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## Regleprudence – at OIRA and Beyond

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# ARTICLES

## Regleprudence—at OIRA and Beyond

NESTOR M. DAVIDSON & ETHAN J. LEIB\*

*There are significant domains of legality within the administrative state that are mostly immune from judicial review and have mostly escaped the attention of legal theorists. Although administrative law generally focuses on the products of agency action as they are reviewed by the judiciary, there are important aspects of regulatory activity that are legal in nature but rarely interrogated by systematic analysis with reference to accounts about the role and nature of law. In this Article, we introduce a category of analysis we call “regleprudence,” a sibling of jurisprudence and legisprudence. Once we explore some regleprudential norms, we delve into a case study—the Office of Information and Regulatory Affairs and the legal work it undertakes through regulatory review. We then suggest how more general attention to regleprudence can improve our understanding of important corners of the Executive Branch.*

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#### INTRODUCTION

Jurisprudence and legisprudence have had their days in the sun.<sup>1</sup> Yet so much of law in its daily working—authoritative decisions by government officials with binding public policymaking functions—remains immune from systematic analysis. Of course, what scholars and lawyers call “administrative law” shines much light into the labyrinthine regulatory state. The subject has long explored ways that many governmental decisions neither judicial nor legislative can be thought of as law and need to be controlled through procedural and substantive oversight, often by judges and sometimes through structural design. There remain, however, significant domains of lawmaking in the administrative state that continue to be hidden from view. Leveraging recent work on the role of

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1. For a discussion of the development of “legisprudence” as a conceptual frame distinct from jurisprudence, see Julius Cohen, *Towards Realism in Legisprudence*, 59 *YALE L.J.* 886 (1950).

precedent in the Federal Executive Branch,<sup>2</sup> we focus on the Office of Information and Regulatory Affairs (OIRA) nestled within the Office of Management and Budget (OMB) that oversees federal regulatory activity,<sup>3</sup> to introduce and explore some foundational questions of what we call “regleprudence”: the systematic analysis of regulation refracted through accounts of the role and nature of law.<sup>4</sup>

OIRA is a ripe case study for the development of the metes and bounds of regleprudence. This once-obscure institution has received substantial attention recently by legal scholars and political scientists,<sup>5</sup> with academics and practitioners beginning a conversation about how to link theories of regulation with the institutional design of regulatory review and oversight outside the courts. In this discourse, OIRA’s work of centralized regulatory review is rarely understood to be jurisgenerative, in part because its role in the Executive Branch is not subject to direct judicial review. But it is becoming increasingly clear that this is no longer a tenable way to think about the office, for OIRA practices law (even though it is staffed mostly by nonlawyers). Much of the oversight process by OIRA and the larger OMB bureaucracy in which the office sits is a de facto layer of lawmaking.<sup>6</sup> This is not to diminish from OIRA’s role in aggregating dispersed information across the Executive Branch and serving as the locus of “alternative dispute resolution” among agencies, and between agencies and the

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2. See, e.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2008); see also MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111–12 (2008).

3. OIRA was created by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521 (2012)), but its core raison d’être derives from a series of executive orders on regulatory review put in place by successive presidents since the Reagan Administration. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted in* 5 U.S.C. § 601 app. at 806 (2012); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 802–06 (2012); Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816–17 (2012).

4. This is a reworking of a standard definition of “legisprudence” from WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 587 n.a. (4th ed. 2007).

5. See, e.g., Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?*, 43 PRESIDENTIAL STUD. Q. 443 (2013); Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101 (2011); Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011).

6. See, e.g., Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014) [hereinafter Heinzerling, *Inside EPA*] (highlighting that OIRA has the capacity to displace statutory means and ends); Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006) [hereinafter Heinzerling, *Statutory Interpretation*] (same). OMB has a general counsel’s office in recognition that law is made there every day, but beyond that office, hundreds of non-attorney line officers in constant communication with federal agencies are in the business of making law.

White House.<sup>7</sup> Of course there are ways to supervise and manage an agency's rulemaking that fall shy of "law." OIRA, however, regularly decides a variety of legal questions, such as the proper parameters for cost-benefit analysis and notice-and-comment requirements throughout the administrative state, that have coercive impact on citizens' daily lives.<sup>8</sup> And the office likewise plays a sometimes-decisive role in interpreting statutory, constitutional, and treaty questions.<sup>9</sup> It is thus necessary to do more to establish how OIRA exercises this lawmaking function and how the office should treat the law it is making.<sup>10</sup>

Several critical inquiries have informed our research, including: How do staff within OIRA approach the question of precedent in, for example, interpreting Executive Orders 12,866 and 13,563, which structure OIRA's authority? Is there an "administrative common law" on questions such as what constitutes a "significant regulatory action" under the relevant executive orders, or is drawing the boundaries of OIRA's jurisdiction routinely a "political" decision? How does office staff take into account past OIRA practice more generally? Is practice memorialized on these questions, as occurs in the Office of Legal Counsel (OLC) within the Justice Department?<sup>11</sup> If there is a body of precedent, is it communicated to agencies in some way or does it arise only in the process of individual regulatory reviews? Does OIRA produce some corollary of "interpretive regulations" that further define the operative terms in the executive orders? If so, through what process? Do occasional letters from OIRA Administrators amount to a "common law"?<sup>12</sup> Assuming OIRA is not merely a place to sanitize brute political oversight of the administrative state, what are the norms of legality that constrain OIRA review?<sup>13</sup>

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7. See Sunstein, *supra* note 5, at 1840 ("Outside of the White House, numerous agencies are also involved, and they may well be the driving forces in the process that is frequently misdescribed as 'OIRA review.' It would not be excessive to describe OIRA as, in large part, an information aggregator.").

8. See *infra* sections II.B.1–2.

9. See *infra* section II.B.3.

10. As we discuss below, see *infra* section II.A, this legal function has long raised concerns about the proper allocation of delegated authority to interpret statutes within the Executive Branch. In 1981, the Justice Department's Office of Legal Counsel opined that OIRA's oversight of the regulatory process should be understood not to "include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation." Memorandum from Larry L. Simms, Acting Assistant Att'y Gen., Office of Legal Counsel, to David Stockman, Dir., Office of Mgmt. & Budget, Proposed Executive Order Entitled "Federal Regulation" 64 (Feb. 13, 1981), available at <http://www.justice.gov/sites/default/files/olc/opinions/1981/02/31/op-olc-v005-p0059.pdf>.

11. For details about OLC's memoranda on stare decisis, see Morrison, *supra* note 2, at 1452–53.

12. See *infra* sections II.C and III.A (discussing OIRA return, review, and prompt letters, and trans-substantive memoranda).

13. Any discussion of OIRA as a lawmaking institution begs the predicate question of whether we have a theory of "law" to defend that description. This is a thicket that raises many interesting questions, but we are operating in what might be described as a defensible heartland. As we spell out, OIRA is deeply engaged in interpreting legal documents, enforcing the commands of statutes and executive orders, and even applying treaties and foreign affairs doctrines. See *infra* section II.B.

These descriptive questions about OIRA also inform our normative inquiries into what would be a desirable system for disclosure, transparency, and use of precedent. Administrative law has for ages sought to articulate principles of judicial review of agency action;<sup>14</sup> regleprudence focuses instead on immanent concerns of legality that ought to structure administrative action even in the absence of that judicial oversight. Regleprudence focuses on law internal to the administrative state that is something more than mere politics or convention.<sup>15</sup> And we focus on *stare decisis* first—treating like cases alike—because it is often called “the most basic principle of jurisprudence,”<sup>16</sup> with transparency operating as a counterbalance, necessitating reason-giving about departures from precedent.<sup>17</sup>

The descriptive and normative questions we ask of OIRA limn the contours of regleprudence, and their answers have consequences for a much broader array of administrative practice. As to OIRA, regleprudential commitments to core rule-of-law values of consistency and transparency can help ground a reform agenda for the office.<sup>18</sup> Perhaps because OIRA does not have a long tradition of articulated reason-giving, inquiries into *stare decisis* and the alternative legitimating function of transparency are especially pressing in this context.

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Whatever the conceptual outer bounds of regleprudence beyond OIRA—which we hope will be fertile ground for future scholarship—the descriptive reality is that the case for OIRA as a legal institution is relatively straightforward. As to the deeper jurisprudential issues about how to draw the concept of law here, see *infra* section IV.B.

14. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940–41 (2011) (arguing that the “body of jurisprudence we know as administrative law” is built “on the appellate review model of the relationship between reviewing courts and agencies,” and tracing the history of that understanding of administrative law).

15. Conventions are a set of practices within the Executive Branch that have the property of regular observance but probably come shy of being treated by decision makers as law. See generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013). These conventions are, Vermeule argues, more than politics but less than law. *Id.* at 1181–94. Our argument for regleprudence is, in part, an effort to theorize about the more law-like side of conventions that are, in Vermeule’s terminology, “moral constraints.” *Id.* at 1189 (emphasis omitted). The regularity observed with respect to these constraints is not, we assert, a product of a “poorly understood” “psychological process[]” of “normative internalization,” *id.* at 1189–90, but flows from the logic of legality. Once it becomes clear that law is happening, behavioral regularity—precedent formation—follows.

16. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

17. Michael Livermore recently described the process of precedent within the bureaucracy at OIRA:

Given the many pressing demands faced by agencies and OIRA, and the need to avoid constant seeking of direction from political leadership, risk-averse and resource-conscious managers are likely to frown on attempts to raise issues that have already been dealt with in the past. If a prior decision can be cited as controlling the current matter, internal bureaucratic forces are likely to encourage that it govern, absent a compelling reason to revisit the matter.

Livermore, *supra* note 5, at 623. Livermore then makes the analogy to courts in a footnote. *Id.* at 623 n.60.

But notice Livermore’s framing of the use of precedent here: it is wholly instrumental and generated from the sociology of organizations (and the risks they create). Our hope is to focus on the use of precedent as a *legal* mechanism not just as a feature of managing bureaucracies.

18. See *infra* section III.B.

We thus endeavor to show what a focus on regleprudence can do to improve the process and substance of regulatory review, better calibrating political accountability and dynamic flexibility with the benefits of a deeper commitment to norms of legality.<sup>19</sup>

Ultimately, although we focus on OIRA as a case study, the analytic and normative efforts here should pay dividends throughout the work of the Executive Branch. All folkways and norms of agency practice that have real law-making functions (even when not otherwise controlled by the tentacles of administrative law proper) might usefully be seen through the lens we develop here. A new regleprudence has the potential to promote stability, accountability, and rule of law within the entire administrative state. By calibrating the rule-of-law values once illuminated by jurisprudence and legisprudence to the specific context of the administrative state, regleprudence promises a study of legality within a sphere that balances politics, deliberation, transparency, and consistency differently than its forbearers. Only by understanding that unique site for legality can we hope to make progress in thinking about how and whether *stare decisis* and other foundations of legal legitimacy ought to be given expression and respect within the regulatory state. That is regleprudence's agenda.

\* \* \*

Our Article proceeds as follows. In Part I, we explain why regleprudence as a research agenda for legal scholars could be illuminating. By drawing on the development of legisprudence and recent scholarly focus on precedent's function within the Executive Branch, we highlight the importance of sketching analytic principles for regleprudence and distinguish the domain of regleprudence from administrative law (perhaps overdrawing the distinction to render salient some unique features of the domain of regleprudence). In Part II, we turn to OIRA, outlining the myriad ways in which the office is engaged in core questions of procedural and substantive law. We also offer an empirical analysis of a little-studied repository of published OIRA comments to agencies, a rare glimpse inside the black box of OIRA's regulatory review. In Part III, we address a series of questions about how OIRA might function in a landscape more attentive to appropriate regleprudential priorities, focusing in particular on the function of *stare decisis* and transparency across the modalities of law-

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19. In suggesting a recalibration of precedent, transparency, and other rule-of-law values within OIRA, we recognize that there are costs as well as benefits to this shift. Indeed, at a time when critics are excoriating OIRA for its anti-regulatory bias and the ossification of regulatory review, *see, e.g.*, Lisa Heinzerling, *Who Will Run the EPA?*, 30 *YALE J. ON REG. ONLINE* 39 (2013), [jreg.common.yale.edu/files/2013/03/Heinzerling-EPA5.pdf](http://jreg.common.yale.edu/files/2013/03/Heinzerling-EPA5.pdf); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *DUKE L.J.* 1385 (1992), it is fair to argue that more transparency and disclosure would simply raise additional frictions. However, there is a difference between improving the structure of regulatory review and adding costs to individual instances of oversight, and we are advocating the former in the hope of improving the latter. *See infra* section III.B.3.

making evident in OIRA's work. Finally, in Part IV, we conclude by tracing the broader implications of our project, empirically and conceptually.

### I. WHY REGLEPRUDENCE?

In formulating the research agenda we aim to establish here, three foundational points are in order. Section I.A traces how we arrive at the concept of “regleprudence” from its forbearer in legisprudence and from legisprudence’s points of departure from jurisprudence. Legisprudence was conceived to move legal theorists away from the judiciary as the primary expositor of law, emphasizing statutes as an equally legitimate source of legal authority. Although administrative law recognizes that agencies make law, regleprudence adds Executive Branch lawmaking beyond those realms specifically policed by judicial oversight as no less important for legal scholars to include in theories of law. Section I.B explains why regleprudence is not simply a fancy way of talking about old administrative law themes. And section I.C lays the groundwork for the discussion to follow: we preview the role that *stare decisis* can play in legal institutions outside the courts as a way to craft a regleprudential lens into the particular bureaucracy we explore in Part II.

#### A. FROM LEGISPRUDENCE TO REGLEPRUDENCE

It is worth beginning by briefly reviewing why anyone thought we needed a category of “legisprudence” when we were seemingly doing just fine as legal scholars with conventional studies of jurisprudence.<sup>20</sup> For that story, one has to revisit Julius Cohen’s classic, *Towards Realism in Legisprudence*.<sup>21</sup> The seeds of regleprudence become apparent when we explore the etiology of Cohen’s departure from jurisprudence in the first instance.

Some might think of legisprudence as merely another name for studying court decisions about statutory interpretation; it seems common enough to use the term as a stand-in for statutory interpretation theory.<sup>22</sup> But its original

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20. Jurisprudence, of course, is itself a contested terrain. Here, we primarily use the term “jurisprudence” with a distinctly American accent, focusing on accounts and fundamental features of adjudication. However, the broader technical, academic understanding of jurisprudence—theoretical debates about the concept of law most generally—have deep significance for regleprudence (and likely vice versa). See *infra* section IV.B.

21. See generally Cohen, *supra* note 1.

22. See, e.g., William N. Eskridge, Jr., *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 867–69 (2013); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990); Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills*, 21 QUINNIPIAC L. REV. 907, 910, 915 (2003). Others have different usages of the term. See, e.g., Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 140 n.26 (2011) (“My use of the term ‘legisprudence’ is different from that of William Eskridge, who uses the word to refer to the subset of jurisprudence that deals with the way judges should interpret statutes (i.e. statutory interpretation). I use the term to refer to theories about how legislators should make law.” (citation omitted)).



ambition was somewhat grander.<sup>23</sup> Cohen sought nothing less than “a working partnership between ethics and science” in the domain of “legislative policy-making.”<sup>24</sup> Admittedly, this gambit was taken against a background of a deeply realist way of thinking about judicial decisionmaking. But Cohen was also writing at a time when lawyers had “the ingrained habit of regarding law as genuine only if it is labelled ‘judge-made.’”<sup>25</sup> So it seemed necessary to remind people that law was made, deliberated about, and implemented outside of courts. He wanted “no longer [to] give continued support to the ‘monopoly of the judicial point of view.’”<sup>26</sup>

Once Cohen made the (probably banal to modern eyes) observation that law is made outside the courts,<sup>27</sup> he proceeded to attempt to evaluate and constrain the forms of decisionmaking utilized by “Congress, . . . the state legislatures, . . . municipal councils, [and] administrative tribunals.”<sup>28</sup> Just as some realists (or those resisting them) tried to find ways to constrain judicial decisionmaking through ethics and science, Cohen saw that there was a need to do the same in the domain of legislative decisionmaking. To be sure, people are somewhat less disturbed by realism with respect to legislatures than they are about realism with respect to judges; but even in legislatures, legal principles must constrain lawmaking. Hence, legisprudence.<sup>29</sup>

The administrative state, too, requires systematic analysis with reference to the role and nature of law, although the case for it must be differently calibrated than it is for legislatures.<sup>30</sup> In some respects, the radical realism expected of political actors at the legislative level (republican theories requiring all legislators to seek the public good, notwithstanding)<sup>31</sup> makes the requirement for

23. To be fair, even Cohen showed signs of limiting his earlier ambitions when revisiting legisprudence three decades after his mission statement. *See generally* Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983).

24. Cohen, *supra* note 1, at 887 (emphasis omitted).

25. *Id.*

26. *Id.* at 888.

27. To be sure, even this observation could be missed by many first-year law students who continue to develop their lawyering skills largely through common law classes and excessive attention to appellate judges. *See generally* Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166 (2008) (arguing that the first-year curriculum ought to include a course on legislation and regulation).

28. Cohen, *supra* note 1, at 887.

29. *See generally id.* Although the reference to “administrative tribunals” in Cohen’s early articulation might suggest that regleprudence was already contemplated by Cohen, all of Cohen’s case studies that followed were in the domain of legislation. Indeed, in Cohen’s later exploration of the “problems and agenda” for legisprudence, the administrative state wasn’t much present at all. *See generally* Cohen, *supra* note 23.

30. Ed Rubin might say that all legislative and regulatory work is “policy and implementation,” so the same kinds of inquiries might be necessary at the legislative and regulatory levels: it is all policy science. *See generally* EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005). But since we have different expectations of ethics and science in the different instrumentalities of governance, individualized attention seems well advised.

31. One of us has developed arguments for constraining legislators through principles of ethical representation, which require pursuit of the public good. *See generally* Ethan J. Leib & David L. Ponet,

constraining principles of legality essential—but also natural and obvious. The administrative state is not as easy to reconcile with standard legisprudential concerns with controlling and channeling politics because it is most generally justified and legitimated through appeals to delegation and expertise.<sup>32</sup> These structural differences between legislators and administrators highlight why the animating principles and attendant practices of legisprudence and regleprudence might need to differ too.

Tethering legisprudential principles and constraints to actors to whom they are not expected to apply therefore seems ill-advised. Although there is an ineliminable flow of politics coursing through the veins of the administrative state (at OIRA and in the agencies it oversees), conventional political checks of elections or indirect checks like the “unitary executive thesis”—the notion that the President is supposed to control policymaking in the entire administrative state—do not justify the importation of principles of legisprudence down into the daily lawmaking within the regulatory agencies; they call for their own principles of legality.

In articulating the concept of legisprudence, Cohen wanted to help legislators learn and take seriously nonpolitical “facts,” and he wanted legislators to develop legal thinking that was not merely responsive to what a court might say. Ultimately, most modern commentators have similar hopes for nonpolitical fact gathering in our administrative agencies—and for agencies’ serious engagement with law that is not wholly generated from courts’ pronouncements. But the challenges to achieve these desiderata in the administrative state differ from the more purely legislative arena: accountability, mission, role, and deliberative structures all differ, militating towards a regleprudence that is inspired by Cohen’s call but is applied in an area that is not always understood as a locus of lawmaking. If anything, attention to norms of legality is even more urgent within the administrative state than in the legislature, with its direct democratic legitimacy. Nor must one have as realist a starting point as Cohen’s to see the urgency of nonpolitical facts as the center of what ought to be driving the administrative state’s expert work.

At the conceptual level, it may be that the same underlying questions supervene over jurisprudence, legisprudence, and regleprudence: What is law?

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*Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178 (2012); Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013); Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596 (2013).

32. See generally *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Of course, judicial review was sometimes thought to provide legitimation to the administrative state as well. See generally DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) (arguing that judicial review is a “necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid”). But as with *Chevron*’s once popular theory of legitimation through the democratic accountability of agencies, these other legitimation themes seem secondary to (or subsumed by) expertise and congressional delegation.

Who should be making it? Through what procedures? Who has authority to decide what? How ought previous legal decisions be treated by future lawmakers? How much candor and transparency is appropriate? Are political considerations appropriate to legal decisionmaking? But because the institutional actors that are the subjects of the theories have such different responsibilities within the tapestry of modern government, regleprudence will enable scholars and lawyers to focus on the unique kind of policymaking occurring in less obvious parts of modern lawmaking, which students of bureaucracy usually study more carefully than lawyers do.

B. ISN'T REGLEPRUDENCE LESS AWKWARDLY CALLED ADMINISTRATIVE LAW?

Even if readers have followed us this far, an obvious question presents itself: Why isn't "regleprudence" just swallowed by administrative law? Since the kinds of descriptive and normative inquiries likely to arise in regleprudence as the field develops will primarily be taken up by administrative lawyers, will likely be studied in administrative law courses, and will, to some extent, play themselves out within the doctrines and processes of administrative law, what work is done by isolating regleprudence for sustained attention?

In the first place, identifying and explicating the *legal* core of the administrative state's activities still seems urgent. The disadvantage of assuming administration and implementation is "technical" rather than *legal* tends to distract attention from the ways in which the administrative state's instrumentalities are sources of coercion in the daily lives of citizens.<sup>33</sup> From that coercion flows the need for a justificatory and legitimating framework; regleprudence invites this focus. Surely, this theorizing will find a home in administrative law.<sup>34</sup> Rules and adjudications are sufficiently legally oriented to have already gained the attention of administrative law scholars. But highlighting regleprudence's continuity with developed principles of jurisprudence and legisprudence more neatly emphasizes its deep tie to theories of *law* in particular.<sup>35</sup>

Although administrative law—the doctrines controlling the judicial review of the administrative state's processes and substantive decisions—should clearly be informed by regleprudential concerns, these central issues are too often secreted off in favor of doctrinal and positive questions about particular organic

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33. In Sunstein's recent article on OIRA, he uses the term "technical" twenty-three times in thirty-eight pages to describe the work done at the office. Sunstein, *supra* note 5. The word "technical" seems used to assuage us that the work is not lawmaking.

34. The closest category in the standard administrative law casebooks is "legal regularity," though it is unfortunately embedded within a discussion of the scope of judicial review. *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 928–38 (11th ed. 2011).

35. Although it may be hard to find people these days who would deny with a straight face that agencies make law, it wasn't always so. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

statutes, the requirements of the Administrative Procedure Act (APA),<sup>36</sup> or other structural or constitutional requirements of notice or due process. And regleprudential values are no doubt articulated by courts all the time, albeit crafted in a manner that presupposes the centrality of processes and decisions that can be reviewed by the judiciary. If legisprudence taught us anything, it taught us how to think about law without thinking like a court.

The realm of regleprudence, moreover, can encompass a variety of domains within the Executive Branch that administrative law tends to discount because they do not reflect final agency action subject to judicial review, in APA terms.<sup>37</sup> Administrative agencies engage in a wide variety of interpretive tasks—through guidelines, policy statements, opinion letters, manuals, circulars, and other avenues—that are not, in a formal sense, binding on the general public.<sup>38</sup> This often internally facing work of agencies nonetheless often operates in distinctly law-like ways, and can control agency actors and those who rely on them even if they are not (again as a formal matter) directly applicable to the general public or enforceable in court. And there are a number of institutions within the Executive Branch—including OIRA, the subject of our case study, but many others as well—that similarly are discounted in administrative law scholarship in the distinctively legal work they undertake because such work is subsidiary to final agency action subject to judicial review.<sup>39</sup> To wit, direct presidential action is excluded from APA review because courts have decided that the President is not an agency.<sup>40</sup> Yet executive orders and signing statements issued

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36. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

37. See 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”). Indeed, administrative law scholars argue that delegated agency authority in the realm of rulemaking is only legitimate to the extent that it is judicially reviewable. See, e.g., Peter L. Strauss, *Legislation That Isn’t—Attending to Rulemaking’s “Democracy Deficit,”* 98 CALIF. L. REV. 1351, 1357 (2010).

38. See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992). Much ink—judicial and scholarly—has been spilt on the question whether a given agency pronouncement is binding on the public or falls outside the APA’s requirements for notice and comment because they are, in the APA’s terms, “interpretative rules,” “general statements of policy,” or come within other APA exceptions. See, e.g., Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 569–85 (2012); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282–89 (2010); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322–23 (2001). That there is a realm of nonbinding agency action that is often understood to stand outside the formal bounds of administrative procedure does not mean that that realm does not possess important legal characteristics in many instances. On the other hand, we are not arguing that all agency action is necessarily sufficiently jurisgenerative to warrant examination in regleprudential terms. Much of what agencies and other Executive Branch institutions do in their day-to-day work is genuinely ministerial or technical.

39. We explore these and a number of other domains in greater depth after our case study on OIRA has set the framework for a regleprudential perspective. See *infra* section IV.A.

40. See *Dalton v. Specter*, 511 U.S. 462, 470 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

by the White House might be usefully viewed through a regleprudential lens. Other similar Executive Branch domains abound.<sup>41</sup>

A new conceptual framework under the banner of regleprudence, then, could supplement dominant modes of exploring lawmaking in the administrative state—and take as its first point of departure that the administrative state sometimes makes *law* throughout the Executive Branch, even when this law is not subject to judicial review most of the time. The fact that much of what regleprudence takes as its subject matter is not subject to routine judicial oversight does not, however, make it any less *legal*. That is not an embarrassment to the constitutional lawmaking of Schoolhouse Rock.<sup>42</sup> Rather, it is starting from where legisprudential theory left off: just as legal theorists needed to move off the judiciary as the sole source of law and welcome statutory law into the theoretical and practical core of what counts as law, so do we now need to move off thinking of the legislature and judiciary as exclusive sources of law and judicial oversight as the *sine qua non* of legality within the Executive Branch.

#### C. A PREFACE TO A STUDY OF STARE DECISIS IN THE ADMINISTRATIVE STATE

Once the concessions just outlined are made, which we expect few will reasonably reject, our first order of business is squarely on the table. If the internal workings of the administrative state are law, to what extent must they be rendered consistent with traditional rule-of-law values: consistency, predictability, transparency, and perhaps even, to return to Cohen's starting point, rationality? This inquiry welcomes a brief discussion about the potential role of *stare decisis* within the Executive Branch.

It is not entirely clear, to begin, that there should be a role for *stare decisis* within the workings of the Executive Branch. After all, although *stare decisis* seems essential to the rule of law in courts,<sup>43</sup> it might not be a general feature of the rule of law outside the judiciary. Indeed, Mark Tushnet goes further: “It seems *obvious* to me that *stare decisis* is not an essential aspect of the rule of law generally: legislatures can radically change the law or repeal entire bodies of law without offending rule-of-law principles. The rule-of-law justification of *stare decisis* therefore must be confined to the judicial practice.”<sup>44</sup> The role of the Executive is so tied up with the promise of energetic discretion and responsive politics that it is perhaps hard to see why past practice ought to be a reason for consistent action in the future within the Executive Branch. And

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41. See *infra* section IV.A.

42. Schoolhouse Rock!, *I'm Just a Bill*, YOUTUBE (Sept. 1, 2008), <http://www.youtube.com/watch?v=tyeJ55o3EI0>.

43. Admittedly, some think precedent is oversold as a virtue, even when they think abstract rule-of-law values are important. See, e.g., ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012); Abner S. Greene, *The Fit Dimension*, 75 *FORDHAM L. REV.* 2921 (2007).

44. Tushnet, *supra* note 2, at 1339 n.2 (emphasis added).

electoral transition, or even political winds changing between elections, may provide reason enough to depart from earlier positions. Indeed, the unitary executive thesis could be thought to rest on important democratic foundations that tie executive agency work to a democratically accountable chief executive.<sup>45</sup> Being bound to precedent is downright undemocratic under this account.

One could go further, from theory to practice, to make the point. Consider adjudication at the National Labor Relations Board (NLRB), as an example. One might have thought that an administrative agency like the NLRB, which has chosen to engage in the vast majority of its policymaking through adversarial litigation,<sup>46</sup> might feel constrained by the adjudicative, quasi-judicial setting to adhere to *stare decisis*. Yet it is not truly contested that political shifts—which in turn lead to new appointments at the NLRB—change substantive labor law in the United States, without deep respect for *stare decisis*.<sup>47</sup> Although this practice of adjudication without a commitment to *stare decisis* is not, to put it mildly, without its detractors,<sup>48</sup> it is some evidence that the Executive Branch—even when doing mostly adjudicatory work—can feel free to act without feeling the weight of precedent.<sup>49</sup> Thus, one needs an argument one way or another for whether *stare decisis* has a role within the workings of the administrative state.

Yet, Tushnet actually goes on to furnish reasons why the rule-of-law values that *stare decisis* embodies and promotes *do* have a place outside the judiciary. He explores, for example, the role of “super-statutes” that cannot easily be repealed or changed because of rule-of-law values that support the application

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45. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). For an alternative view emphasizing the dangers of the concentration of power in a unitary executive, see, for example, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

46. See generally *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

47. See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (Board may change its mind abruptly); *NLRB v. Viola Indus., Inc.*, 979 F.2d 1384, 1391 (10th Cir. 1992) (Board may change its mind); *NLRB v. Kostel Corp.*, 440 F.2d 347, 350 (7th Cir. 1971) (Board policies do not need to abide by *stare decisis* because industrial conditions change over time). For discussions of *stare decisis* at the NLRB, see generally Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707 (2006); Tanja L. Thompson & R. Bradley Mokros, ABA Section of Labor & Emp’t Law Annual CLE Conference, *As the Pendulum Swings: The Role of Precedent in National Labor Relations Board Decisions* (Nov. 4–7, 2009), <http://www.americanbar.org/content/dam/aba/administrative/laborLaw/meetings/2009/ac2009/159.authcheckdam.pdf>. For some examples of issues at the Board that change rapidly with new political appointments, see generally *Brown Univ.*, 342 N.L.R.B. 483 (2004); *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

48. See *Facilitating the Use of Rulemaking by the National Labor Relations Board* (Recommendation No. 91-5), 1 C.F.R. 305.91-5 (1992).

49. Consider also the well-known practice of the Internal Revenue Service (IRS) not to use prior “letter rulings” about specific taxpayer deduction claims as precedent. But letter rulings—unlike IRS “revenue rulings,” upon which taxpayers are supposed to rely—are self-consciously binding only on a specific taxpayer addressee. The letter rulings have little intra-agency review, and the U.S. Tax Court doesn’t recognize them as precedent in part because of their sheer numerosity. See *Davis v. Comm’r*, 65 T.C. 1014, 1022–23 (1976); STRAUSS ET AL., *supra* note 34, at 935–36.

of stare decisis in the legislative arena.<sup>50</sup> Indeed, the very legitimacy of governmental institutions can be tied up with their willingness to let past decisions stand undisturbed, enabling private parties and other governmental entities to rely on equal treatment in similar fact scenarios.<sup>51</sup> Thus, just as stare decisis is a bedrock practice for the rule of law in courts, it may also serve a similar bedrock function within the Executive Branch.

Even at the NLRB, “[o]f course, all responsible [Board] Members realize the value of stare decisis,”<sup>52</sup> even if departure from that practice is sometimes necessary to acclimate to fast-paced changes in politics or the economy.<sup>53</sup> It isn’t that stare decisis is always the paramount value in the Executive Branch; but it is worth getting clear when it has a place to constrain decisions.<sup>54</sup> And when stare decisis has to give way, the NLRB example reveals one of the most important substitutes for stare decisis to ensure a legitimate, stable, and reliable regime: reason-giving. To wit, “so long as the Board explains the reasons for its departure from past precedent,”<sup>55</sup> it gets flexibility.<sup>56</sup> This is not to suggest that the NLRB has struck the right balance among precedent, consistency, and reason-giving, but it is an example where stare decisis fights for relevance and is weighed against other values within the administrative state.

The general justifications for stare decisis are easy to state. The reasons courts hold prior decisions to be binding “without regard to the apparent

50. Tushnet, *supra* note 2, at 1343–46. *See generally* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

51. Kathryn Kovacs has argued that the APA serves as a “superstatute” for administrative procedure within the Executive Branch. *See generally* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. (forthcoming 2015).

52. *The National Labor Relations Board: Recent Decisions and Their Impact on Workers’ Rights: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions, S. Subcomm. on Emp’t & Workplace Safety, H. Comm. on Educ. & Labor, and H. Subcomm. on Health, Emp’t, Labor & Pensions*, 110th Cong. 16 (2007) (statement of Robert J. Battista, Chairman, Nat’l Labor Relations Bd.).

53. Notwithstanding courts’ routine passivity in the face of the fast pace of change of substantive law at the Board, there is severe judicial allergy to retroactive decisions. *See, e.g.*, Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987).

54. *Cf.* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114 (2011) (“Like all decisionmakers, agencies operate against the backdrop of their previous rulings. Some of those rulings may have been issued when the agency was staffed with personnel different, in both identity and worldview, from those who currently populate it. But even as personnel turn over, the agency’s prior positions remain relevant.”).

55. Thompson & Mokros, *supra* note 47, at 3.

56. This is consistent with broader practice across the Executive Branch. Indeed, as the Supreme Court has made clear, while administrative agencies are not generally required as a formal matter of administrative law to adhere to precedent, *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–16 (2009), agencies are under an obligation to provide a reasoned explanation for a change in position that acknowledges the fact of departure from prior agency pronouncements, *id.* at 515; *see also* Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (explaining that agencies have a duty to explain departures from prior decisions); Shaw’s Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36 (1st Cir. 1989) (same); NLRB v. Int’l Union of Operating Eng’rs, Local 925, 460 F.2d 589, 604 (5th Cir. 1972) (same).

correctness of the prior decision”<sup>57</sup> include: (1) the saving of decision costs;<sup>58</sup> (2) the independent value of consistency in governance because it supports legitimacy;<sup>59</sup> (3) providing a “focal point” to help coordinate action by decision makers and those living under law;<sup>60</sup> (4) the need to respect private parties’ reliance on settled law to order their affairs; and (5) the sense that law needs to be general and generalizable, something that is promoted when officials treat like cases alike. In short, it is not at all clear that these justifications are limited to the judicial sphere.

Indeed, one domain within the Executive Branch has recently received some attention for its internal norms of precedent: the Office of Legal Counsel.<sup>61</sup> In some ways, the case for stare decisis in OLC decisionmaking is straightforward. The actors in OLC—all lawyers—are self-consciously making legal decisions and writing legal opinions. These actors are intimately familiar with the jurisprudential firmament and emerge from a culture where people cite cases, statutes, and constitutional provisions and history to make arguments about legality. Standing by decisions made is the common law lawyer’s first principle. In fact, there are many historical instances of Attorneys General essentially treating the views of their predecessors as having stare decisis effect.<sup>62</sup> OLC similarly treats its previous decisions precedentially.<sup>63</sup> More, OLC even writes memos trying to specify how it intends to respect precedent in future exercises of counsel.<sup>64</sup>

Although OLC practice and policy confirm that stare decisis has a role outside the courts proper and within the President’s branch, it would still be reasonable to ask whether nonlawyers who do not usually reason by case and precedent do or should feel themselves bound by prior institutional decisions. Moreover, stare decisis’s contribution to the rule of law does come with important costs of its own, which the NLRB practice highlights. To wit, stare decisis can create tension with political accountability, creativity, innovation, dynamism, and flexibility by stuffily hewing to things already decided.

What this all means for the new regleprudence is both that “standing by things decided” should be on the agenda as a factor in decisionmaking within the Executive Branch, and that the costs of that mode of decisionmaking must be weighed in the balance too. As the NLRB example makes clear, however, rule-of-law values can be vindicated even without stare decisis, so long as transparent reason-giving is a priority.

It is also worth observing that there are many degrees (and forms) of stare

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57. Morrison, *supra* note 2, at 1449 (adapting Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987)).

58. See Tushnet, *supra* note 2, at 1339.

59. See *id.* at 1339 n.2. The legitimacy is both sociological and normative.

60. See *id.* at 1340 (drawing on THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57–58 (1980)).

61. See generally Morrison, *supra* note 2.

62. See Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 44.

63. See Morrison, *supra* note 2, at 1470–74.

64. See *id.* at 1475.



decisis, too, so the regleprudential question about precedent is not just a binary one.<sup>65</sup> One can ask not only whether an agency should embrace precedent or transparency (surely sometimes it should embrace both!), but what mode of stare decisis is best for the policy space. For example, it is routine to think that the common law version of stare decisis is departed from more easily in constitutional interpretation (where judges have the last word), while it is departed from with greater constraints when courts are interpreting statutes, given that legislatures can fix interpretive mistakes if any are made within the judiciary.<sup>66</sup> These modes of stare decisis do not exhaust the possibilities for thinking about how to reason from precedent. But they show that stare decisis can carry several meanings within the Executive Branch—and that even judicial actors have multiple approaches to stare decisis.<sup>67</sup> Calibrating the right mix of precedent, reason-giving, and transparency is all on the agenda for regleprudence.

In what follows below, we will explore OIRA's practices that we think are rightfully seen as forms of lawmaking. This will prime our inquiry of whether there is a role for stare decisis in the law made within the Executive Branch—or whether other kinds of regleprudential commitments to reason-giving or transparency could be a kind of substitute for stare decisis in some modalities of lawmaking at OIRA.

## II. LAW IN THE INFRASTRUCTURE OF THE ADMINISTRATIVE STATE: THE EXAMPLE OF OIRA

Just as judicial opinions are the most salient products of courts, and statutes the embodiment of the work of legislatures, the most visible output of the administrative state is final agency action, subject to judicial review. This domain, which includes not only rulemaking, but also enforcement, grant making, licensing, and similar agency activity, is the traditional purview of administrative law. Much of what the administrative state does, however, is never embodied in this type of definitive agency action, or, if it is judicially reviewable, only incidentally so. Instead, it operates through a significant institutional substrate, both vertically—through presidential oversight—and horizontally—through interagency relations.<sup>68</sup>

One of the most important institutions in this infrastructure of the administra-

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65. Cf. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) (discussing varying models of precedent).

66. See ESKRIDGE ET AL., *supra* note 4, at 630–31.

67. The role of precedent is even more complex institutionally within the judiciary, given the distinction between horizontal and vertical stare decisis, with courts at different levels and across the federal and state boundary treating prior decisions differently depending on those institutional relationships. There may be some analogy to this within the Executive Branch, given the formal (and informal) hierarchies within the administrative state.

68. For an excellent discussion of the landscape of contemporary interagency coordination, see Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); see also Bijal Shah, *Hidden Administrative Coordination: Interagency Adjudication in Immigra-*

tive state is the Office of Management and Budget, a much-studied but still poorly understood arm of the White House.<sup>69</sup> OMB develops the federal budget, supervises Executive Branch management rules, and, most controversially, coordinates regulatory review through its Office of Information and Regulatory Affairs. In this Part we outline OIRA's history and contemporary functions, then explain the significant, if largely hidden, array of lawmaking that is involved in the oversight and coordination that make up regulatory review.

#### A. OIRA AND ITS DISCONTENTS

##### 1. History and Contemporary Functions

Every modern President has struggled with the simple reality that a relatively small White House staff must oversee a federal administrative apparatus of scores of agencies.<sup>70</sup> The historical method of interacting through the Cabinet and other agency heads is hardly equal to this task, and administrations have for decades sought to rationalize their oversight.<sup>71</sup> In 1970, President Nixon established OMB as part of a sweeping effort to assert control over the federal bureaucracy.<sup>72</sup>

OMB, as it has evolved through various administrations, now serves as the primary institutional mechanism through which the President oversees the Executive Branch. OMB's responsibilities are divided roughly into three main functions, although there is much overlap among them.<sup>73</sup> The "management"

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*tion & Beyond*, 128 HARV. L. REV. (forthcoming 2015) (exploring interagency coordination in adjudication).

69. Although the most prominent, OMB is only one of a number of similar Executive Branch institutions. To pick one example, under the Small Business Regulatory Enforcement Fairness Act, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) are each required to convene interagency Small Business Advocacy Review Panels for proposed rules that will significantly impact a substantial number of small businesses. See Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 244, 110 Stat. 857, 867–68. These panels review proposed rules and hear comments from small business representatives, then convey that input back to the promulgating agency, where the panel's report is included in final rulemaking. See *id.*

70. If, as Cass Sunstein has noted, White House oversight is undertaken by "a 'they,' not an 'it,'" Sunstein, *supra* note 5, at 1840, then "they" are quite outnumbered by an Executive Branch that employs nearly three million people. See *Total Government Employment Since 1962*, U.S. OFFICE PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/> (last visited Nov. 8, 2014) (indicating that in 2011, the number of civilian Executive Branch employees was 2.756 million).

71. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272 n.96 (2001) ("From the point of view of administration, the history of the Presidency in the twentieth century has been the history of presidents' attempts to gain control of the sprawling federal bureaucracy." (quoting FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 329 (1994))).

72. President Nixon created OMB by reorganizing and expanding what had been the Bureau of the Budget, an agency originally established in the Treasury Department in 1921, and moved into the White House structure as part of the creation of the Executive Office of the President in 1939. See *id.* at 2275–76.

73. As one OMB official pithily noted, "The Government works using three things: money, people, and regulations; [federal agencies] must get all three through OMB." Jim Tozzi, *OIRA's Formative*

side of OMB focuses on issues such as human resources, procurement policy, information technology, financial management, and performance.<sup>74</sup> OMB's "budget"-side staff, which are centered on five subject-matter-focused resource management offices, oversee budget submissions by agencies and develop a unified Administration budget.<sup>75</sup>

OMB's third primary function is regulatory review, a process of agency oversight and interagency coordination that is managed by OIRA.<sup>76</sup> Congress established OIRA as an office within OMB in the Paperwork Reduction Act of 1980 (PRA),<sup>77</sup> which was one of a series of regulation-related statutes passed in the late 1970s and early 1980s. Congress initially tasked OIRA only with overseeing requests by federal agencies to collect information from the general public under the PRA.<sup>78</sup> Shortly after taking office in 1981, however, President Reagan issued Executive Order 12,291, which for the first time enabled review of all rules by OMB.<sup>79</sup> The Reagan Administration placed responsibility for this

*Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 65 (2011) (quoting an unnamed OMB official).

74. See Office of Mgmt. & Budget, *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, [http://www.whitehouse.gov/omb/organization\\_mission](http://www.whitehouse.gov/omb/organization_mission) (last visited Oct. 15, 2014). Much of OMB's management function is carried out through offices within OMB that, like OIRA, were established by statute. These other statutory offices are the Office of Federal Financial Management, the Office of Federal Procurement Policy, the Office of Electronic Government and Information Technology, and the Office of the U.S. Intellectual Property Enforcement Coordinator. See *id.*

75. See *id.* Other pockets within the reaches of OMB include the so-called Credit Crew, a group of staff responsible for overseeing programs that involve federal credit and debt collection, and the Legislative Reference Division, which reviews and coordinates the steady flow of Executive Branch legislative proposals, statements of administrative policy, congressional testimony by Administration officials, and presidential signing statements. See *id.*

76. Formal regulatory review had its origins with the Nixon Administration's efforts to curtail certain regulations by the Environmental Protection Agency and the Occupational Safety and Health Administration that President Nixon considered overly burdensome. One tool that the Nixon Administration used for this was circulating such regulations for comment within the Executive Branch. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1057 (2013); see also Memorandum from George P. Shultz, Dir., Office of Mgmt. & Budget, to the Heads of Dep'ts and Agencies, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety (Oct. 5, 1971), available at <http://www.thecre.com/ombpapers/QualityofLife1.htm> (establishing the Quality of Life Review program for "significant" proposed and final rules relating to "environmental quality, consumer protection, and occupational and public health and safety"). The Ford and Carter Administrations extended the practice of oversight and coordination to regulations that were projected to have an annual impact in excess of \$100 million. See William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76, 79 (2005). For an insider's history of regulatory review before OIRA's establishment, see Tozzi, *supra* note 73.

77. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501-3521 (2012)).

78. The PRA also assigned to OMB responsibility for "information policy, . . . statistical policy and coordination, records management, privacy, and automatic data processing and telecommunications," responsibilities that were all delegated to OIRA. Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1259 (2006).

79. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted in* 5 U.S.C. § 601 app. at 806 (2012). Technically, Executive Order

process in OIRA's hands.<sup>80</sup> As part of this OIRA review, the Reagan Executive Order also required all "major rule[s]," defined largely by economic impact, to be accompanied by a "Regulatory Impact Analysis," including a comparison of costs and benefits.<sup>81</sup>

In 1993, President Clinton issued Executive Order 12,866, replacing and greatly expanding Reagan's regulatory review Executive Order. The Clinton Executive Order establishes a framework that, with some modifications, still governs today.<sup>82</sup> Executive Order 12,866 requires each agency to provide OIRA with a list of the agency's planned regulatory actions, which was intended to set OIRA's review agenda.<sup>83</sup> The Executive Order then mandates that each agency provide OIRA with the text of rules at the proposal stage and with an accompanying regulatory assessment, with further OIRA review after notice and comment.<sup>84</sup> OIRA also reviews a variety of agency actions that are preliminary to rulemaking, such as advanced notices of proposed rulemaking, as well as

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No. 12,291 merely authorized OMB to review regulatory impact analyses as well as proposed and final rules, and included a provision that deemed such review completed if OMB did not meet certain deadlines. *See id.* § 3(e), 3 C.F.R. at 129.

80. President Reagan further expanded OIRA's role in regulatory review in 1985, requiring Cabinet departments and independent agencies to provide OMB with a "regulatory program" each year. *See* Copeland, *supra* note 78, at 1262 (citing Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 8, 1985)).

81. Exec. Order No. 12,291 § 3(a), 3 C.F.R. at 128.

82. To give a sense of scale of regulatory review, OIRA conducted a total of 424 reviews in 2012, the most recent year data are available, including pre-rule, proposed rule, interim rule, final rule, and notices. *See* MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 9 (2013). This was a significantly lower number than previous years, which had 740 reviews in 2011, 690 reviews in 2010, and 595 reviews in 2009. *Id.* Of the 424 reviews OIRA conducted in 2012, 83 were of "economically significant" regulatory actions. *Id.* at 11.

83. *See* Exec. Order No. 12,866 § 6(a)(3)(A), 3 C.F.R. at 645. The Executive Order called for agencies to identify which regulations were significant and provided that:

[T]hose not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order.

*Id.* The Executive Order further provides that "OIRA may review *only* actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section," *id.* § 6(b)(1), 3 C.F.R. at 646 (emphasis added), with "[r]egulatory action[s]," again, being only those agency actions "that promulgate[] or [are] expected to lead to the promulgation of a final rule or regulation," *id.* § 3(e), 3 C.F.R. at 641.

As a practical matter, however, OIRA reviews many agency pronouncements regardless of any formal designation of significance and, indeed, regardless of whether the pronouncement is even a "regulatory action" under the technical terms of the Executive Order. Indeed, OMB has indicated publicly that it reads the Executive Order much more expansively to include even non-binding agency notices and guidance documents. *See* Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts and Agencies, Guidance for Regulatory Review (Mar. 4, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf). This is, of course, plainly contrary to the text of Executive Order No. 12,866.

84. *See* Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. at 645–46.

agency notices related to grants and similar funding streams.<sup>85</sup>

OIRA review largely takes place through informal communications with the agencies involved, but the office is empowered under Executive Order 12,866 to issue “return letters.”<sup>86</sup> These are formal documents designed to apprise an agency of the grounds for OIRA’s concerns about a given regulatory action. Although the Executive Order mandates return letters whenever OIRA requires an agency to give further consideration of some agency action,<sup>87</sup> this mechanism for articulating concerns about the substance of regulations under review has traditionally been used rarely. Its use in the current Administration has almost entirely ceased, with one return letter issued in the Obama Administration’s first six years.<sup>88</sup>

The Clinton Executive Order was recently reaffirmed and modified by President Obama’s Executive Order 13,563,<sup>89</sup> which has the potential to complicate the regulatory process and the interpretive tasks facing OIRA in overseeing its mandates.<sup>90</sup> As a statement of overarching Executive Branch regulatory policy, the Obama Executive Order provides that agencies should:

- (1) [P]ropose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);

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85. *Cf. id.* § 6(b)(2)(A), 3 C.F.R. at 646. As noted, the scope of OMB oversight is much broader than what the Executive Order technically calls for. *See supra* note 83.

OIRA is supposed to review preliminary agency actions prior to rulemaking within ten days, and then review regulatory actions at each stage within ninety days, although the office is technically allowed a thirty-day extension. OIRA review, however, has slowed in recent years, and currently regularly fails to meet the Executive Order’s deadlines. *See generally* CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2013). Copeland notes that in the first half of 2013, the average period of time OIRA took to review regulatory actions was 140 days, with a number of rules languishing significantly longer. *Id.* at 24–25; *see also* Editorial, *Stuck in Purgatory*, N.Y. TIMES, June 30, 2013, [http://www.nytimes.com/2013/07/01/opinion/stuck-in-purgatory.html?\\_r=0](http://www.nytimes.com/2013/07/01/opinion/stuck-in-purgatory.html?_r=0) (decrying the length of OIRA review).

86. *See* Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. at 647. The Executive Order also provides for similar communication notifying agencies in writing at the end of the review period. *Id.* § 6(b)(2), 3 C.F.R. at 646. As discussed below, in addition to these return and review letters, OIRA also issues “prompt” letters on OIRA’s initiative to suggest regulatory action by an agency. *See infra* section II.C.

87. *See* Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. at 647 (“For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying.”).

88. *See* Letter from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Lisa P. Jackson, Adm’r, Env’tl. Prot. Agency (Sept. 2, 2011), *available at* [http://www.whitehouse.gov/sites/default/files/ozone\\_national\\_ambient\\_air\\_quality\\_standards\\_letter.pdf](http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf). For the practice in prior administrations, *see OIRA Return Letters*, OFFICE INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoReturnLetters> (last visited Oct. 15, 2014); *see also* Sunstein, *supra* note 5, at 1846 n.37 (noting that the use of return letters is “highly unusual in any administration”).

89. Exec. Order No. 13,563 § 1(b), 3 C.F.R. 215, 215 (1994), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012).

90. Cass Sunstein has described Executive Order 13,563 as “a kind of mini-constitution for the regulatory state.” Sunstein, *supra* note 5, at 1846.

- (2) [T]ailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- (3) [S]elect, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- (4) [T]o the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- (5) [I]dentify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.<sup>91</sup>

OIRA primarily undertakes case-by-case regulatory review, but also occasionally is part of an OMB process of promulgating general, forward-looking guidance to agencies on regulatory issues.<sup>92</sup> For example, in 2003, OMB issued Circular A-4, providing general direction to all executive agencies “to assist analysts . . . by defining good regulatory analysis” and “standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”<sup>93</sup> The Circular sets forth what OMB (and presumably OIRA) considers the core elements of regulatory analysis, providing detailed guidance for each of the elements.<sup>94</sup>

In short, Executive Orders 12,866 and 13,563 together create an oversight structure as well as articulate a regulatory philosophy through which OIRA seeks to manage the administrative state.

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91. Exec. Order No. 13,563 § 1(b), 3 C.F.R. at 215. One longtime career OIRA staffer has noted that ensuring compliance with the predecessor statement of regulatory philosophy in Executive Order 12,866 is as much a part of OIRA oversight as ensuring compliance with the Executive Order’s analytical requirements. See Donald R. Arbuckle, *OIRA and Presidential Regulatory Review: A View from Inside the Administrative State* 39 (May 2008) (unpublished manuscript) (on file with authors).

92. OIRA also occasionally, although rarely, enters into memoranda of understanding with specific agencies. See, e.g., Memorandum of Understanding Between the Office of Info. & Regulatory Affairs and the U.S. Commodity Futures Trading Comm’n (May 9, 2012), available at [http://www.whitehouse.gov/sites/default/files/omb/inforg/regpol/oira\\_cftc\\_mou\\_2012.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforg/regpol/oira_cftc_mou_2012.pdf) (governing sharing of technical assistance); Memorandum of Understanding Between the Office of Advocacy, U.S. Small Bus. Admin. and the Office of Info. & Regulatory Affairs (Mar. 19, 2002), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/oira1.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/oira1.pdf).

93. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 1 (2003) [hereinafter CIRCULAR A-4]; see also OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, REGULATORY IMPACT ANALYSIS: A PRIMER 1 (2011).

94. See CIRCULAR A-4, *supra* note 93, at 2 (calling for each regulatory impact analysis to include “(1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis”).

## 2. Critiques of OIRA

OIRA—and the larger OMB oversight structure in which the office operates—has come under sustained criticism almost since the inception of regulatory review. The full panoply of these critiques does not bear extensive rehearsing, but to understand OIRA's legal functions, it is useful to outline three of the most prominent.

The first is that OIRA undertakes regulatory review with an antiregulatory bias. This is hardly surprising, given the roots of regulatory review in the Nixon Administration's hostility to environmental, occupational safety, and consumer regulation.<sup>95</sup> But the charge continues to have significant salience across administrations. OIRA is frequently seen as an institution inclined to slow, water down, or block regulation, ostensibly under the banner of cost-benefit analysis.<sup>96</sup> This concern is bolstered by the relative expertise that agencies tend to have in their areas of particular focus, compared to an oversight institution that is tasked with trying to rationalize almost the entire range of Executive Branch subject matters.<sup>97</sup>

Closely related to this critique is a second concern, that the seemingly neutral process through which OIRA oversees regulation involves an inappropriate degree of political interference from the White House.<sup>98</sup> This argument privileges the idea of regulation as the realm of expertise, with rulemaking understood as a process of informed, technical decisionmaking, as opposed to the expression of any administration's political preferences. This has generated a significant debate over the relative political insulation of OIRA versus the agencies that is difficult to resolve empirically.<sup>99</sup> Regardless of whether OIRA or the agencies are more subject to capture, however, OIRA has always been viewed with some suspicion for acting as a conduit for naked political preferences in the regulatory arena.

Finally, especially under recent OIRA administrators, the office has come under attack for its lack of transparency and consistency. As Lisa Heinzerling

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95. See *supra* note 76.

96. OIRA's defenders take the opposite view, arguing that OIRA review actually improves, rather than undermines, the regulatory work of the agencies. See, e.g., Sunstein, *supra* note 5. A related argument in favor of OIRA review is that the office's function is less to improve the quality of regulation or coordinate potential conflicts among agencies, but to police fidelity to the President's policy agenda. See Livermore, *supra* note 5, at 616.

97. Again, the obverse of this concern is that OIRA's panoptical perspective may add value in reviewing and modifying any individual regulation. Cf. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1084–85 (1986) (defending OMB substantive regulatory input). Moreover, much of OIRA review actually involves interagency coordination, which allows the office to draw on the expertise of cognate agencies particularly focused on the subject matter of any given regulation.

98. See Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1070–71 (1986); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083, 1104–05 (2007).

99. See, e.g., Livermore & Revesz, *supra* note 5; see also Livermore, *supra* note 5 (arguing that cost-benefit analysis actually serves to preserve agency independence).

has noted, Executive Order 12,866 imposes a number of requirements on OIRA designed to mandate disclosure of critical aspects of its decisionmaking, yet OIRA regularly and blithely ignores these mandates.<sup>100</sup> OIRA is often seen as a black box, not only to the general public, but more immediately to the agencies whose day-to-day work requires OIRA approval.<sup>101</sup> There are few mechanisms that enable OIRA to provide public reasons for its regulatory decisions,<sup>102</sup> which ultimately undermines OIRA's legitimacy.

All of these concerns have direct bearing on why rule-of-law values matter in the internal workings of the administrative state.

## B. LEGAL INTERPRETATION IN REGULATORY REVIEW

Scholars have largely focused on OIRA's coordination and policy oversight, but much of what OIRA does as a functional matter implicates questions of law on a range of substantive and procedural issues.<sup>103</sup> Although Congress has formally delegated to OIRA only responsibility for the PRA,<sup>104</sup> a statutory role that requires some measure of interpretive discretion, a much broader swath of OIRA's work involves legal interpretation. Indeed, Executive Order 12,866 specifically delegates to OIRA the job of ensuring that "each agency's regulatory actions are consistent with applicable law."<sup>105</sup> This places legal interpretation at the core of regulatory review, although largely outside of judicial review.<sup>106</sup>

As this section describes, the legal questions that OIRA staff—the overwhelming majority of whom are not lawyers—are regularly called upon to grapple with can be roughly grouped into three categories: questions of OIRA jurisdiction and authority; trans-substantive doctrines of administrative practice; and substantive questions of law.

### 1. Interpretations of OIRA Jurisdiction and Authority

As noted, Executive Orders 12,866 and 13,563 establish the parameters of OIRA oversight and raise a number of textual questions that determine whether, to what extent, and with what kind of scrutiny a given agency action will be

100. See Heinzerling, *Inside EPA*, *supra* note 6, at 330–33.

101. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (2009).

102. For a discussion of these limited mechanisms, see *infra* section II.C.

103. Cf. Sunstein, *supra* note 5, at 1842 n.18 ("OIRA helps to ensure that . . . legal issues receive careful attention and that those within the executive branch believe that regulatory actions are consistent with law. Indeed, this responsibility is central.")

104. See *supra* note 77 and accompanying text.

105. Exec. Order No. 12,866 § 6(b), 3 C.F.R. 638, 646 (1994), *reprinted in* 5 U.S.C. § 601 app. at 805 (2012).

106. See Livermore & Revesz, *supra* note 5, at 1339 ("The OIRA oversight process is entirely internal to the executive branch: it was established by executive order . . . and is not subject to judicial review.")



reviewed. For example, the question of whether an action is subject to review at all turns on the definition of “regulation” or “rule” in Executive Order 12,866, as well as the meaning of the term “regulatory action.” The Executive Order echoes the definition in the APA of “rule” (and, in turn, “rulemaking”), although there are some differences.<sup>107</sup> The Executive Order’s definition of “rule,” like the APA’s, has several exceptions, including “rules that pertain to a military or foreign affairs function of the United States,”<sup>108</sup> and rules “that are limited to agency organization, management, or personnel matters.”<sup>109</sup> The Executive Order’s definition of “regulatory action,” moreover, covers “any substantive action . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation,”<sup>110</sup> a sweeping scope that is, again, open to interpretation.

Beyond the threshold jurisdictional question of regulatory action *vel non*, Executive Order 12,866 nominally divides OIRA oversight into two categories.<sup>111</sup> A first, general subset of regulatory actions is defined as “significant,” a determination of which can be triggered by four criteria:

“Significant regulatory action” means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.<sup>112</sup>

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107. The APA generally defines a “rule” to be “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency,” 5 U.S.C. § 551(4) (2012), while Executive Order 12,866 defines a “rule” or “[r]egulation” to be “an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency,” Exec. Order No. 12,866 § 3(d), 3 C.F.R. at 641.

108. *Id.* § 3(d)(2), 3 C.F.R. at 641.

109. *Id.* § 3(d)(3), 3 C.F.R. at 641.

110. *Id.* § 3(e), 3 C.F.R. at 641.

111. Under the Congressional Review Act, moreover, Congress may disapprove “major” regulations through a theoretically expedited legislative process, 5 U.S.C. § 801(a)(3) (2012), and the statute delegates the task of delineating “major” rules to OIRA based on a definition that parallels President Reagan’s Executive Order’s definition, *compare id.* § 804(2), *with* Exec. Order No. 12,291 § 1(b), 3 C.F.R. 127, 127–28 (1982), *revoked by* Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted in* 5 U.S.C. § 601 app. at 806 (2012). *See generally* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009).

112. Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641–42.

If a rule is deemed “significant” under any of these standards, the determination triggers OIRA review and the requirement for regulatory impact analysis. Within that general category, if a rule is determined to be economically significant under the first part of the analysis, the required scope of cost–benefit analysis is more extensive.<sup>113</sup>

These are all important definitional issues because whether an agency action constitutes “[r]egulatory action” and, more importantly, whether that regulatory action is “significant” or “economically significant” determines OIRA jurisdiction,<sup>114</sup> and agencies can have legitimate reasons for checking OIRA overreach. Not surprisingly, OIRA and the agencies it oversees do, in fact, disagree about the interpretation of these terms.<sup>115</sup>

## 2. Trans-Substantive Administrative Process

The APA and individual statutory regimes govern many aspects of agency process.<sup>116</sup> But OIRA polices a variety of administrative processes not addressed by the APA or other statutes, forming a body of law that is comprised of a combination of quasi-statutory law based in executive orders and a type of administrative common law.

*a. Cost–Benefit Analysis.* Since OIRA’s founding, one central focus of regulatory review has been the requirement that agencies prepare, and OIRA review, regulatory impact analyses.<sup>117</sup> Executive Order 12,866 and OMB’s Circular A-4 specify requirements for this exercise.<sup>118</sup> Under the Executive Order, all signifi-

113. Roughly one-sixth to one-seventh of the regulatory actions OIRA reviews fall into this category of extra scrutiny for economic significance. See Copeland, *supra* note 78, at 1257.

114. Or, at least these definitions should carry such significance, if OIRA is following the Executive Order with fidelity. For a discussion of ways in which OIRA departs from the plain language of the Executive Order in practice, see *infra* notes 233–34 and accompanying text.

115. As some evidence of this tussle, one can look to the FAQs that OMB has issued to clarify the scope of the Executive Order. Under the question of economic significance, OMB has clarified:

The \$100 million threshold applies to the impact of the proposed or final regulation in *any one year*, and it includes *benefits, costs, or transfers*. (The word “or” is important: \$100 million in annual benefits, *or* costs, *or* transfers is sufficient; \$50 million in benefits and \$49 million in costs, for example, is not.)

OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, REGULATORY IMPACT ANALYSIS: FREQUENTLY ASKED QUESTIONS (FAQs) 1 (2011) [hereinafter FAQs]. The alternative trigger for economic significance—that a regulation would “adversely affect in a material way” the economy or sectors of the economy—is even harder to pin down and open to interpretation. OIRA has noted that “[t]here are no hard-and-fast rules here,” *id.*, but has not offered much general guidance beyond that.

116. The APA sets forth procedures for the most common form of rulemaking, called “informal” in the nomenclature of the statute for its notice-and-comment requirements, as well as formal rulemaking and various forms of hybrid and negotiated approaches to rulemaking. See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

117. See Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128–30, *revoked by* Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted in* 5 U.S.C. § 601 app. at 806 (2012) (Regulatory Impact Analysis and Review).

118. See Exec. Order No. 12,866 § 6(a)(3), 3 C.F.R. at 645–46; CIRCULAR A-4, *supra* note 93.

cant rules must include an “assessment of the potential costs and benefits of the regulatory action,”<sup>119</sup> while, as noted, the analysis for economically significant regulations must be elaborated in much greater depth.<sup>120</sup>

Although regulatory impact analysis is a practice dominated by economists and public policy generalists, both at OIRA and the agencies, the terms and nuances of cost–benefit analysis present a *legal* interpretive exercise. What counts as a “cost”? How are regulatory “benefits” determined? Over what period of time and with how much uncertainty should any of these factors be measured?<sup>121</sup> Moreover, under the Executive Orders and related guidance documents, cost–benefit analysis involves sometimes quite difficult trade-offs between quantifiable and nonquantifiable values. As Executive Order 13,563 notes, “each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”<sup>122</sup> All of these issues not only raise deeply contestable normative questions,<sup>123</sup> but are also exactly the kinds of interpretive determinations that legal actors are typically called upon to make in other contexts.<sup>124</sup>

*b. Structural Oversight.* OIRA oversight also includes the management of the mechanics of regulation at the agencies. Agencies are required, for example, to develop a unified agenda of all pending regulations and a “Regulatory Plan” that should specify “the most important significant regulatory actions.”<sup>125</sup> The idea of this, and related authority under the two primary regulatory review Executive Orders, is to create a planning mechanism that, if operating according

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119. Exec. Order No. 12,866 § 6(a)(3)(B)(ii), 3 C.F.R. at 645.

120. Specifically, for this subset of regulations, agencies must provide greater detail on, and quantification of, “benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias),” *id.* § 6(a)(3)(C)(i), 3 C.F.R. at 645, as well as a similar analysis of anticipated costs such as, “but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment[.]” *Id.* § 6(a)(3)(C)(ii), 3 C.F.R. at 646. Finally, the Executive Order requires an assessment of “potentially effective and reasonably feasible alternatives” and “an explanation why the planned regulatory action is preferable to the identified potential alternatives.” *Id.* § 6(a)(3)(C)(iii), 3 C.F.R. at 646.

121. OMB Circular A-4 and related documents, *see, e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, AGENCY CHECKLIST: REGULATORY IMPACT ANALYSIS (2010); FAQs, *supra* note 115, elaborate in some detail on these questions.

122. Exec. Order No. 13,563 § 1(c), 3 C.F.R. 215, 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 817 (2012).

123. There is significant literature on the normative valence of cost–benefit analysis. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

124. Cost–benefit analysis, as such, is not subject to direct judicial review, but to the extent that the quality of an agency’s Regulatory Impact Analysis is a factor in APA review, then unlike much of what OIRA does, its handiwork in this context has an external check.

125. Exec. Order No. 12,866 § 4(c)(1), 3 C.F.R. at 642.

to their description, places OIRA at the center of a coordination process that includes elevating conflicts between agencies to the vice-presidential level.<sup>126</sup>

OIRA likewise manages government-wide deregulatory exercises that implicate questions of law. Executive Order 13,563, for example, instructs federal agencies to develop a plan for reviewing—and possibly modifying or repealing—existing rules, both immediately after the Executive Order’s effective date and on an ongoing basis.<sup>127</sup> Specifically, the Executive Order mandates that “agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”<sup>128</sup> This process, overseen by OIRA, requires legal interpretation of statutory commands, not only the calculation of the costs and benefits of rules.<sup>129</sup>

There are a number of structural or process-oriented statutes, moreover, that are regularly implicated in OIRA review, regardless of the substantive domain of any given regulatory exercise. These include the National Environmental Policy Act,<sup>130</sup> the Regulatory Flexibility Act,<sup>131</sup> the Unfunded Mandates Reform Act,<sup>132</sup> and others.<sup>133</sup> Again, all of these structural statutes present legal

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126. Originally, the Clinton Executive Order placed this conflict-resolution responsibility with the Vice President. *See id.* § 4(c)(5), 3 C.F.R. at 643. In 2002, President Bush issued Executive Order 13,258, removing this responsibility from the Vice President, but in 2009, President Obama revoked the Bush-era Executive Order, restoring Executive Order 12,866 to its prior form. *See* Exec. Order No. 13,497 §§ 1–2, 3 C.F.R. 218, 218 (2010), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012) (revoking Exec. Order No. 13,422, 3 C.F.R. 191 (2008) and Exec. Order No. 13,258, 3 C.F.R. 204 (2003)).

127. Executive Order 13,563, although relatively recent, has the potential to add to both the complexity of agency regulatory process and, more immediately for our purposes, to the interpretive tasks facing OIRA in overseeing its mandates.

128. Exec. Order No. 13,563 § 6(a), 3 C.F.R. 215, 217 (2012), *reprinted in* 5 U.S.C. § 601 app. at 817 (2012).

129. For an earlier version of this deregulatory mandate, see Exec. Order No. 12,866 § 5, 3 C.F.R. at 644. The Obama Administration followed up Executive Order 13,563 with Executive Order 13,579, which urged independent agencies to conduct the same kind of retrospective review of regulations. *See* Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. at 817–18 (2012).

130. National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2012).

131. Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2012). Under the Regulatory Flexibility Act, agencies must conduct “regulatory flexibility” analyses for proposed and final rules that will have “significant economic impact on a substantial number of small entities.” *Id.* § 602(a).

132. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.). The Unfunded Mandates Reform Act requires agencies to assess the costs and benefits of federal mandates that could require expenditures by state, local, and tribal governments or by the private sector of more than \$100 million in any one year. *See id.*

133. Similarly, several crosscutting executive orders can be implicated in regulatory review. For example, Executive Order 13,132, on “Federalism,” *see* Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 app. at 807–09 (2012), contains procedural and substantive requirements for agency regulation that raise questions of interpretation. It mandates that agencies “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” *Id.* § 6(a), 3 C.F.R. at 209. It also requires agencies to interpret statutes that have “federalism implications” to narrow the scope of potential preemption when issuing rules, *see id.* § 4(a), 3 C.F.R. at 208, as well as to grant states as much “administrative discretion” as allowed under the terms of any cooperative federalism regime, *id.* § 3(c), 3 C.F.R. at 208. Similar crosscutting executive orders potentially at issue in rulemaking cover

questions implicated in the process of OIRA oversight; when OIRA takes a stand on an answer, it is in the process of making law.

*c. Procedural Administrative Common Law.* Although the APA sets the framework for specific administrative procedures,<sup>134</sup> OIRA has undertaken, through a kind of administrative common law, to push agencies to undertake various forms of notice and comment or other public input for actions that would not otherwise formally require such procedures.<sup>135</sup> For example, OIRA regularly encourages agencies to seek comment on informal agency actions that come shy of regulation, as well as when agencies are drafting regulatory impact analyses.<sup>136</sup> Similarly, when the Obama Administration promulgated Executive Order 13,563, then-OIRA Administrator Cass Sunstein outlined public-outreach procedures that he recommended accompany each agency's look-back review of existing rules.<sup>137</sup>

### 3. Substantive Legal Interpretation

Perhaps the most controversial (and least studied) aspect of OIRA's legal work involves the office's interpretation of substantive statutes delegated to specific agencies in the course of regulatory review. When President Reagan first directed OIRA to engage in regulatory review under Executive Order 12,291, there was sufficient concern in the White House about the legality of this involvement in substantive regulation that OLC was called upon to opine. In concluding that OIRA review did not unconstitutionally infringe on the authority that Congress had delegated to agencies, OLC emphasized that:

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issues such as takings, *see* Exec. Order No. 12,630, 3 C.F.R. 554 (1989), *reprinted in* 5 U.S.C. § 601 app. at 800–01 (2012); environmental concerns, *see* Exec. Order No. 13,045, 3 C.F.R. 198 (1998), *reprinted in* 42 U.S.C. § 4321 app. at 280–82 (2012); and energy impacts, *see* Exec. Order No. 13,211, 3 C.F.R. 767 (2002), *reprinted in* 42 U.S.C. § 13201 app. at 1306–07 (2012), among others.

134. For an argument that courts regularly engraft procedural requirements in contravention of the simplicity contemplated by the APA, *see* Kovacs, *supra* note 51.

135. Moreover, OIRA sets—and monitors closely—the form and format of proposed and final rules, requiring, for example, statements that proffer “a reasonably detailed description of the need for the regulatory action,” Exec. Order No. 12,866 § 6(a)(3)(B)(i), 3 C.F.R. 638, 645 (1994), *reprinted in* 5 U.S.C. § 601 app. at 805 (2012), and Circular A-4 has elaborated on the possible justifications at length, *see* CIRCULAR A-4, *supra* note 93, at 3–7 (detailing the range of possible market failures and other justifications that might prompt regulation, including “improving the functioning of government, removing distributional unfairness, or promoting privacy and personal freedom”).

136. *See, e.g.*, CIRCULAR A-4, *supra* note 93, at 3 (“As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues.”).

137. *See* Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep’ts and Agencies, and of Indep. Regulatory Agencies, Executive Order 13563, “Improving Regulation and Regulatory Review” 5–6 (Feb. 2, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>. We will discuss the lawmaking function of OIRA-issued memoranda below. *See infra* section III.A.

The [Executive] [O]rder does not empower the Director [of OIRA] . . . to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions. . . . [The Director’s] power of consultation would not . . . include authority to reject an agency’s ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation.<sup>138</sup>

Although this analysis predated the Supreme Court’s *Chevron* decision, it is consistent with one foundational principle the Court identified in that case as undergirding deference, which is that Congress selects specific agencies to be “entrusted to administer” particular statutory regimes.<sup>139</sup> The principle is also reflected in Executive Order 12,866, which explicitly disclaims the displacement of agency legal authority.<sup>140</sup>

However, notwithstanding OLC and the Executive Order’s reservation of ultimate decisionmaking in the agencies, and *Chevron*’s structural implications, it is inevitable that not only in terms of cost–benefit analysis, but also in evaluating the substantive merits of individual regulations, OIRA must engage with the substantive statutory provisions on which any given regulation is based.

To give one example, Lisa Heinzerling has written about modifications made by OIRA to a rule promulgated by the Environmental Protection Agency (EPA) interpreting the Clean Air Act.<sup>141</sup> The rule covered water-intake structures used to cool power plants, and was being issued under Section 316(b) of the Act. That provision requires, in relevant part, that any standards governing such structures “reflect the best technology available for minimizing adverse environmental impact.”<sup>142</sup> EPA, however, withdrew its proposal to use what was, Heinzerling argues, the best available technology for certain particularly harmful power plants because of a cost–benefit interpretation of the statute by OIRA that took a significantly different view of the meaning of the operative clause than EPA had.<sup>143</sup>

OIRA involvement in the interpretation of primary substantive legislation can be innocuous or not, depending on the nature of OIRA’s intervention, and there is a longstanding debate about comparative institutional competence as between

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138. Memorandum from Larry L. Simms, *supra* note 10, at 63–64.

139. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). On *Chevron*’s structural implications for presidential oversight, compare Kagan, *supra* note 71 (arguing in favor of presidential authority to direct administrative action under statutory delegations to agencies), with Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that congressional delegation to an agency does not imply delegation to the President).

140. Exec. Order No. 12,866 § 9, 3 C.F.R. at 649 (“Nothing in this order shall be construed as displacing the agencies’ authority or responsibilities, as authorized by law.”).

141. See generally Heinzerling, *Statutory Interpretation*, *supra* note 6.

142. 33 U.S.C. § 1326(b) (2012).

143. See Heinzerling, *Statutory Interpretation*, *supra* note 6, at 1104–06.

OIRA and the agencies that we need not rehearse here.<sup>144</sup> Our observation is simply that weighing in on substantive statutory questions in the course of regulatory review is part and parcel of the day-to-day work of the office. Indeed, OIRA's internal institutional organization reflects this fact in so far as the "desks" within the office are divided along subject-matter lines, with desk officers on the front line focused only on individual clusters of statutes and subject areas.<sup>145</sup> Although regulatory review is trans-substantive at a conceptual level, OIRA's interactions with the agencies it oversees at a practical level is statute and subject specific,<sup>146</sup> inevitably involving OIRA in a wide range of statutory questions.

### C. TRACES OF OIRA COMMON LAW

Having laid the foundation for understanding OIRA's lawmaking function at the conceptual level, it is possible to find clear and telling traces of this aspect of the office's functioning in the letters it publishes and makes public, which together give some indication of a type of common law produced by the office.<sup>147</sup> Since 2001, OIRA has kept a repository of letters online, ostensibly to enable the public to better understand its work and to comply with its organizational executive orders.<sup>148</sup> The repository includes three types of letters: prompt letters, which are written to encourage agencies to undertake an action or repeal an existing regulatory requirement; return letters, which communicate when OIRA believes a rule must be withdrawn or delayed; and review letters, which are written when OIRA does not delay or reject a rule but still wants an agency to engage in further consideration or deliberation about issues pertinent to a rulemaking.<sup>149</sup>

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144. See, e.g., DeMuth & Ginsburg, *supra* note 97, at 1084–85 (defending OMB substantive regulatory input).

145. See Sunstein, *supra* note 5, at 1845 ("OIRA consists of about forty-five people, almost all of them career staff. They work in a number of 'branches,' covering different agencies and areas. Each of the branches has a number of 'desk officers,' all with substantive expertise in one or more areas, and spending most of their time on one or a small number of agencies. For example, a desk officer may specialize in regulatory actions from the Department of Health and Human Services, the Department of Transportation, or the Environmental Protection Agency.").

146. See *id.* See generally U.S. GEN. ACCOUNTING OFFICE, GOA-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003).

147. For another effort to describe "the common law of 13,563," see Heinzerling, *Inside EPA*, *supra* note 6, at 342–64.

148. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 34–35 (4th ed. 2006); Brian Mannix, *A Mid-Term Grade for the Bush Administration*, REG., Fall 2003, at 12, 14–15; Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, CQ WKLY. (Feb. 23, 2002), <http://0-library.cqpress.com.gull.georgetown.edu/cqweekly/weeklyreport107-000000384218>.

Some agencies, moreover, also make publicly available redline/strikeout versions of rules that reflect changes made in response to OIRA comments. These can be accessed on the regulations.gov website, although they are not catalogued individually or referenced in any kind of systematic way. These redlines provide another window into the "common law" of OIRA oversight, but they are difficult to decode, given that the redlines include no explanation or substantive discussion.

149. All three categories of letters in the repository can be accessed at the following link: <http://www.reginfo.gov/public/jsp/EO/letters.jsp>. As noted above, see *supra* section II.A, the repository

Here, we peer into OIRA's nearly three-and-a-half decade experience overseeing regulatory review, with an emphasis on the second Bush Administration, when the office appeared to take somewhat more seriously the mandate in Executive Order 12,866 to provide written statements on return and review.<sup>150</sup> Given the breadth of OIRA's work, the repository is a small sample, to be sure.<sup>151</sup> However, despite that much of what OIRA does—including its law-making work—is “informal” and does not leave a public paper trail, there is still good reason to pursue the more “formal” actions it takes that are publicly memorialized in the repository of opinion and decision letters.<sup>152</sup>

A careful reading of the entire repository, despite the limitations of this empirical record, yields several insights into OIRA's legal function.<sup>153</sup> As a

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reflects those provisions of Executive Order 12,866 that require OIRA to provide statements in writing to agencies when completing a regulatory review or returning a proposed regulatory action to an agency for further review. *See* Exec. Order No. 12,866 § 6(b)(2)–(3), 3 C.F.R. 638, 646–47 (1994), *reprinted in* 5 U.S.C. § 601 app. at 805 (2012).

150. There are no letters in the repository prior to 2001 and two since 2009: a 2010 review letter regarding a rule from the National Highway Traffic Safety Administration (NHTSA) on tire fuel efficiency consumer information and, as noted above, a 2011 letter to the EPA on ambient air quality standards. As a result, the overwhelming bulk of the evidence in the repository comes from the two terms of the second Bush Administration.

151. The entire repository contains only twenty-eight return letters, sixteen review letters, and sixteen prompt letters, representing a tiny fraction of the regulatory review underway during the relevant period. For a thorough look at the data on OIRA's review work, see Acs & Cameron, *supra* note 5.

152. Although this repository constitutes the best publicly available evidence of an articulated rationale behind OIRA's work product, the lack of detail in the letters is striking. The rules that OIRA was reviewing were often lengthy and no doubt in many cases required months, if not years, of staff work at the agencies seeking to promulgate them. This suggests that the real substance of OIRA's review even in an era during which return and review letters were more common was conveyed through the kinds of informal and in-person communications that dominate the OIRA–agency relationship. The record can only provide surface traces of much more complex underlying dynamics.

153. The repository also sheds some light on common misperceptions about OIRA. For example, although OIRA is sometimes thought to have special target agencies for its work, the repository shows letters addressed to a diverse set of agencies: the Food and Drug Administration, EPA, Department of the Interior, NHTSA, National Institutes of Health, Office of Federal Housing Enterprise Oversight, Marine Administration, OSHA, U.S. Department of Agriculture (USDA), Department of Homeland Security, Department of Energy, NASA, Department of Housing and Urban Development, Department of Defense, General Services Administration, Department of Veterans' Affairs (VA), Small Business Administration, Social Security Administration (SSA), Federal Railroad Administration, Federal Aviation Administration, and NOAA.

Moreover, as some evidence that not all of OIRA's actions are deregulatory despite the office's reputation, several prompt letters (all of which, as noted, were promulgated during the second Bush Administration) could be classified as supportive and inviting of more regulation rather than less regulation. *See, e.g.*, Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, and James L. Connaughton, Chairman, Council on Env'tl. Quality, to Benjamin Grumbles, Acting Assistant Adm'r, Office of Water, Env'tl. Prot. Agency (Apr. 16, 2004), *available at* [http://www.reginfo.gov/public/prompt/epa\\_beach-act-2000.pdf](http://www.reginfo.gov/public/prompt/epa_beach-act-2000.pdf) (encouraging federal regulation to create safe beaches rather than waiting for state-based standard setting); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Craig Manson, Assistant Sec'y for Fish & Wildlife & Parks, Dep't of the Interior (Aug. 21, 2003), *available at* [http://www.reginfo.gov/public/prompt/doi\\_mapping\\_prompt.pdf](http://www.reginfo.gov/public/prompt/doi_mapping_prompt.pdf) (encouraging an initiative to provide more information to the public); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Claude A. Allen, Deputy Sec'y, Dep't of Health & Human



threshold matter, many of the letters confirm that OIRA focuses its review on cost-benefit analysis and often asks agencies for more careful or different regulatory impact analysis, occasionally challenging the methodology employed by the expert agency.<sup>154</sup> Moreover, recent efforts by scholars to study OIRA's activities have emphasized the degree to which the office focuses on inter-agency coordination in the Executive Branch.<sup>155</sup> There is substantial evidence in the repository that this is indeed a focus of OIRA's work.<sup>156</sup> And scholarly

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Servs., and James R. Moseley, Deputy Sec'y, Dep't of Agric. (May 27, 2003), *available at* [http://www.reginfo.gov/public/prompt/prompt\\_dietary\\_052703.pdf](http://www.reginfo.gov/public/prompt/prompt_dietary_052703.pdf) (encouraging the USDA and HHS to update dietary guidelines and the food pyramid); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Armando Falcon, Jr., Dir., Office of Fed. Hous. Enter. Oversight (May 29, 2002), *available at* [http://www.reginfo.gov/public/prompt/prompt\\_ofheo052902.html](http://www.reginfo.gov/public/prompt/prompt_ofheo052902.html) (encouraging more rules to control the corporate governance of Fannie Mae and Freddie Mac, as well as new disclosure obligations); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Tommy G. Thompson, Sec'y, Dep't of Health & Human Servs. (Sept. 18, 2001), *available at* [http://www.reginfo.gov/public/prompt/hhs\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html) (encouraging the FDA to pay more careful attention to the regulation of trans fatty acids); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to John Henshaw, Assistant Sec'y of Labor, Occupational Safety & Health Admin. (Sept. 18, 2001), *available at* [http://www.reginfo.gov/public/prompt/osh\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/osh_prompt_letter.html) (encouraging OSHA to require automatic external defibrillators in the workplace).

154. *See, e.g.*, Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to Marcus C. Peacock, Deputy Adm'r, Evtl. Prot. Agency (July 3, 2008), *available at* [http://www.reginfo.gov/public/return/Epa\\_Return\\_letter\\_7\\_03.pdf](http://www.reginfo.gov/public/return/Epa_Return_letter_7_03.pdf) (returning rule to justify costs of pesticide container recycling regulation); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Kay Cole James, Dir., Office of Pers. Mgmt. (Dec. 18, 2002), *available at* [http://www.reginfo.gov/public/return/opm\\_return\\_letter.pdf](http://www.reginfo.gov/public/return/opm_return_letter.pdf) (returning rule on federal employee health benefits because of cost-benefit analysis inadequacies); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Kirk K. Van Tine, Gen. Counsel, Dep't of Transp. (Feb. 12, 2002), *available at* [http://www.reginfo.gov/public/return/dot\\_revised\\_tire\\_rtnltr.pdf](http://www.reginfo.gov/public/return/dot_revised_tire_rtnltr.pdf) (returning rule on tire pressure for cost-benefit analysis inadequacies); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Bill Hawks, Dep't of Agric. (Jan. 29, 2002), *available at* [http://www.reginfo.gov/public/return/usda\\_ee\\_for\\_nonhuman\\_primates\\_rtnltr012902.html](http://www.reginfo.gov/public/return/usda_ee_for_nonhuman_primates_rtnltr012902.html) (returning rule for agency's failure to address "likely significant economic impacts"); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Jeffrey R. Holmstead, Assistant Adm'r, Evtl. Prot. Agency (Sept. 24, 2001), *available at* [http://www.reginfo.gov/public/postreview/spark\\_engines\\_epa\\_sep2001.html](http://www.reginfo.gov/public/postreview/spark_engines_epa_sep2001.html) (disagreeing with the way the EPA decided how to measure costs, citing earlier OMB guidelines that should control); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep't of Transp. (Sept. 14, 2001), *available at* [http://www.reginfo.gov/public/return/boeing737\\_return\\_letter.html](http://www.reginfo.gov/public/return/boeing737_return_letter.html) (returning rule for cost-effectiveness analysis); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Acting Gen. Counsel, Dep't of Transp. (Aug. 8, 2001), *available at* [http://www.reginfo.gov/public/return/wetlines\\_return\\_letter3.html](http://www.reginfo.gov/public/return/wetlines_return_letter3.html) (returning rule for agency's failure to justify the costs of a regulation).

155. *See* Sunstein, *supra* note 5, at 1840, 1850. *See generally* Freeman & Rossi, *supra* note 68.

156. *See, e.g.*, Letter from Donald R. Arbuckle, Deputy Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep't of Transp. (July 20, 2001), *available at* [http://www.reginfo.gov/public/return/faa\\_repair\\_stations\\_rtnltr-dot.html](http://www.reginfo.gov/public/return/faa_repair_stations_rtnltr-dot.html) (returning rule to encourage inter-agency coordination); Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm'r, Evtl. Prot. Agency (July 10, 2008), *available at* [http://www.reginfo.gov/public/postreview/OIRA\\_letter\\_to\\_EPA\\_7\\_10\\_08.pdf](http://www.reginfo.gov/public/postreview/OIRA_letter_to_EPA_7_10_08.pdf) (encouraging interagency coordination on greenhouse gas emission regulation); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep't of Transp. (June 13, 2003), *available at* <http://www.reginfo.gov/public/return/return-dot061303.pdf> (returning rule for failure to coordinate on ocean vessel regulation); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to

work on OIRA's role in promoting public participation in notice-and-comment processes and elsewhere<sup>157</sup> is also reinforced by the repository.<sup>158</sup>

Yet what is most relevant for regleprudence are the many and varied traces of engagement with legal questions across the repository. In terms of trans-substantive administrative process, several prompt letters acknowledge that the kind of analysis OIRA wants to see from regulatory agencies is not necessarily required by the organic statutes that agencies administer.<sup>159</sup> This record highlights the way the Executive Orders that structure OIRA's work are sources of law that affect the application of statutory law. In some cases, OIRA presses against statutory commands and even considers legislative fixes for rules it disfavors.<sup>160</sup>

Indeed, a substantial number of letters take explicit positions on statutory interpretation, using the leverage the office has during regulatory review to enforce particular (and potentially contestable) interpretations that may have been congressionally delegated to the agency being reviewed rather than to OIRA.<sup>161</sup> Sometimes OIRA is seeking to enforce statutory commands under

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Bill Hawks, Under Sec'y for Mktg., Dep't of Agric. (Jan. 29, 2002), *available at* [http://www.reginfo.gov/public/return/usda\\_ee\\_for\\_nonhuman\\_primates\\_rtnltr012902.html](http://www.reginfo.gov/public/return/usda_ee_for_nonhuman_primates_rtnltr012902.html) (encouraging interagency coordination); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Tim McClain, Gen. Counsel, Dep't of Veterans Affairs (Sept. 28, 2001), *available at* [http://www.reginfo.gov/public/return/va\\_exclusions\\_rtnltr.html](http://www.reginfo.gov/public/return/va_exclusions_rtnltr.html) (enforcing VA-DOJ interagency coordination in VA rulemaking).

157. *See* Sunstein, *supra* note 5, at 1846, 1870.

158. *See, e.g.*, Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep't of Transp. (Aug. 22, 2003), *available at* [http://www.reginfo.gov/public/return/return-dot\\_rspa.pdf](http://www.reginfo.gov/public/return/return-dot_rspa.pdf) (returning rule for public comment); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Tracy Mehan, Assistant Adm'r for Water, Envtl. Prot. Agency (Oct. 2, 2001), *available at* [http://www.reginfo.gov/public/return/epa\\_water\\_quality\\_rtnltr.html](http://www.reginfo.gov/public/return/epa_water_quality_rtnltr.html) (returning rule for more input from the states); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Mary Glenn-Croft, Special Advisor to the Comm'r, Soc. Sec. Admin. (Sept. 27, 2001), *available at* [http://www.reginfo.gov/public/return/ssa\\_4rules\\_rtnltr.html](http://www.reginfo.gov/public/return/ssa_4rules_rtnltr.html) (returning rule to enable the SSA to seek comments).

159. *See, e.g.*, Letter from Donald R. Arbuckle, Acting Adm'r & Deputy Adm'r, Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm'r, Envtl. Prot. Agency (Apr. 13, 2006), *available at* [http://www.reginfo.gov/public/prompt/Prompt\\_Letter\\_to\\_EPA.pdf](http://www.reginfo.gov/public/prompt/Prompt_Letter_to_EPA.pdf).

160. *See* Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to William T. Hawks, Under Sec'y for Mktg. & Regulatory Programs, Dep't of Agric. (Oct. 27, 2003), *available at* [http://www.reginfo.gov/public/postreview/ltr\\_to\\_william\\_hawks\\_on\\_cool.pdf](http://www.reginfo.gov/public/postreview/ltr_to_william_hawks_on_cool.pdf) (recognizing that the relevant "statute severely restricts USDA's discretion in crafting this rule," but still pressing the agency to focus more on costs to consumers than the statute requires and considering "legislative relief"); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Kirk K. Van Tine, Gen. Counsel, Dep't of Transp. (Oct. 22, 2001), *available at* [http://www.reginfo.gov/public/postreview/faa\\_tcas\\_rtn10-22-01.html](http://www.reginfo.gov/public/postreview/faa_tcas_rtn10-22-01.html) (recognizing that the "FAA has limited alternatives available under the statute," but still urging it to focus more on costs and consider whether implementing the statute is reasonable); *see also* Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Michael P. Jackson, Deputy Sec'y, Dep't of Transp. (Sept. 28, 2001), *available at* [http://www.reginfo.gov/public/postreview/coastguard\\_tank\\_level\\_rtnltr.html](http://www.reginfo.gov/public/postreview/coastguard_tank_level_rtnltr.html) (recognizing that the agency is trying to meet a judicial deadline for a rule required by statute, but still focusing on the failure to establish net benefits with the rule choice and considering "legislative relief").

161. *See* Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm'r, Envtl. Prot. Agency (July 10, 2008), *available at* <http://www.reginfo.gov/public/>

statutes such as the Unfunded Mandates Reform Act<sup>162</sup> or the Paperwork Reduction Act that gave birth to OIRA.<sup>163</sup> But more often the office seems to be using its power under relevant executive orders or OMB circulars to interpret substantive statutes within an agency's delegated domain and expertise.<sup>164</sup>

Let us give some examples: In an October 30, 2007 return letter addressed to the General Counsel of the Department of Commerce regarding a rule about coastal fisheries proposed by the National Oceanic and Atmospheric Administration (NOAA), the then-OIRA Administrator stated that one ground for returning the rule was that it was "not consistent with NOAA's authority to regulate the fishery under the Magnuson-Stevens Act."<sup>165</sup> Similarly, in a September 14, 2001 return letter addressed to the General Counsel of the Department of Veterans Affairs, one ground for rejecting a proposed rule that would have created presumptions about whether a potential beneficiary was entitled to

postreview/OIRA\_letter\_to\_EPA\_7\_10\_08.pdf (taking a position on the substantive reach of the Clean Air Act); Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency (Mar. 12, 2008), *available at* [http://www.reginfo.gov/public/postreview/Steve\\_Johnson\\_Letter\\_on\\_NAAQs\\_final\\_3-13-08\\_2.pdf](http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf) (same); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep't of Transp. (Feb. 11, 2004), *available at* [http://www.reginfo.gov/public/return/dot\\_return\\_vessels.pdf](http://www.reginfo.gov/public/return/dot_return_vessels.pdf) (returning rule because of inconsistency with congressional intent); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep't of Transp. (June 13, 2003), *available at* <http://www.reginfo.gov/public/return/return-dot061303.pdf> (returning rule because regulation "establish[es] requirements inconsistent with Congressional intent"); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Hector V. Barreto, Adm'r, Small Bus. Admin. (Feb. 11, 2002), *available at* [http://www.reginfo.gov/public/return/sba\\_eidl\\_rtnltr.html](http://www.reginfo.gov/public/return/sba_eidl_rtnltr.html) (returning a rule in part because the proposal threatens to take a congressional program beyond its "original intent"); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Tim McClain, Gen. Counsel, Dep't of Veterans Affairs (Sept. 14, 2001), *available at* [http://www.reginfo.gov/public/return/permanent\\_and\\_total\\_disability\\_va\\_return\\_letter.html](http://www.reginfo.gov/public/return/permanent_and_total_disability_va_return_letter.html) (returning rule because of concerns about the right interpretation of statutes administered by the VA).

162. *See* Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Kirk K. Van Tine, Gen. Counsel, Dep't of Transp. (Feb. 12, 2002), *available at* [http://www.reginfo.gov/public/return/dot\\_revised\\_tire\\_rtnltr.pdf](http://www.reginfo.gov/public/return/dot_revised_tire_rtnltr.pdf) (enforcing Unfunded Mandates Reform Act but also appealing to the authority of Executive Order 12,866).

163. *See* Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Mary Glenn-Croft, Special Advisor to the Comm'r, Soc. Sec. Admin. (Sept. 27, 2001), *available at* [http://www.reginfo.gov/public/return/ssa\\_4rules\\_rtnltr.html](http://www.reginfo.gov/public/return/ssa_4rules_rtnltr.html) (returning rule to the Social Security Administration to enforce compliance with the Paperwork Reduction Act).

164. *See* Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to Gus Coldebella, Acting Gen. Counsel & Regulatory Policy Officer, Dep't of Homeland Sec. (Aug. 13, 2008), *available at* [http://www.reginfo.gov/public/return/DHS-CBP\\_Coastwise\\_Cruises\\_Return\\_Letter.pdf](http://www.reginfo.gov/public/return/DHS-CBP_Coastwise_Cruises_Return_Letter.pdf) (returning rule to enforce agency compliance with Executive Order 12,866 and OMB Circular A-4); Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to John J. Sullivan, Gen. Counsel, Dep't of Commerce (Oct. 30, 2007), *available at* [http://www.reginfo.gov/public/return/return\\_doc\\_20071030.pdf](http://www.reginfo.gov/public/return/return_doc_20071030.pdf) (returning rule to enforce compliance with Executive Order 12,866, as amended by Executive Order 13,422); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Hector V. Barreto, Adm'r, Small Bus. Admin. (Feb. 11, 2002), *available at* [http://www.reginfo.gov/public/return/sba\\_eidl\\_rtnltr.html](http://www.reginfo.gov/public/return/sba_eidl_rtnltr.html) (returning rule to encourage agency to comply with OMB Circular A-129).

165. Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to John J. Sullivan, Gen. Counsel, Dep't of Commerce (Oct. 30, 2007), *available at* [http://www.reginfo.gov/public/return/return\\_doc\\_20071030.pdf](http://www.reginfo.gov/public/return/return_doc_20071030.pdf).

disability benefits was that the rule “would contradict the statutory authority and intent of the program.”<sup>166</sup> This goes beyond what Lisa Heinzerling observed when she was able to obtain the record of OIRA’s review of EPA’s power-plant cooling rule,<sup>167</sup> in that these traces of OIRA’s substantive interpretation of agency statutes do not involve engrafting cost–benefit analysis in statutory regimes where it does not apply. Rather, they evidence OIRA taking (and enforcing) positions on the scope of delegation effectuated by a congressional act and on Congress’s legislative intent.

The repository also suggests OIRA involvement in the quasi-constitutional domains of federalism and preemption.<sup>168</sup> Although these matters are covered by an Executive Order and a guidance document from OMB,<sup>169</sup> OIRA is technically responsible for their enforcement. Accordingly, OIRA’s preferences on federalism and preemption can be superimposed upon agency decision-making.<sup>170</sup>

OIRA also takes upon itself enforcement of treaties and consideration of other international concerns. Thus, in a September 20, 2001 return letter to the Deputy General Counsel of the Department of Transportation (DOT), OIRA relied primarily on potential inconsistency between the proposed rule and the obligations of the United States under the North American Free Trade Agreement (NAFTA).<sup>171</sup> Similarly, OIRA returned another proposed DOT rule because of potential “adverse international consequences” and because of a need

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166. Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Tim McClain, Gen. Counsel, Dep’t of Veterans Affairs (Sept. 14, 2001), *available at* [http://www.reginfo.gov/public/return/permanent\\_and\\_total\\_disability\\_va\\_return\\_letter.html](http://www.reginfo.gov/public/return/permanent_and_total_disability_va_return_letter.html).

167. *See supra* text accompanying notes 141–43.

168. *See supra* note 133.

169. *See* Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 app. at 807–09 (2012); Memorandum from Jacob J. Lew, Dir., Office of Mgmt. & Budget, to Heads of Exec. Dep’ts and Agencies, and Indep. Regulatory Agencies, Guidance for Implementing E.O. 13132, “Federalism” (Oct. 28, 1999), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/m00-02.pdf>.

170. For examples from the repository, see Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Alphonso Jackson, Acting Sec’y, Dep’t of Hous. & Urban Dev. (Mar. 22, 2004), *available at* [http://www.reginfo.gov/public/postreview/hud\\_response9.pdf](http://www.reginfo.gov/public/postreview/hud_response9.pdf) (preemption); Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Tracy Mehan, Assistant Adm’r for Water, Env’tl. Prot. Agency (Oct. 2, 2001), *available at* [http://www.reginfo.gov/public/return/epa\\_water\\_quality\\_rtnltr.html](http://www.reginfo.gov/public/return/epa_water_quality_rtnltr.html) (federalism and tribal lands). Catherine Sharkey has offered a careful assessment of OIRA’s role in these matters based on in-depth interviews with agency officials and OIRA personnel. *See generally* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012). Sharkey argues that OIRA does very little to enforce the relevant Executive Order, but there is at least some evidence of attention to federalism and preemption in the letters from the repository. Rather than insisting that a sentence or two in the repository letters is itself a cause for direct concern about what OIRA is doing about enforcing the executive orders on federalism and preemption, we observe only that an OIRA unbound—unmoored from regleprudential norms—could be engaging in a lot of jurisgenerative action in the domains in which it has legal enforcement authority.

171. *See* Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep’t of Transp. (Sept. 20, 2001), *available at* [http://www.reginfo.gov/public/return/fra\\_dispatching\\_rtnltr-dot.html](http://www.reginfo.gov/public/return/fra_dispatching_rtnltr-dot.html).

to comply with “applicable international trade agreements.”<sup>172</sup> And these examples are not the only instances of OIRA insinuating international legal considerations into its regulatory review.<sup>173</sup> It is not entirely clear that these matters fall within the jurisdictional grants to OIRA under Executive Orders 13,563 and 12,866. But OIRA is making law in these domains, nevertheless.

What this repository seemingly confirms, with its fish-eye lens into OIRA review (which we perfectly well concede may project a distorted image), is that OIRA’s legal function is wide ranging, covering procedural and substantive matters across a number of domains. Together with other evidence and the structure of OIRA review, it is clear that OIRA represents an important and active legal institution within the Executive Branch, no less significant (and arguably much more significant) than OLC and other offices that have received the lion’s share of attention by scholars and practitioners. Recognizing this legal function now allows us to return to the questions we raised at the outset about how to analyze this kind of law from the perspective of rule-of-law values like consistency, reason-giving, and transparency.<sup>174</sup>

### III. REGLEPRUDENCE: STARE DECISIS AND ITS ALTERNATIVES

Because regulatory review places OIRA in the position to interpret important legal questions, we have warrant to ask whether traditional jurisprudential concerns grounded in values such as consistency, reason-giving, and transparency can be applied across different modalities of lawmaking at OIRA.<sup>175</sup> And different modalities of lawmaking may counsel for different techniques of

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172. Letter from Donald R. Arbuckle, Deputy Adm’r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep’t of Transp. (July 20, 2001), available at [http://www.reginfo.gov/public/return/faa\\_repair\\_stations\\_rtnltr-dot.html](http://www.reginfo.gov/public/return/faa_repair_stations_rtnltr-dot.html).

173. See, e.g., Letter from John D. Graham, Adm’r, Office of Info. & Regulatory Affairs, to Rosalind A. Knapp, Deputy Gen. Counsel, Dep’t of Transp. (Feb. 11, 2004), available at [http://www.reginfo.gov/public/return/dot\\_return\\_vessels.pdf](http://www.reginfo.gov/public/return/dot_return_vessels.pdf) (returning rule because it “undermine[s] foreign policy objectives”).

174. One objection to our characterization of OIRA as an institution engaged in lawmaking might be that OIRA’s role is inchoate and ultimately advisory, as the OLC memo on regulatory review and the text of Executive Order 12,866 seem to suggest. There is plenty of evidence, however, that OIRA’s pronouncements on legal matters carry significant—indeed, perhaps determinative—weight within the Executive Branch. Moreover, the simple realpolitik of OIRA’s gatekeeping function suggests that it carries great leverage in conflicts with agencies. Finally, the kinds of regleprudential questions we think appropriate to ask of OIRA’s legal function are not dependent on that legal function having finality in the sense of a judicial decision, enacted legislation, or even final agency action. Given OIRA’s inherently predicate role in the regulatory process, its influence on the law within the Executive Branch—and ultimately beyond—will always take place through the iterative process it oversees.

175. In a recent article, Catherine Sharkey suggests that courts ought to take a harder look at agency action when that action has not been first reviewed by the Executive through its mechanisms of regulatory oversight like OIRA. See generally Catherine M. Sharkey, State Farm “*With Teeth*”: Heightened Judicial Review in the Absence of Executive Oversight, 89 N.Y.U. L. REV. 1589 (2014). If OIRA review is to be taken to have legal relevance (and the hydraulics of deference and judicial review is going to be responsive to OIRA oversight), that is all the more reason not to accede to the view of OIRA review as merely political. Conformity with regleprudential norms at OIRA could help reinforce the institution’s significance during judicial review, where applicable.

hewing to precedent or other rule-of-law values. The primary question in this Part, then, is whether OIRA's lawmaking carries any precedential effect and whether the law made there ought to engender stare decisis-like treatment. As we discuss, precedent, reason-giving, and transparency have the potential to work together (or as substitutes) in OIRA's balancing the need for rule of law with the need for effective executive action. From these discussions, we recommend some reforms to improve OIRA's role in controlling a legitimate administrative state from a regleprudential perspective.

A. MODALITIES OF LAWMAKING AT OIRA: QUASI-ADJUDICATION, QUASI-ENFORCEMENT, AND QUASI-RULEMAKING

Through a regleprudential lens, OIRA can be seen to be engaged in three types of lawmaking. Often, OIRA's legal interventions occur through individualized reviews of other agencies' rulemaking processes. One might call this mode of review *quasi-adjudication*. From another perspective, to the extent that OIRA is engaging in enforcing and implementing various executive orders,<sup>176</sup> the Paperwork Reduction Act,<sup>177</sup> the Unfunded Mandates Reform Act,<sup>178</sup> and OMB circulars and guidance documents,<sup>179</sup> we might conceptualize its work as *quasi-enforcement*, with enforcement aimed at other Executive Branch instrumentalities. Both quasi-enforcement and quasi-adjudication naturally prime consideration of the extent to which precedent ought to play a role in decisionmaking precisely because the workaday use of precedent in adjudication and enforcement inside and outside the judiciary (and the Department of Justice) is hardly

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176. See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 app. at 802–06 (2012); Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 app. at 807–09 (2012); Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012); Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816–17 (2012).

177. Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501–3521 (2012); see also, e.g., Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Mary Glenn-Croft, Special Advisor to the Comm'r, Soc. Sec. Admin. (Sept. 27, 2001), *available at* [http://www.reginfo.gov/public/return/ssa\\_4rules\\_rtnltr.html](http://www.reginfo.gov/public/return/ssa_4rules_rtnltr.html) (returning rule to enforce compliance with Paperwork Reduction Act).

178. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.); see also, e.g., Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Kirk K. Van Tine, Gen. Counsel, Dep't of Transp. (Feb. 12, 2002), *available at* [http://www.reginfo.gov/public/return/dot\\_revised\\_tire\\_rtnltr.pdf](http://www.reginfo.gov/public/return/dot_revised_tire_rtnltr.pdf) (enforcing Unfunded Mandates Reform Act but also appealing to authority of Executive Order 12,866).

179. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-129, POLICIES FOR FEDERAL CREDIT PROGRAMS AND NON-TAX RECEIVABLES (2013); CIRCULAR A-4, *supra* note 93; Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads of Exec. Dep'ts and Agencies, Open Government Directive (Dec. 8, 2009), *available at* <http://www.whitehouse.gov/open/documents/open-government-directive>; see also Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to Gus Coldebella, Acting Gen. Counsel & Regulatory Policy Officer, Dep't of Homeland Sec. (Aug. 13, 2008), *available at* [http://www.reginfo.gov/public/return/DHS-CBP\\_Coastwise\\_Cruises\\_Return\\_Letter.pdf](http://www.reginfo.gov/public/return/DHS-CBP_Coastwise_Cruises_Return_Letter.pdf) (returning rule to enforce agency compliance with Executive Order 12,866 and OMB Circular A-4); Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Hector V. Barreto, Adm'r, Small Bus. Admin. (Feb. 11, 2002), *available at* [http://www.reginfo.gov/public/return/sba\\_eidl\\_rtnltr.html](http://www.reginfo.gov/public/return/sba_eidl_rtnltr.html) (returning rule to encourage agency to comply with OMB Circular A-129).

controversial. Recall that even at the NLRB—where *stare decisis* is extremely light—some special hoop jumping is necessary to move off matters already decided.<sup>180</sup> Thus, although these modalities of lawmaking—quasi-adjudication and quasi-enforcement—recommend some form of *stare decisis*, much more work would be necessary to settle on just the right form: neither absolute *stare decisis* that statutory decisions get in the courts, nor *ad hoc* decisionmaking with no reference to prior decisions make sense. We will return to these and related questions shortly.<sup>181</sup>

Yet there is also another modality of decisionmaking and lawmaking at OIRA: what we might call *quasi-rulemaking*. Quasi-rulemaking, unlike quasi-adjudication and quasi-enforcement, involves the development of principles, guidance, checklists, and information about how future adjudications and enforcement will proceed. It is usually divorced from specific reviews of agency activities, though of course prior experience in enforcement and adjudicative actions provides meaningful background for the development of prospective rules.

The Obama Administration's OIRA has thus far chosen to issue few "formal" letters in quasi-adjudicative processes. Although OIRA's work remains principally the review of agency rulemakings, only one return letter appears from 2011.<sup>182</sup> Given that public interactions with agencies provide a source of law to help agencies anticipate and plan for OIRA review and understand its priorities, we might have expected a law professor-OIRA Administrator—Cass Sunstein—to contribute more than one letter to the repository of common law. To be sure, a previous Administrator observed that OIRA "ha[s] witnessed some agencies simply withdrawing rules rather than face a public return letter,"<sup>183</sup> so it could be that agencies are trying to avoid public flogging with return letters or review letters.

Yet Sunstein chose to communicate with agencies through trans-substantive memoranda rather than through the letter form: quasi-rules, in our typology, rather than the quasi-adjudications contained in the repository.<sup>184</sup> These also

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180. See *supra* section I.C.

181. See *infra* section III.B.1.

182. See *supra* note 88.

183. See Mannix, *supra* note 148, at 14 (quoting former OIRA Administrator John Graham).

184. See, e.g., Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep'ts and Agencies, Cumulative Effects of Regulations (Mar. 20, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effects-guidance.pdf>; Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep'ts and Agencies, and Indep. Regulatory Agencies, Executive Order 13563, "Improving Regulation and Regulatory Review" (Feb. 2, 2011), available at [http://www.va.gov/ORPM/docs/EO\\_OIRA\\_Guidance\\_M11-10.pdf](http://www.va.gov/ORPM/docs/EO_OIRA_Guidance_M11-10.pdf); Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep'ts and Agencies, and Indep. Regulatory Agencies, Facilitating Scientific Research by Streamlining the Paperwork Reduction Act Process (Dec. 9, 2010), available at <http://www.regulationwriters.com/downloads/OIRA-M-11-07-Facilitating-Scientific-Research-by-Streamlining-the-PRA-Process-12-9-10.pdf>; Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep'ts and Agencies, and Indep. Regulatory Agencies, Information Collec-

provide guidance and are a source of law for agencies to follow, although they are less easy to find, less focused on specific statutory commands, and less calibrated to specific decisionmaking tasks agencies are already in the process of facing.<sup>185</sup> It is hard to tell on the cold record if anything *informal* changed under Sunstein—he certainly published many speeches to give some insight into how he was running the office<sup>186</sup>—but his formal actions differed in their effective withdrawal from the repository of letters collected, published, and publicized since the Bush Administration,<sup>187</sup> preferring the form of the memorandum.<sup>188</sup>

To give a feel for what we are calling “quasi-rulemaking,” consider Sunstein’s memorandum of June 18, 2010, on “Disclosure and Simplification as Regulatory Tools.”<sup>189</sup> Drawing on OIRA’s presumptive authority under Executive Order 12,866—and relevant directives issued by President Obama and OMB<sup>190</sup>—Sunstein issued “principles” about disclosure and simplification that “agencies should follow.”<sup>191</sup> Although a later clarifying memorandum was said to be a product of “input from, among others, the National Science and Technology Council’s Task Force on Smart Disclosure,”<sup>192</sup> there is no evidence of any process—notice and comment or otherwise—that led to these trans-

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tion Under the Paperwork Reduction Act (Apr. 7, 2010), *available at* <http://www.regulationwriters.com/downloads/OIRA-PRA-Primer-4-7-10.pdf>; Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep’ts and Agencies, and Indep. Regulatory Agencies, Paperwork Reduction Act—Generic Clearances (May 28, 2010), *available at* <http://www.regulationwriters.com/downloads/OIRA-PRA-Generic-ICRs-5-28-2010.pdf>; Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep’ts and Agencies, and Indep. Regulatory Agencies, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), *available at* <http://www.regulationwriters.com/downloads/OIRA-Social-Media-Guidance-4-7-10.pdf>; Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep’ts and Agencies, and of the Indep. Regulatory Comm’ns, Testing and Simplifying Federal Forms (Aug. 9, 2012), *available at* <http://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/testing-and-simplifying-federal-forms.pdf>.

185. As noted, there are other memoranda and circulars promulgated by OMB that govern aspects of rulemaking and agency practice. *See supra* text accompanying notes 92–94. These could also be considered quasi-rulemaking in our typology.

186. Sunstein’s speeches are collected at [http://www.whitehouse.gov/omb/inforeg\\_speeches/](http://www.whitehouse.gov/omb/inforeg_speeches/).

187. *See supra* note 149.

188. At this stage of our research, we cannot discern whether acting through memorandum rather than letter makes a difference on the ground. For now, we observe these different modes of lawmaking, so they can be subjected to comparative analysis in the future.

189. Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep’ts and Agencies, Disclosure and Simplification as Regulatory Tools (June 18, 2010), *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure\\_principles.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf).

190. *See* Memorandum from Barack Obama, President of the U.S., to Heads of Exec. Dep’ts and Agencies, Transparency and Open Government (Jan. 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment); Memorandum from Peter R. Orszag, *supra* note 179.

191. *See* Memorandum from Cass R. Sunstein, *supra* note 189, at 1–2.

192. Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep’ts and Agencies, Informing Consumers Through Smart Disclosure 2 (Sept. 8, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf>.



substantive disclosure and simplification principles Sunstein announced by memorandum.

From one standpoint, the substance of the principles on summary disclosure seem intuitive: agencies should know why they are forcing disclosure; agencies should promote simple and specific disclosure, accurate and in plain language; agencies should consider the timing and placement of disclosed information; ratings and scales should be easy to understand and have reference to benchmarks that matter; agencies should test the effects of disclosure and monitor disclosure's effects over time; and agencies should do cost-benefit analyses about disclosure strategies.<sup>193</sup> Yet there is no doubt that these are substantive and normative choices, and an agency's command from a statute may recommend a different set of principles that might be derived in a way that trans-substantive principles cannot always easily accommodate. Notwithstanding a disclaimer in the memorandum that "[a]gencies should follow the principles outlined here in accordance with their own authorities, judgments, and goals, to the extent permitted by law,"<sup>194</sup> there is no doubt that the memorandum sets the agenda for OIRA's analysis of proposed rules involving summary disclosure. When the FDA or NHTSA take to rulemaking about tobacco labeling, food-nutrition labeling, or energy-efficiency labeling, for example, the Sunstein memo becomes the document to comply with or to contend with, rather than a focus on the role of disclosure in the organic statute or comprehensive statutory scheme. The agency will now need to explain why it is departing from the "Sunstein principles," if it chooses to.

The "simplification" principles are even more clearly substantive and normatively contestable. In these norms of guidance to agency heads, Sunstein informs regulators that they ought to be considering "opt-out" default rules to help nudge people to make the choices regulators may prefer, as well as "active choosing" to mitigate the effects of bias towards default rules.<sup>195</sup> The memorandum also encourages agencies to consider default rules instead of mandates or bans.<sup>196</sup> One could be forgiven for thinking that Sunstein—with an identical disclaimer here that "[a]gencies should follow the principles outlined here in accordance with their own authorities, judgments, and goals, to the extent permitted by law"<sup>197</sup>—is writing into law a version of one of his own recent books.<sup>198</sup> One can celebrate and admire Sunstein's (and Thaler's) *Nudge* and still think some public participatory procedure ought to have been followed before it got pride of place in a memorandum all federal executive agency heads must follow or justify departing from. In any case, the Sunstein memoranda and

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193. See Memorandum from Cass R. Sunstein, *supra* note 189, at 3–6.

194. *Id.* at 3.

195. *Id.* at 9–10.

196. See *id.* at 10.

197. *Id.* at 9.

198. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

the Sunstein principles articulated therein are modes of lawmaking that take the form of quasi-rules.

#### B. CALIBRATING STARE DECISIS AT OIRA

Whichever modality of regleprudential development is more effective or democratically justifiable—quasi-adjudications, quasi-enforcement, or quasi-rulemaking—OIRA is developing a law of sorts. The question for this section is whether the results of these methods of lawmaking are entitled to any precedential effect. In the alternative, when stare decisis seems like the wrong approach, is there another technique—reason-giving or transparency for the agencies OIRA oversees and for the public, most notably—that can build off of commonly held rule-of-law values to help tame the law being made by OIRA?<sup>199</sup>

##### 1. Precedent in Three Modalities of Lawmaking

In section I.C above, we introduced the idea of applying stare decisis—to stand by things decided—into the inner workings of the administrative state, especially in domains outside the regular scope of judicial review. We provided reasons to think that corners of the Executive Branch that actually issue authoritative decisions that bind governmental and private actors—structuring their primary conduct—could benefit from a regleprudential commitment to the same rule-of-law values prevalent within the judicial system that underwrite the doctrine of stare decisis there. For many of the same reasons that the use of precedent as binding makes sense in courts, the Executive Branch might be seen as subject to a general principle to stand by things decided, even if the contours of the form of stare decisis have yet to be articulated. Whether it is to save decision costs, promote the independent value of consistency, provide a focal point for coordination, respect and channel reliance, or because something about the concept of “law” requires it, domains of the administrative state mostly immune from judicial review still need to be thinking about the law they are making as law. As such, law of this sort should be refracted through the value (and costs) of adhering to precedent. It is not, of course, our view that all law is the same and that all law must respect precedent in the same way to vindicate rule-of-law values. The role of precedent will likely vary across the three different modalities of lawmaking at OIRA, as will the trade-offs between standing by things decided and competing values of creativity, flexibility, and the political accountability that comes from being able to depart from such precedent in response to democratic shifts.

Consider what we have called quasi-adjudication, which has at times been memorialized in the letters that OIRA writes when it returns rules to agencies

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199. To be clear, we are not arguing that OIRA simply ignores all past practice. Rather, we are beginning with the proposition that OIRA does not appear to conceive of stare decisis as an essential aspect of its decisional considerations, so we are outlining where precedent might play a more self-conscious role.

and when after a review it wishes for the agency to continue to think through its regulatory approach. Should the legal order OIRA imposes through these reviews be considered a system of precedent that future quasi-adjudications should respect in some form? We think that makes a lot of sense. Such a legal order would save decision costs for decision makers with many different jobs and tight deadlines; it would promote the independent value of consistency; it would facilitate coordination; and it would help respect and channel agencies' reliance. It would, moreover, pay homage to the simple reality that many quasi-adjudications involve contestable interpretations of statutes, executive orders, circulars, and guidance memoranda. Rather than allowing politics to overwhelm the process of regulatory review, treating the law made with precedential effect serves the further goal of legitimating the power of the Executive Branch in its oversight over the agencies.

This does not, of course, mean that *stare decisis* ought to function identically within OIRA as it does in a court of appeals, binding future panels and requiring elaborate processes—like *en banc* review<sup>200</sup>—to overturn a decision already made. There is no denying that OIRA is, in part, a political office with an obligation to represent the views of the President, views that can (and do) legitimately change between and even within administrations.<sup>201</sup> And some of the arguments against the relevance of precedent grounded in rationales of expertise apply to aspects of OIRA's oversight.<sup>202</sup> But it does mean that, with those caveats, the arguments that make *stare decisis* a good rule of thumb in courts can carry over to quasi-adjudications within OIRA. And this is the bulk of OIRA's work day-to-day. If OIRA's view about what NAFTA requires changes day-to-day with no notice or reason-giving, this could upset the smooth functioning of the bureaucracy and the private ordering that relies on it.

Given that we began by comparing OIRA to the Office of Legal Counsel, we can see now that although OLC presents itself as an easy case for a practice of *stare decisis*, there are reasons that OIRA might be an even better locus for respecting *stare decisis* in the Executive Branch. First, the role that OLC lawyers assume is one of counsel and *prediction*. By contrast, OIRA's work in overseeing regulatory review, enforcing relevant executive orders, and controlling the bureaucracy at the highest level, by adjudicating disputes among agencies about which has jurisdiction over certain kinds of activities under a

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200. See generally Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001 (2014).

201. Cf. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

202. Cf. Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 604 (1987) (“[A]t least one version of the ideal of the administrative process holds that an agency should be free to consider the fullness of certain problems without the constraints of following its or another agency's prior handling of a different array of highly complex facts.”).

cluster of complex statutes, takes on a more immediate character of legal practice. It may be that OLC similarly sees itself as an adjudicator of sorts in sensitive political cases where courts are actually unlikely to intervene. But OIRA is a frontline decision maker; it does not see its principal role as prediction of what courts would do. This may compel even more attention to the practice of precedent at OIRA.

Moreover, one plausible story about why stare decisis is rational rather than arbitrary is that the first decision maker witnessed and participated in a proper adversarial process that reinforces confidence in and reliability of the primary decision. In OIRA, it is possible that there is more adversary process—with better representation of the relevant interested parties—than there is at OLC, where a difficult question of who the actual “client” is prevails.<sup>203</sup> Lawyers at OLC are, at once, representing the President, the Law, the Constitution, and the People.<sup>204</sup> This confuses their work—and disables proper deliberation among and with potential stakeholders. That furnishes yet another reason to give stare decisis pride of place within OIRA: although both OLC and OIRA are “brain-trusts” of a sort, OIRA is expected to deliberatively engage persons and entities controlled by their decisions in a way OLC is not. This is a reason to think agencies actually ought to be bound by the legal decisionmaking at OIRA, and OIRA ought to give greater respect to the accretion of its decisional resources over time.

It is also useful to think about calibrating stare decisis within the domain of what we have called quasi-enforcement. In this arena, there are reasons to think that the Executive Branch needs more discretion.<sup>205</sup> Just as prosecutors and police have wide berths to consider individual factual contexts without a lot of worry about whether a charging decision is consistent with or establishes precedent, to the extent that what OIRA does is “enforce” in the way prosecutors and police do, perhaps OIRA ought to be given a corollary of “prosecutorial discretion.” Indeed, prompt letters are perhaps a domain where OIRA should not be shackled by precedent because it is clearer in that context that the ultimate decision about how to proceed rests with the agency being given a prompt, which is really meant to be a preliminary signal rather than an adjudication of the merits of agency action.

Yet it does not follow that precedential thinking is wholly irrelevant in quasi-enforcement. There is good reason for Executive Branch actors to be clear

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203. See Tushnet, *supra* note 2, at 1352.

204. See Bruce Ackerman, *Presidential Power Grabs: Their Causes and Cure*, HUFFINGTON POST (Feb. 10, 2014, 8:34 AM), [http://www.huffingtonpost.com/bruce-ackerman/presidential-power-grabs\\_2\\_b\\_4759352.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/bruce-ackerman/presidential-power-grabs_2_b_4759352.html?view=print&comm_ref=false); cf. HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009) (highlighting the structural reasons presidents get bad advice from their Offices of Legal Counsel).

205. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985). For a useful critique highlighting how lawmaking and policymaking pervades agency prosecutorial discretion, see Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996).

about enforcement priorities so that primary conduct can acclimate to the enforcement environment.<sup>206</sup> After all, repeat players—which Executive Branch agencies no doubt are—do watch patterns of enforcement and learn from them. Accordingly, when an administration wants to shuffle resources to enforce certain kinds of laws less aggressively than others, it is often (though not always) better for decision costs, consistency, coordination, and reliance interests for actors to be on notice about how enforcement is likely to proceed. So too within OIRA: although there is a vast range of quasi-enforcement that can be indifferent to precedent, the office’s priorities can be usefully memorialized in guidance and policy documents that help agencies learn how to behave and comply. It is for this reason that OIRA sometimes enters into memoranda of understanding with agencies to help streamline particularized regulatory review.<sup>207</sup>

Quasi-regulations seem closer to quasi-enforcement than to quasi-adjudication. Again here—and perhaps more clearly so—the tight force of precedent as constraining the application of legal norms ought to be substituted by a more limited requirement of reason-giving and transparency. That a policy or guidance document has been settled one way is not a decisive reason to settle it the same way when the question arises again if political or technological winds have shifted, revealing new regulatory priorities. Yet the exercise of legal power that coerces other actors still must cohere with the standard rule-of-law values that in adjudication and quasi-adjudication command some adherence to *stare decisis*.

Yet, rule-of-law values also suggest some role for letting things decided stand even in the realm of quasi-regulation. To wit, when a new Administrator is appointed at OIRA (or a new desk officer takes over a policy area), it likely makes sense to let old documents and policy-guidance memoranda remain valid until revisited carefully, so long as the original “enactment” followed the right process. Just because OIRA undergoes an internal shift does not mean the entire federal bureaucracy should have to immediately suffer destabilization.

Across all three modalities, however, hewing to past practice has costs as well as benefits,<sup>208</sup> and departures can be justified. Here, it is possible to recognize a kind of hydraulic trade-off among *stare decisis*, reason-giving, and transparency. In some instances, all of these rule-of-law values can be served simultaneously; in other contexts, they can serve as substitutes. As the NLRB example—and similar practice across a range of traditional administrative realms—illustrates,<sup>209</sup> departures from past practice place a particular burden of notice and explanation on legal actors.

The general argument for such reason-giving by OIRA in its capacity as a

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206. See generally Andrias, *supra* note 76.

207. For examples, see *supra* note 92.

208. See *infra* section III.B.3.

209. See *supra* text accompanying notes 52–56.

legal actor echoes the same imperative in other legal contexts.<sup>210</sup> Reason-giving, of course, enables meaningful reliance on the decision made, helps justify binding agencies in the future, and provides an organized way to depart from precedent when that is salutary. Public reason-giving, moreover, by exposing legal decisionmaking to question and contestation, stands to improve that decisionmaking. There is also arguably a dignitary interest at play as well for those affected by a legal process. This is not to make a strictly instrumental argument for a kind of efficiency-of-rights approach to OIRA's legal function, to echo David Super.<sup>211</sup> Normative legitimation can derive from the iterative nature of reason-giving and response.<sup>212</sup>

Whatever independent value inheres in reason-giving, across all three modalities, it is doubly necessary when OIRA departs from past practice. This is perhaps easiest to see in the realm of quasi-adjudication. If the agencies subject to OIRA oversight enter regulatory review with a sense of how OIRA has approached particular legal questions in the past, any departure in the context of a given regulatory action should be explained and justified. This should not cabin discretion any more than the similar mandate does for agencies; however, it should require some articulation of the reason for a departure.<sup>213</sup>

This value of transparency applies as well to OIRA's quasi-enforcement work. Enforcement has effects on people's organization of their primary conduct enough that actors are entitled to feel that enforcement agencies are constrained by some rule-of-law priorities. Transparency about how enforcement resources will be focused within an administration can thus substitute for the constraining role of precedent if the exercise of discretion requires more flexibility.

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210. See generally Mathilde Cohen, *Reason-Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257 (2008); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010); Mathilde Cohen, *The Rule of Law as the Rule of Reasons*, 96 ARCHIV FÜR RECHTS—UND SOZIALPHILOSOPHIE 1 (2010).

211. See generally David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051 (2005).

212. Jeremy Waldron has argued that agency—in the individual sense—is critical to Rule of Law (as he capitalizes it), and the same argument can apply to those institutional actors subject to oversight within the administrative state:

The publicity of [legal] norms is not just a matter of pragmatic administrative convenience along the lines of its being easier to govern people if they know what is expected of them. It embodies a fundamental point about the way in which the systems we call “legal systems” operate. They operate by using, rather than suppressing and short-circuiting, the responsible agency of ordinary human individuals. Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. It is also quite different from eliciting a reflex recoil with a scream of command. The publicity and generality of law look to what Henry Hart and Albert Sacks called “self application,” that is, to people's capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand.

Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 26–27 (2008).

213. Again, transparency here is important both for the administrative entities that OIRA oversees and for the general public that will eventually be bound by OIRA's understanding of the law.

Finally, in quasi-regulation, because the initial position of the office is publicly articulated in the first instance, that transparency raises the importance of articulating reasons for departure from past practice. This reflects a broader insight—within realms more traditionally subject to judicial review—that agencies engaging in rulemaking or other final agency action binding on the general public may depart from past agency practice but cannot do so without a reasoned explanation.<sup>214</sup> In this way, reason-giving and stare decisis operate as counterweights in constraining agency action: to the extent that an Executive Branch actor chooses to reject precedent, it must, at a minimum, state that it is doing so and explain why.<sup>215</sup>

Consistency and transparency can thus form a balance and an equilibrium that, in some aspects of OIRA's work, suggest that both reason-giving and respect for precedent must be enhanced, whereas in other contexts, clear articulation with the right process may be enough to justify change. These regleprudential insights help sketch a reform agenda for OIRA to which we now turn.

## 2. OIRA Reform in Regleprudential Terms

The conceptual apparatus we have sketched thus far suggests a regleprudential reform agenda for OIRA that can better reflect core rule-of-law values of consistency and transparency.<sup>216</sup> As we have discussed, OIRA has been the

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214. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”). In *Fox*, the majority rejected the proposition that there was any *heightened* burden on agencies to explain an agency change of position, but reiterated the longstanding proposition that norms of reason-giving in judicial review of agency action require addressing the fact of change. *Id.* at 515–16. See generally Kozel & Pojanowski, *supra* note 54 (arguing that agencies should have a higher burden of justification when engaging in “expository” reasoning—interpreting sources of law—as opposed to “prescriptive” reasoning, which involves evidence, expertise, and policy choices).

In some ways, our interests here align with “the *Accardi* principle,” the principle that agencies need to follow their own rules. See generally *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (deciding when agencies need to follow their own rules); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006) (exploring the contours of the under-theorized decision in *Accardi* and its progeny). Some refer to this idea as “the *Arizona Grocery* principle.” See, e.g., STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 438–79 (6th ed. 2006) (referencing and discussing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932)). Ultimately, although clarifying the justifications for these principles would be productive for regleprudence, because the principle is really about devising rules for the *judicial review* of when agencies depart from their previous practices, *Accardi* and *Arizona Grocery* are mainline administrative law rather than what we are calling regleprudence.

215. Moreover, quasi-rulemaking raises the additional rule-of-law concern that there is no mechanism for challenging any abrogation of authority, raising the value of transparency all the more.

216. While we can defend the valence of these particular rule-of-law values, we acknowledge that the generality of the concept of rule of law might lead others to a different set of prescriptions for constraining Executive Branch legal decisions. Cf. Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491 (2008). Indeed, some think the rule of law is essentially about accountability mechanisms that are largely meant to be effectuated

subject of sustained criticism not only for its antiregulatory bias, but also for the overly politicized nature of its regulatory review and the office's opacity, both to the public and to the agencies it oversees.<sup>217</sup> Two related strands of reform could form the core of a strategy that would respond to these critiques: a commitment by the office to public reason-giving for its legal functions and a related recognition that transparency carries with it a need to justify variations from precedent.<sup>218</sup>

As a first step in implementing a commitment to reason-giving, OIRA could return to—and build on—the simple promise of transparency embodied in the original text of Executive Order 12,866.<sup>219</sup> Recall that the Executive Order was drafted to mandate, at a minimum, written notification to agencies of the result (or waiver) of OIRA review as well as a “written explanation” for any regulatory action that is returned to an agency specifying the pertinent Executive Order provision being invoked.<sup>220</sup> As we have discussed, there was at least a small period during which OIRA complied with this mandate for at least some of its rules, although that window has largely closed.<sup>221</sup>

There is a related, although rarely discussed, mandate in Executive Order 12,866 that, unlike review and return letters, has been largely ignored to our knowledge.<sup>222</sup> In section 6(b)(4)(D), the Executive Order mandates that:

After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.<sup>223</sup>

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through judicial review. *See, e.g.*, William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723. We hope our lens into the rule of law here exposes how regleprudence is rooted in rule-of-law values but does not rely principally on judicial review.

217. *See supra* section II.A.2.

218. To be clear, much of what we are advocating in this section is not new. Academics, advocates, the General Accountability Office, and the Administrative Conference of the United States have sought to bring transparency and consistency to OIRA. What is novel about our prescriptions is their grounding in an explicit recognition of OIRA's critical role as a legal institution and in a category of analysis we are calling regleprudence.

219. Lisa Heinzerling has made a similar observation about the failed promise of the Executive Order's commitment to transparency. *See* Heinzerling, *Inside EPA*, *supra* note 6, at 365.

220. *See supra* notes 86–87 and accompanying text.

221. *See supra* section II.C.

222. To the extent that this provision tends to warrant mention in the literature on OIRA, it is generally in passing. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1164 (2014). This is perhaps because the provision has been so roundly ignored by the office itself in practice.

223. Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1994), *reprinted in* 5 U.S.C. § 601 app. at 806 (2012). As noted, some redline/strikeout versions of rules that reflect OIRA review are available, but give little context for the substantive choices associated with those line edits and little explanation for why the rules are being changed.



Compliance with this important requirement would fundamentally transform OIRA's work, both for the agencies it oversees and for the public that is eventually subject to the legal interpretation that OIRA imbeds in the rules it reviews.<sup>224</sup>

Although there exists a repository of review and return letters, the value of those letters is quite limited given how few there are and how uniformly cursory are their explanations. Indeed, once one removes the introductory and hortatory concluding language from the letters, each contains a bare few paragraphs, at best, of substance. Accordingly, a second step in embracing the value of public reason-giving would involve actually giving real *detail* about the nature of the review, the substance of OIRA's concerns, the "precedent" on which OIRA relied, and the lessons—in a common law way—that the individual quasi-adjudication might hold for subsequent regulatory actions. Scholars have raised significant concerns in recent years about the increasingly summary nature of the dispositions courts are undertaking, undermining their value in undergirding the rule of law,<sup>225</sup> and the same concerns recommend that OIRA provide reasoned substance as it puzzles through the challenging oversight it undertakes. Flexibility is one thing and arbitrariness another; one is a virtue, the other implicates the legitimacy of a government.

We acknowledge, of course, that OIRA is not a judicial institution, and we are not advocating the equivalent of judicial decisions for each instance of regulatory review. There are certainly other practical ways for OIRA to provide notice and a reasoned body of practice to the agencies it oversees. OIRA conducts a significant number of reviews, and even at the height of the era in

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224. In recent years, OIRA has created an online interface that gives the illusion of transparency by providing real-time data on all rules undergoing regulatory review under Executive Order No. 12,866. For a link to OIRA's regulatory review "dashboard," see Regulatory Review Dashboard, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last visited Nov. 9, 2014). In truth, this online record says essentially nothing substantive, neither providing access to any communications with agencies nor, more importantly, even the cursory substance that was for a short period of time available through review and return letters.

Another element of nominal OIRA transparency that also seems illusory is the mandated log of external communications. OIRA purports to make available a list of meetings with non-Executive Branch personnel and oral communications received during regulatory review, as required by Executive Order 12,866 § 6(b)(4)(C), 3 C.F.R. at 647–48. Given the volume of regulatory review, however, it is striking how relatively few of such contacts are logged. It is difficult to determine whether the paucity of such records indicates that OIRA maintains very little contact with outside constituencies, of course, but it is certainly possible that compliance with this requirement of the Executive Order is not complete.

225. There is a significant body of literature debating the merits of the rise of both nonprecedential, unpublished decisionmaking at the appellate level and a host of related summary dispositional practices that undermine the public-reasoning nature of the judicial enterprise. See, e.g., Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

which OIRA was providing return and review letters, those letters covered only a tiny fraction of relevant regulatory actions.<sup>226</sup>

Rather, OIRA could accomplish this reform through some kind of periodic or topical cumulative restatement of its “common law,” referencing and digesting some universe of particular prior reviews (its quasi-adjudications). OIRA could then draw from what is most rule of law-like in the promulgation of its quasi-regulations, providing a period for agencies to comment on this restatement, which would give OIRA input that could refine the office’s future work on a given statutory regime or regulatory domain. We imagine this to be an iterative process, perhaps short of the ideal of full transparency, but a marked improvement over the reality of the black-box approach that OIRA currently maintains. Because OIRA is already reporting annually to Congress on the benefits and costs of federal regulatory activity,<sup>227</sup> these reports could contain some self-reflective sections on the developing common law within the office, disclosing to agencies and the public what the law of the office looks like.

Indeed, several recent “regleprudential moments” recommend themselves as models for reform at OIRA more generally. First, when President Obama undertook to craft his own executive orders that were to control the work of OIRA, he did not simply promulgate them after consulting only with personal advisors, White House Counsel, or OLC. Rather, Obama “directed the Director of OMB, in consultation with regulatory agencies, to produce a set of recommendations for a new executive order on federal regulatory review within 100 days, followed by an unusual request for public comments on the same subject. Almost 200 public comments were received.”<sup>228</sup> Although there are some meaningful ways that the Bush Administration’s OIRA under John Graham was more transparent than what became of Obama’s OIRA in his first term—the repository is a much better window into Graham’s OIRA than it is into Sunstein’s OIRA—Obama understood that importing a public comment process into trans-substantive regulatory review itself could be salutary and promote rule-of-law values.

But Bush’s OMB also understood the benefit of notice and comment for the details of trans-substantive regulatory review. To wit, when OMB issued its “Peer Review Bulletin” on December 16, 2004, it responded to 243 comments over two comment periods.<sup>229</sup> And when OMB issued its “Final Bulletin for

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226. See *supra* note 82.

227. See *OIRA Reports to Congress*, OFF. MGMT. & BUDGET, [http://www.whitehouse.gov/omb/info/reg\\_regpol\\_reports\\_congress](http://www.whitehouse.gov/omb/info/reg_regpol_reports_congress) (last visited Nov. 9, 2014). These reports, issued pursuant to the Regulatory Right-to-Know Act, focus on the benefits and costs of federal regulation. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, app. C, § 624, 114 Stat. 2763, 2763A-161 to -162 (2000). They supply both aggregate benefit and cost information, as well as analyses of individual rules. These reports, however, are not focused at all on the substance of the rules at issue and shed little light on the questions pertinent to regleprudence.

228. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 28–29 (5th ed. 2012) (footnotes omitted).

229. LUBBERS, *supra* note 148, at 35–36.

Agency Good Guidance Practices” on January 18, 2007, it responded to thirty-one comments from diverse public and private stakeholders.<sup>230</sup> Or perhaps even more importantly, when OMB issued Circular A-4 on September 17, 2003, guidance that defines good regulatory analysis for the entire administrative state, it had subjected drafts to public comment, interagency review, and peer review.<sup>231</sup>

In short, OIRA could more regularly commit to taking a page out of President Obama’s and OMB’s playbook, subjecting at least its quasi-rulemaking to more transparent notice-and-comment processes. It is perhaps ironic to recommend that the notice-and-comment police ought to be subject to the same kind of processes they are supposed to be encouraging others to improve. But it somehow seems just right, too.

### 3. Costs of the Rule of Law at OIRA

Were OIRA to commit to public reason-giving and a greater respect for consistency in regulatory review, it is certainly likely that such reforms would render more costly and time consuming a process that is already a symbol of the ossification of the administrative state.<sup>232</sup> By all appearances, OIRA is currently incapable of meeting the deadlines set by Executive Order 12,866,<sup>233</sup> even a relatively periodic accounting of the basis for its decisions might burden regulatory review to the breaking point.<sup>234</sup>

The kind of commitment to rule-of-law values we advocate, however, need not radically change the nature of OIRA’s case-by-case oversight, even if we envision fairly significant structural changes to how those reviews are memorialized and communicated.<sup>235</sup> The substance of what is communicated to agencies need not have the formality and depth of a judicial opinion in order to apprise agencies of the reasoned basis for decisionmaking and, again, there are relatively simple ways to capture the office’s common law development in specific domains over time.<sup>236</sup>

To the extent that OIRA’s resistance to meeting the transparency mandates of Executive Order 12,866 derives from a too-burdensome docket, there is a

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230. Memorandum from Rob Portman, Dir., Office of Mgmt. & Budget, to Heads of Exec. Dep’ts and Agencies, Issuance of OMB’s “Final Bulletin for Agency Good Guidance Practices” (Jan. 18, 2007), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf>.

231. See CIRCULAR A-4, *supra* note 93.

232. Cf. McGarity, *supra* note 19.

233. See *supra* note 85.

234. If OIRA was born in the Paperwork Reduction Act, see *supra* note 3, we can certainly acknowledge the further irony of advocating that OIRA produce, well, more paperwork.

235. On one level, though, in suggesting that OIRA hew at a minimum to the ignored transparency mandates of Executive Order 12,866, we are in some ways advocating a return to norms envisioned when the current structure of regulatory review was first articulated.

236. Just as there are summary judicial dispositions, there may be contexts where nonprecedential or even essentially per curiam-like cursory statements simply noting the fact of review may continue to be appropriate. However, that would at least provide some accounting for the relative importance and precedential value of a given pronouncement.

simple institutional answer. OIRA could retreat from the outsized gatekeeping role it currently performs and recommit to the original scope of its jurisdiction under the Executive Order. Or it could limit full regulatory review to only the most economically significant rules. Certainly this raises the basic Weberian implausibility of a bureaucratic institution ceding power, but that should not deter us. There are good reasons—tied to OIRA’s lawmaking role we have identified here—to focus OIRA’s resources on the most significant of agency actions, as originally contemplated in a more modest era of regulatory review.

A separate concern with a commitment to a more rule-of-law-inflected practice at OIRA might be that exposing the inner workings of the office would chill deliberation and candor within the Executive Branch. To the extent that OIRA commits to articulating and publicly accounting for its views in the course of regulatory review, staff and officials involved may hesitate to provide their most incisive input. We are not, however, suggesting that a commitment by OIRA to consistency and transparency would have to violate important deliberative norms. One could analogize, in fact, to the work of judges on panels deliberating in confidence or judges discussing cases in chambers with their clerks in the process of drafting opinions. What matters in that context is the final decision, not the negotiation that produced the decision. We are thus suggesting a corrective to the current public silence that overwhelmingly pervades the process of regulatory review.

#### IV. REGLEPRUDENCE BEYOND OIRA

Although we have focused regleprudential attention upon OIRA’s lawmaking functions, our themes have the potential to apply to a much broader swath of the infrastructure of the regulatory state. In this Part, we outline a variety of other contexts ripe for regleprudential inquiry. We then conclude by outlining a research agenda that can highlight how this project connects with mainline jurisprudential concerns.

##### A. THE BEYOND

Scholars have paid increasing attention in recent years to the reality of the breadth of lawmaking activity within the Executive Branch. But this work has largely focused on the most visibly legal aspects of the phenomenon. Some have, for example, explored the President’s structural role in separation of powers, the interplay between final regulatory action and judicial review, and even those aspects of the internal functioning of the Executive Branch that are most clearly legally oriented, such as work of the Office of Legal Counsel.<sup>237</sup>

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237. Beyond Trevor Morrison’s recent work on *stare decisis* in OLC, *see* Morrison, *supra* note 2, there is some literature developing on lawmaking within the Executive Branch. *See, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1303–04 (2000) (“The relative inattention to the executive branch as

These are important grounds of inquiry, but they risk obscuring a number of important institutional practices within the Executive Branch that, like OIRA's regulatory review, are lawmaking processes that are routinely overlooked as such.<sup>238</sup>

To take one example, the practice of presidents issuing statements when signing legislation has erupted into a source of much controversy in recent years.<sup>239</sup> Although the practice has deep roots,<sup>240</sup> presidential signing statements have in recent administrations become a significant vehicle not only to register publicly the Executive's interpretation of newly enacted legislation—and voice reservations about statutes—but also to direct officials in how to act in enforcing such legislation.<sup>241</sup> Signing statements can be subject to a similar kind of administration-wide interagency review as regulatory actions<sup>242</sup> and often involve significant and controversial questions of law.<sup>243</sup> All of the questions that we have asked of OIRA are relevant in this context: What is the force of *stare decisis* when presidents consider past signing statements (or other sources of executive precedent) in the course of promulgating succeeding statements? How should presidents balance the value of minimizing decision costs, promoting consistency, focusing coordination, and respecting reliance, with the democratic mandate reflected in the political reality of changing administrations? What process might improve the legitimacy of such signing statements when they have practical legal effect?

A perhaps even more significant arena of independent executive lawmaking can be found in foreign affairs. As Harold Koh has argued from personal experience serving as Legal Adviser at the State Department, the President has

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an expositor of the law is striking given the extraordinary breadth and significance of executive branch legal interpretation.”); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); see also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

238. To be clear, we are not arguing that legal domains within the Executive Branch that are the subject of traditional administrative law are beyond examination through the lens of *regleprudence*. We are merely focusing on institutions within the Executive Branch that have not generally been subject to direct and routine judicial review.

239. See generally Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11 (2007).

240. See TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1 (2012) (noting that “Presidents have issued such statements since the Monroe Administration”).

241. See Cass & Strauss, *supra* note 239, at 18 (“Signing statements can be used within an administration to help resolve disputable questions of interpretation. There are many different executive officials who might have a hand in the implementation, and therefore the interpretation, of statutory instructions. A signing statement provides the President’s direction on which interpretive turn to take.”); see also Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 538 n.54 (2012) (discussing signing statements as lawmaking when they bind Executive Branch actors).

242. See Cass & Strauss, *supra* note 239, at 14 (noting the “wide consultation within the executive branch” that precedes the promulgation of signing statements).

243. See generally GARVEY, *supra* note 240 (providing an overview of the substance of signing statements since the Reagan Administration).

the authority not only to “enter a binding international agreement based on his own independent, Article II authorities, without action from Congress,”<sup>244</sup> but also to undertake international agreements that have significant legal consequences in the interstices of existing statutory authority.<sup>245</sup> Indeed, when the State Department is overseeing any process of treaty making, it engages in an administration-wide review process with significant legal dimensions.<sup>246</sup> As Koh has described the process:

[It] is exhaustive and designed to ensure that all proposed U.S. international agreements—even if concluded by a different agency—are subject to a rigorous legal and policy review by the State Department before being negotiated and concluded. Through this process, the State Department plays the same kind of clearinghouse role with respect to international agreements that the Office of Management and Budget (OMB) plays with regard to federal regulations.<sup>247</sup>

In all of this, as with OIRA’s work, it is legitimate to ask about the potentially variable force of precedent along dimensions such as the formality of the international agreement as well as how norms of reason-giving, transparency, and accountability might operate when the President unilaterally makes foreign affairs law.

Likewise, much of what the Executive Branch is charged with under the President’s Article II “Take Care” mandate classically involves *enforcement* of statutory law.<sup>248</sup> Even in this task, new law is often made (in effect) both through the exercise of executive discretion and through the acts and interpretation that actually occur in the process of enforcement.<sup>249</sup> This exercise of

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244. Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Twenty-First-Century International Lawmaking (Oct. 17, 2012), Remarks for the 33rd Thomas F. Ryan Lecture, in 101 GEO. L.J. 725, 732 (2013). This brand of executive lawmaking, Koh argues, is of a species with a broader practice he describes as “quasi-constitutional custom,” which is “a widespread and consistent practice of Executive Branch activity that Congress, by its conduct, has essentially accepted.” *Id.* at 733. For a somewhat contrary view, see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1789 (2009) (“[T]he President may not, through his foreign affairs executive power, make new domestic law. He can make a treaty. He can negotiate an executive agreement implemented by legislation within Congress’s power. But he can no more make law on his own, through the exercise of the foreign affairs aspect of ‘the executive Power,’ than he can legislate on his own.” (footnote omitted)).

245. Koh, *supra* note 244, at 733–34 (giving the recent example of the Anti-Counterfeiting Trade Agreement, a multilateral intellectual property pact); *see also id.* at 738 (noting that the Executive Branch engages in lawmaking through the development of customary international law).

246. *Id.* at 734 (noting that the State Department’s “lawmaking practice is not limited to *joining* treaties and other agreements; we spend just as much time ensuring the U.S. is in a position to *comply* with its international obligations”).

247. *Id.* at 735.

248. *See generally* Andrias, *supra* note 76.

249. *See generally* Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012).

executive discretion is just as often shielded from meaningful judicial review.<sup>250</sup> Enforcement, no less than the quasi-statutory realm of the regulatory process, can be evaluated for how precedent is deployed, how executive institutions approach horizontal and vertical coordination, and how rule-of-law values beyond *stare decisis* might improve executive action. All regleprudential questions.<sup>251</sup>

And these questions are equally pertinent to executive action through deal making, a mode of governance that has become increasingly important, particularly in the wake of the recent economic crisis.<sup>252</sup> Notably, Congress authorized a \$700 billion program that allowed the Treasury Department (and, through separate authority, the Federal Reserve) to intervene in a large number of private firms.<sup>253</sup> As Steven Davidoff and David Zaring have argued, this signature set of policies was shaped significantly by legal constraints and simultaneously pressed the outer limits of authority at two institutions arguably “least constrained by the law.”<sup>254</sup> A regleprudential approach to this increasingly significant aspect of executive activity could offer ways to respond to the concerns the practice raises, providing appropriate institutional constraints grounded in rule-of-law values even in the absence of meaningful judicial oversight.

In all of these institutional domains, and many others within the Executive Branch,<sup>255</sup> regleprudence has tremendous potential to raise—and hopefully answer—questions about lawmaking functions that have received far too little attention. Those insights, in turn, can draw on the rich tradition of jurisprudence to understand the administrative state, just as legisprudence has sought to illuminate the legislative domain of lawmaking. There is a path to appreciating limits within these areas of law that are not born just of politics or conventions. Legality itself contains the seeds of constraint.

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250. *Id.* at 629–42 (offering examples of executive discretion in practice).

251. Indeed, Kate Andrias has advocated for a coordinating mechanism within the White House bureaucracy that would function for enforcement in ways that are not dissimilar to how OIRA oversees regulatory review. *See* Andrias, *supra* note 76, at 1077–1107. Were such a coordination mechanism to be adopted, it would no doubt pose the same kinds of legal-interpretive oversight challenges that OIRA raises, and our regleprudential inquiry into OIRA would be directly relevant.

252. *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 468 (2009) (noting that “while administrative law scholars spend much of their time thinking about how the D.C. Circuit and Supreme Court might review government administrative decisions, it is worth noting that the response to the financial crisis has had nothing to do with the courts”).

253. *Id.* at 513–18; *see also* Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 437 (2011) (outlining the breadth of deal-like responses by a variety of federal agencies).

254. Davidoff & Zaring, *supra* note 252, at 466 (discussing the Treasury Department and the Federal Reserve).

255. *See supra* note 69 (outlining other Executive Branch structures performing legal interpretive work in the interstices of administrative practice).

## B. WHAT IS LAW, AGAIN?

This leads us back to what might be considered some foundational questions for a new regleprudence: What *is* law within the administrative state? What conditions determine the validity of that legal authority? Questions like these have long been the animating concerns of jurisprudence and legisprudence, and they are equally important for Executive Branch lawmaking—what we might call, with apologies to John Austin—the province of regleprudence.<sup>256</sup>

In some basic sense, then, arguing for a regleprudence is an invitation to engage the philosophical tradition of jurisprudence and apply its insights to the inner workings of the administrative state.<sup>257</sup> Which is not to say that this is the place for a full exploration of how the many debates that animate jurisprudence might play out for the kinds of Executive Branch institutions on which we have focused. Instead, it is enough to recognize the relevance of such debates to a future research agenda for regleprudence. After all, not one of the three major compendia of work on jurisprudence and the philosophy of law has an entry on the administrative state (or even administrative law).<sup>258</sup>

Still, we offer a final word on some of what has passed for a jurisprudence of the administrative state. In light of the relatively recent interest in how the administrative state responds to emergencies, theorists have investigated and analyzed “black holes” and “grey holes” that permit a form of action by the Executive seemingly outside the legal order.<sup>259</sup> “Black holes” are areas where the law is thought to have a gap that essentially permits unbridled discretion for the Executive to act without judicial oversight; “grey holes” are areas where the legal order uses such flexible constraints over the Executive that there is effectively unbridled discretion, even though judges maintain the façade of judicial oversight.<sup>260</sup>

However, philosophers of law are not arguing about the ways in which these holes reveal different pockets of legal ordering that have their own commitments to legal regularity and validity—what regleprudence would de-

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256. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

257. We have made assumptions throughout this Article about some important aspects of how those debates might play out. For example, we have made a normative argument for applying certain core rule-of-law values to OIRA; but a scholar of jurisprudence in a Hartian vein could reasonably respond with a positivist critique of this approach, questioning whether such values have any necessary role in regleprudence. Cf. H. L. A. HART, *THE CONCEPT OF LAW* (2d ed. 1994). We obviously feel that there is a basis for our particular normative approach, but we recognize that judgment probably requires more argument.

258. See *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY*, at v–viii (Dennis Patterson ed., 1996); *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW*, at vii–viii (Jules Coleman & Scott Shapiro eds., 2002); *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW*, at ix–xii (Andrei Marmor ed., 2012).

259. See, e.g., DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 160 (2006); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *HARV. L. REV.* 1095, 1102 (2009).

260. See Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 *NW. U. L. REV.* 1271, 1271–72 (2010).



mand. They are not, moreover, proposing a legal order without judicial enforcement as its centerpiece, as regleprudence would recognize. Rather, jurisprudential debates are largely about how disputes about executive discretion may or may not be controlled by judges and/or legislatures.<sup>261</sup>

These debates skirt the core project of what we would hope to see in a field of regleprudence. Instead of focusing on the ways the judiciary can be brought to bear on executive action and deciding whether the Executive has lived up to judicially enforceable administrative law, regleprudence can illuminate ways the Executive can grow to appreciate the kind of law it is making, developing, and adhering to over time, even without the shadow of judicial enforcement.

Perhaps what we are offering, then, is just another Fullerian project of discovering an “internal morality of law,” delineating features of legality—like *stare decisis*, consistency, reason-giving, transparency<sup>262</sup>—but one retooled for the modern administrative state. We are pushing back against an old instinct that is routinely attributed to A.V. Dicey, who saw all of administrative law as conceptually inconsistent with the rule of law, who resisted any jurisprudence of the administrative state.<sup>263</sup> This old instinct even reveals itself in Fuller. Consider Ed Rubin on Fuller:

On reflection, the problem is that Fuller has not stated principles that apply to law in general, and reflect its internal morality, but rather principles that apply to the way the state controls the conduct of its citizens through transitive statutes—in other words, to the same traditional, pre-administrative category of enactments that positivists regard as law.<sup>264</sup>

Thus Fuller, although framing his inquiry by investigating a king lawgiver Rex—an executive *par excellence*—still “embodies the basic idea that when the state imposes burdens on a specific person, it must do so through some sort of adjudication.”<sup>265</sup>

In the generations since Fuller, the field of jurisprudence continues mostly to theorize about law as that which is implemented in courts, not as binding principles that work themselves out over time within the Executive Branch itself. Rex may be King—but he has morphed into Hercules the Judge within mainstream jurisprudence.<sup>266</sup> This is not to say that all jurisprudence is adjudication-focused—there is no doubt work on legislation, international law, and law

261. *See generally id.*

262. *See* LON L. FULLER, *THE MORALITY OF LAW* (1964).

263. *See* A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 329 (10th ed. 1959); A. V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 256 (1905). For a more nuanced account of Dicey’s views about administrative law, see John A. Rohr, *Dicey’s Ghost and Administrative Law*, 34 *ADMIN. & SOC’Y* 8 (2002).

264. RUBIN, *supra* note 30, at 218.

265. *Id.*

266. One might attribute to Dworkin’s success in jurisprudence—and his focus on adjudication—the loss of the Fullerian focus on Rex as king. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* (1986); Ronald

outside courts—but it remains true that the philosophy of law has not focused much energy on accounting for the ways regulations, ordinances, administrative practice, executive orders, and regulatory review must be accommodated by the concept of law. We hope our introduction to regleprudence here inspires more work along these lines.

#### CONCLUSION

This Article calls for a new approach to analyzing the legal function at the heart of the administrative state through what we have called regleprudence: the “systematic analysis of regulation refracted through accounts of the role and nature of law.”<sup>267</sup> We have focused on OIRA as a quintessential example of the kind of lawmaking institution internal to the Executive Branch that is rarely conceived of in terms of legality. As we discussed, OIRA clearly interprets and makes law in the course of its regulatory review, and it is important to understand this legal function through a lens that is attuned to the conceptual and practical consequences of this role.

A commitment to regleprudence, however, can illustrate that concerns about the sources and legitimacy of the law, the force of precedent, and myriad other aspects of legality may apply to the entire superstructure (and substructure) of administration. Administrative law has certainly long grappled with how the judiciary should respond to the regulatory state. But law is intrinsic to so much more of the functioning of the Executive Branch than traditional accounts have allowed, and a research agenda in regleprudence can provide a frame for a deeper conceptual and practical engagement with that reality.

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Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim*, 113 U. PA. L. REV. 668 (1965).

267. See *supra* text accompanying note 4.