costs if consideration of distributional effects justifies a departure. See Hahn & Sunstein, *supra* note 2829, at 1525-29.

<sup>369</sup> See Kaplow & Shavell, *supra* note 366-378, at 993 n.64 (“Although the evaluation of legal rules generally should not depend upon distributive consequences, policymakers (particularly legislators, who design the tax and transfer system) need to be aware of any significant distributive effects of legal rules overall, so that these can be taken into account in designing distribution policy.”).

<sup>370</sup> See, e.g., Richard J. Lazarus, *Pursuing “Environmental Justice*, 87 NW. U. L. REV. 787,

OIRA, with its almost exclusive focus on regulatory costs, has so far dodged any responsibility for developing protocols that agencies could use to determine the distributional impacts of a particular regulation—much less implemented any mechanisms to tally cumulative distributional impacts. In the same circular providing exhaustive guidance on the implementation of cost-benefit analysis, OIRA devoted just two paragraphs to a discussion of the distributional consequences of regulation.<sup>371</sup> Given the difficulty of disentangling who pays and who benefits from a particular regulation, OIRA's emphasis (or rather lack thereof) sends a clear message that consideration of distributional consequences is a peripheral concern at best. Regulatory agencies have gotten that message and, in general, pay little attention to distribution: for example, Cass Sunstein reports that “[i]n its voluminous materials on the effects of [its] new arsenic rule . . . the EPA does not say a word about whether poor people would bear the sometimes significant costs of the regulation.”<sup>372</sup> Although OIRA issues an exhaustive annual report tallying the costs and benefits of government-wide regulations, it issues no similar report on the distributional effects of regulation.<sup>373</sup> Without having a sense of what distributional inequities exist across the regulatory state, it is hard to understand just how Congress is supposed to flex its tax-and-transfer power to even them out.

In their recent work on welfare economics, Louis Kaplow and Steven Shavell recognize this problem but argue that “there may be no need separately to identify the redistributive effects of legal rules, especially of particular rules, because general data on the distribution of income and measures of the standard of living will tend to capture the aggregate of distributive effects from all sources.”<sup>374</sup> At least in the context of regulatory policymaking, however, they are too sanguine about the possibility of easily piecing together distributional effects. Most regulatory benefits are not market goods; benefits such as a decrease in the statistical chance of getting cancer do not in any realistic sense constitute part of an individual's measurable wealth, nor is it realistic to think that raw quality-of-life metrics will prove capable of disaggregating statistical reductions in cancer risk in particular groups. It is far more likely that, without sustained

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787-88 (1993) (“There has been virtually no accounting of how pollution controls redistribute environmental risks among groups of persons.”).

<sup>371</sup> See CIRCULAR A-4, *supra* note 4547, at 14.

<sup>372</sup> Sunstein, *supra* note 3638, at 2257-58.

<sup>373</sup> See, e.g., 2004 REPORT TO CONGRESS, *supra* note 9193. As a result of the mandate in the Regulatory Right-to-Know Act, Pub. L. 106-554, 31 U.S.C. 1105, the report does consider the effects of regulations on small businesses, state, local, and tribal governments, wages, and economic growth. Despite this nascent effort to understand the distributional consequences of regulation, such inquiries are quite limited in scope.

<sup>374</sup> Kaplow & Shavell, *supra* note 366378, at n. 64.



attention to the question of whether one group persistently bears disproportionate regulatory burdens, the distributive effect of our regulatory state will remain largely unknown.

It is also not satisfactory to assert that, over time, the more-or-less random distributional effects of hundreds of regulations over many years will cancel each other out, leaving the net redistributive effect of the regulatory state close to zero—the “everything comes out in the wash” theory. There is simply no persuasive reason to believe that benefits and burdens of regulations will fall randomly on different segments of the population.<sup>375</sup> Indeed, because “[a] policy’s political feasibility is influenced strongly by its distributional implications,”<sup>376</sup> public-choice pressures, political imbalances, and lingering discrimination all suggest that the distribution of benefits and burdens will be non-random in a substantial fraction of cases. The burden should therefore be on the proponents of the “wash” theory to demonstrate that distributional consequences even out over time. Until then, we do not have the luxury to shut our eyes to distributional issues in the comforting but unsupported hope that they will somehow evaporate.

Without understating the difficulty of distributional analysis, then—and it *is* a remarkably difficult enterprise<sup>377</sup>—we take as our touchstone the premise that an assessment of the distributional consequences of regulation must be a fundamental component of sound regulatory decision-making.<sup>378</sup> Because of its importance, the difficulty of distributional analysis calls not for ignoring distributional effects, but for a vigorous and coordinated effort to develop methodologies and techniques to aid regulatory agencies in assessing them. If we are serious about mitigating the distributional infirmities of cumulative regulations, efforts to standardize, promote, and aggregate distributional analyses are not only warranted, but absolutely critical.

A centralized agency committed to distributional analysis should take on three tasks. First, the agency should issue distributional analysis guidelines similar in form to OIRA’s guidelines on cost-benefit analysis.<sup>379</sup>

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<sup>375</sup> See Adler & Posner, *supra* note 361373, at 189 (“There is no reason to believe that the people who are injured by [regulatory] projects are usually the same as the people who are benefited by projects.”).

<sup>376</sup> See Revesz & Stavins, *supra* note 355367, at 48.

<sup>377</sup> For a sense of both the difficulties and the possibilities of distributional analysis, see Henry M. Peskin, *Environmental Policy and the Distribution of Benefits and Costs*, in CURRENT ISSUES IN ENVIRONMENTAL POLICY (ed. Paul R. Portney 1978). For a recent analysis in a similar vein, see Matthew E. Kahn, *The Beneficiaries of Clean Air Act Regulation*, 24 REG. MAG. NO. 1, at 22 (2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=267073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267073).

<sup>378</sup> See Sunstein, *supra* note 3638, at 2257 (“[Agencies] should be required to provide, if feasible, a distributional analysis showing exactly who would be helped and hurt by regulation.”).

<sup>379</sup> See CIRCULAR A-4, *supra* note 4547 (OIRA’s cost-benefit guidelines).

Those guidelines should lay out best practices for undertaking distributional analyses, along with default assumptions for agencies to employ when grappling with thorny recurring issues in distributional analysis. For example, the guidelines should provide breakdowns of the relevant subgroups on which distributional analysis should focus—asking every agency to consider the distributional effects on standardized deciles of the population based on income, wealth, race, or age—to facilitate inter-agency comparisons and an eventual aggregation of distributional effects.<sup>380</sup>

Second, the centralized agency should insist that agencies undertake distributional analyses, and should review those analyses with the same critical eye that OIRA currently reviews agencies' cost-benefit analyses.<sup>381</sup> This undertaking would send a powerful message that the chief executive takes distribution seriously, and ensure that agencies do not shirk their responsibility to ascertain which groups will bear the burdens and reap the benefits of regulations.

Third, the centralized agency should aggregate those agency analyses and make a rough tally of the benefits and burdens associated with regulatory rulemakings. Like its annual reports on the costs and benefits of rulemakings,<sup>382</sup> OIRA should provide those figures annually to Congress, giving it the information necessary to correct for any perceived inequities.

Whatever the particular methods employed, however, it is important for a centralized agency with command over the regulatory state to make distributional analysis a core feature of its agenda. There is no good reason that, for more than twenty years, the rhetoric of regulatory centralization has focused almost exclusively on the intricacies of cost-benefit analysis while leaving something as important as the often-unseen distributional consequences of our regulatory state largely unexamined.

#### CONCLUSION

Born out of a desire to minimize compliance costs, and not substantially reconsidered since its inception, our modern system of regulatory oversight continues to operate as a drag on the promulgation of beneficial regulations. In light of the paucity of theoretical or empirical support for the conclusion that the dominant pathology of the regulatory state is bureaucratic over-zealousness, it is long past time to rethink how centralized oversight should be structured to improve the efficiency,

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<sup>380</sup> For a discussion of the difficulty of choosing these categories, see Rae Zimmerman, *Issues of Classification in Environmental Equity*, 21 FORDHAM URB. L.J. 633, 665-67 (1994).

<sup>381</sup> On this point, we join Cass Sunstein in arguing that “[e]xisting executive orders for CBA should be amended to require a careful distributional analysis.” Sunstein, *supra* note 3638, at 2260.

<sup>382</sup> See, e.g., 2004 REPORT TO CONGRESS, *supra* note 9193.

rationality, and equity of the regulatory state. Our hope is that this article provokes a reconceptualization of centralized review, unmooring it from its historical roots in checking agency behavior and securing it to a more broadly conceived mission of harmonizing the operation of our regulatory apparatus.