

# MAKING BUREAUCRACIES THINK DISTRIBUTIVELY: REFORMING THE ADMINISTRATIVE STATE WITH ACTION- FORCING DISTRIBUTIONAL REVIEW

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## ABSTRACT:

*This Article proposes that agencies analyze the distributional impacts of major regulatory actions, subject to notice-and-comment procedures and judicial review. The proposal responds to the legitimacy crisis that the administrative state currently faces in a period of widening economic inequality. Other progressive reform proposals emphasize the need for democratization of agencies. But these reforms fail to address the two fundamental pitfalls of bureaucratic governance: the “knowledge problem”—epistemic limitations on centrally coordinated decision making—and the “incentives problem”—the challenge of aligning the incentives of administrative agents and their political principals.*

*A successful administrative reform must address both problems. Looking to the environmental context, this Article proposes adapting the approach taken in the National Environmental Policy Act of 1969 (NEPA) to confront the contemporary administrative legitimacy crisis. It considers a hypothetical “Distributive Impacts Review Act,” explaining what the statutory scheme would look like and detailing how it would work. The Article concludes by reflecting on potential distributional review’s appeal both to the progressive egalitarians, and to champions of efficient government.*

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## INTRODUCTION

When the populist wave crashed over the United States in 2016, the Trump, Cruz, and Sanders campaigns did not frequently mention administrative agencies.<sup>1</sup> Instead, ire was directed at legislators, the more visible faces of the governing elite. Populists often coupled attacks with proposed reforms of campaign-finance law or restrictions on permissible forms of congressional lobbying. The Trumpian slogan "drain the swamp," for exam-

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1. See PHILIP WALLACH, THE BROOKINGS INST., THE ADMINISTRATIVE STATE'S LEGITIMACY CRISIS 30 (2016) [hereinafter WALLACH, LEGITIMACY CRISIS] (describing the Trump, Cruz, and Sanders campaigns as populist forces engaged in a "great civil war, testing whether American representative democracy uneasily coupled with a powerful technocratic administrative state can long endure."). The Cruz campaign did offer some criticism of the administrative state in advocating a return to a government conforming to the "constitutional framework." *Id.*

ple, was originally interpreted by pundits as a call for lobbying reform.<sup>2</sup> Perhaps because most Americans are unfamiliar with the structure of the administrative state and the nature of its day-to-day activities,<sup>3</sup> if the government required “draining,” it was not the halls of bureaucracy that voters had in mind.

But a legitimacy crisis of the status quo is necessarily a legitimacy crisis of the administrative state: “[o]ur governments are . . . essentially bureaucracies.”<sup>4</sup> A developing movement of progressive administrative lawyers has observed such a legitimacy crisis.<sup>5</sup> In response, reformers are rethinking administrative institutions and contemplating institutional fixes to make government more responsive to the citizenry. This Article assesses some of those reform proposals. It points out what they miss about the nature of bureaucracy, and why this matters. It then makes a novel institutional proposal to address government perpetuation of societal inequities, which lies at the root of populist discontent. The proposed statute would require agencies to prepare a distributional analysis of all major regulatory actions, subject to notice-and-comment procedures and judicial review.

The Article begins by recognizing the structural limitations on bureaucracy as a form of governance, while simultaneously recognizing the importance of accepting and improving the administrative state. The possibility of improving the decisions of bureaucratic organizations is apparent from the environmental movement. Drawing on the example of the National Environmental Policy Act of 1969 (“NEPA”), this Article proposes adapting the NEPA approach to respond to the distributional inequities underlying contemporary populism by making bureaucracies think distributively.<sup>6</sup>

In what follows, Part I describes the development of progressive reform proposals responding to the legitimacy crisis of the federal administrative

2. See Isaac Arnsdorf et al., *Will ‘Drain The Swamp’ be Trump’s First Broken Promise?*, POLITICO (Dec. 22, 2016), <http://www.politico.com/story/2016/12/trump-drain-swamp-promise-232938>.

3. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 412 (2005) (“Because administrative lawyers are intimately familiar with those legal structures, they realize what many ordinary citizens do not: that nearly every facet of our modern life is defined by a sprawling, yet poorly understood, regulatory apparatus.”).

4. Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U.L. REV. 673, 676 (2015) [hereinafter Vermeule, *Optimal*] (“[T]he great flowering of constitutional theory in the late eighteenth century addressed classical institutions, such as elected legislatures and constituent assemblies, whose importance has diminished over time. Our governments are, to a first approximation, essentially bureaucracies.”).

5. See generally K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016) [hereinafter RAHMAN, *DEMOCRACY*].

6. The phrase is a reference to Serge Taylor’s famous study of “the NEPA approach.” See generally SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* (1984).

state. It draws on the work of scholar K. Sabeel Rahman<sup>7</sup> to describe proposals to democratize administrative decision making. Part II then evaluates the democratizing approach on the basis of its ability to confront (1) the “knowledge problem” (epistemic limitations on centrally coordinated administration), and (2) the “incentives problem” (the challenge of aligning the incentives of administrative agents and their political principals). Part III presents a more promising approach to reform embodied in the National Environmental Policy Act of 1969. Part IV brings the previous sections together, proposing that the lessons embodied in NEPA can—and should—be applied to address distributional inequities, the root of the contemporary legitimacy crisis. After describing the inadequacy of distributional impacts analysis in extant regulatory practice, it proposes a mandate to the federal bureaucracy—modeled on NEPA—requiring distributional analysis of all major federal actions. It then considers the potential advantages of such a requirement. The Article concludes with some thoughts on the attractiveness of such an approach to diverse political perspectives.

This Article contributes to several literatures that are not as conversant with one another as they should be. First, it draws upon the literature developed by administrative law scholars and political scientists concerning political control of the federal bureaucracy. Second, it draws on literature about the origins, theory, and practice of federal environmental law, in particular the National Environmental Policy Act of 1969. Third, it engages with literature concerned with populist or anti-systemic political forces emerging in early 21st century advanced industrial societies, and the associated legitimacy crisis of bureaucratic governance. There have been works bringing together some of these strands—notably the work of Rahman, described below, which brings together the first and third—but few bring together all three.

This Article focuses upon a somewhat narrow statutory area—the arcana of NEPA regulatory practice and the voluminous case law concerned with it—to reflect on more general questions of administrative law, institutional design, and the contemporary politico-legal conjuncture.

## I. PROGRESSIVE REFORM OF BUREAUCRATIC GOVERNMENT

The administrative state has expanded over decades in response to a rapidly changing society and economic base. But today, emerging populist movements target the administrative state for reform or even deconstruction. These movements associate the bureaucracy with oligarchic tendencies observed in early 21st century America. Reformers have proposed to redi-

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7. RAHMAN, DEMOCRACY, *supra* note 5.

rect the regulatory bureaucracy's substantive goals and to democratize political control over the bureaucracy by transferring decisional authority from technocrats to lay citizens.

### A. *The Looming Legitimacy Crisis*

Administrative agencies have exercised federal executive power since almost the beginning of the Republic.<sup>8</sup> More recently, “the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”<sup>9</sup> For example, while the 114th Congress passed 329 statutes,<sup>10</sup> in 2015 alone federal agencies promulgated 3,410 rules<sup>11</sup> spanning 24,694 pages in the Federal Register.<sup>12</sup> In past decades, proliferation of regulation has not occurred in a vacuum. Jurists “as radically dissimilar as Chief Justice Harlan Fiske Stone and Carl Schmitt” have attributed the pre-dominance of administrative action to changes in advanced industrial society.<sup>13</sup> Technology, and with it society's economic base, change rapidly, and deliberative legislative institutions necessarily operate at an ineffectual time lag.<sup>14</sup> Government's

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8. See Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1014 (2015) (“[C]ongressional delegations of rulemaking authority began in the very first Congress. For example, the twenty-fourth statute enacted in 1789 provided that the government would continue to pay previously granted pensions ‘under such regulations as the President of the United States may direct.’”).

9. *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting); see Watts, *supra* note 8, at 1014–15.

10. These figures come from a search of government websites originally undertaken by Katherine Watts, see Watts, *supra* note 8, at 1014 n.67, which were updated for this Article: see Advanced Search, CONGRESS, <https://www.congress.gov/advanced-search> (set search parameters as “Search in: Legislation: Congress: is: 114 (2015–2016)” and “Search in: Legislation: Status of Legislation: is: Became Law”) (last visited Oct. 6, 2017).

11. See FED. REGISTER, FEDERAL REGISTER DOCUMENTS ANNUAL PERCENTAGE CHANGE 1976–2015, <https://www.federalregister.gov/uploads/2016/10/docs.PercentageChange2015.pdf> (last visited Oct. 6, 2017).

12. See Regulatory Studies Ctr., *Pages in the Federal Register (1936 – 2016)*, *Reg Stats*, GEO. WASH., <https://regulatorystudies.columbian.gwu.edu/reg-stats> (last visited Oct. 6, 2017). Page lengths might indicate quality rather than quantity of legislation. See also Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1624 (2016) [hereinafter Sunstein, *Most Knowledgeable*] (“One reason for the great length of final rules is that their preambles engage with comments, frequently in considerable detail.”).

13. ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 67 (2016).

14. ADRIAN VERMEULE & ERIC A. POSNER, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 61 (2010) (“[T]he rate of change in the policy environment is too great for traditional modes of lawmaking”).

solution has been to allocate discretion to specialist administrative officials within the executive agencies.<sup>15</sup>

Today, however, populists question the legitimacy and desirability of the transition to government by regulation. For example, President Trump's early administrative policy has clarified the meaning of "draining the swamp."<sup>16</sup> Trump's right-populist movement initially adopted a "deconstructionist" orientation towards the administrative state,<sup>17</sup> via appointment of a political leadership that is either affirmatively opposed to the agencies it directs or includes figures other than textbook unconflicted technocrats.<sup>18</sup> The deconstructionist project concentrates on shifting the federal agencies' coordination and problem-solving functions to more local authorities or allowing reversion to decentralized coordination by the private law in civil society. With at least a significant, politically determinative, portion of the American electorate, the legitimacy of the federal administrative state has been eroded.<sup>19</sup>

Frustration with the distributional outcomes of policy making is at the heart of this process. Americans across the political spectrum increasingly perceive their economic possibilities as limited and the policies structuring these possibilities as unfair.<sup>20</sup> The United States is perceived as slipping towards oligarchy, with economic and political opportunities concentrated

15. *Id.* at 60 ("[E]xecutive officials take center stage, setting the agenda and determining the main lines of the government's response, with legislatures and courts offering second-decimal modifications.").

16. See Matthew Continetti, *Donald Trump's Team of Outsiders: What Drain the Swamp Really Means*, NAT'L REV. (Dec. 3, 2016), <http://www.nationalreview.com/article/442683/donald-trump-draining-swamp-will-look-different-people-think>.

17. Max Fisher, *Stephen K. Bannon's CPAC Comments, Annotated and Explained*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html?mcubz=0> (discussing Bannon's comments that the Administration's "third . . . line of work is deconstruction of the administrative state. . . . If you look at these cabinet appointees, they were selected for a reason and that is the deconstruction.").

18. See Meg Jacobs, Opinion, *Trump is Appointing People Who Hate the Agencies They Will Lead*, CNN, Dec. 12, 2016, <http://www.cnn.com/2016/12/10/opinions/government-is-the-problem-jacobs/index.html>; Eric Lipton, Ben Protess, & Andrew W. Lehren, *With Trump Appointees, a Raft of Potential Conflicts and 'No Transparency'*, N.Y. TIMES (April 15, 2017), <http://www.nytimes.com/2017/04/15/US/politics/trump-appointees-potential-conflicts.html>.

19. See generally WALLACH, LEGITIMACY CRISIS, *supra* note 1; Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 719 (2016) (reviewing DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014)) (describing contemporary uneasiness regarding the administrative state's legitimacy).

20. See GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 223-73 (2017); WALLACH, LEGITIMACY CRISIS, *supra* note 1, at 3-6; BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY 1-3 (2017).

among the wealthy and powerful.<sup>21</sup> The work of social scientists like Thomas Piketty indicates that the perception of economic polarization corresponds to reality.<sup>22</sup> Much of the change is attributable to government, whether directly or indirectly: Congress has experienced impasse and a potentially untenable fiscal situation for almost a decade; outside of government, the country has experienced low growth, rising inequality, looming environmental crisis, and other signs of ostensible decline.<sup>23</sup> Rather than counteracting these trends, the administrative state has participated in upward redistributions of wealth and opportunity.<sup>24</sup> It is from this predicament—to some extent shared with other advanced industrial societies—that the United States has experienced the emergence of populist or “anti-systemic”<sup>25</sup> political forces of both the right and left.

The populist wave coincides with an ascendant legal-academic and judicial movement that questions the legitimacy of the administrative state on constitutional grounds.<sup>26</sup> Adherents of the movement interpret the federal Constitution to emphasize its robust protection of property and economic rights from government intrusion. According to this interpretation, the Constitution has been “in some sense ‘lost’ or ‘in exile’ ” since the New Deal era, when courts acquiesced to an expanding Executive.<sup>27</sup> The movement seeks either for the Executive unilaterally to retract its administrative reach or for the judiciary to corral the bureaucracy within the strictures set

21. See generally SITARAMAN, *supra* note 20; see also Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1302 (2016).

22. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); see also SITARAMAN, *supra* note 20, at 223-73.

23. See generally Nicholas N. Eberstadt, *Our Miserable 21st Century*, COMMENTARY (Feb. 15, 2017), <https://www.commentarymagazine.com/articles/our-miserable-21st-century/>, (noting the decline in American economic conditions and quality of life).

24. LINDSEY & TELES, *supra* note 20, at 6 (“[G]overnment has contributed actively to inequality, not just by failing to restrain naturally inegalitarian market forces but by distorting market forces in an inegalitarian direction. The rise of inequality is, to a significant extent, a function of state action rather than the invisible hand”); Steven M. Teles, *The Scourge of Upward Redistribution*, 33 NATL AFF 78, 78-79 (2015) [hereinafter Teles, *Scourge*] (describing “inequality generated by public policies that distort market allocations of resources in favor of the wealthy—what we might call ‘upward-redistributing rents.’”).

25. See, e.g., Perry Anderson, *Too Frightened to Change a Hated Order*, NATION (Mar. 6, 2017), <https://www.thenation.com/article/too-frightened-to-change-a-hated-order/>.

26. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). Cass R. Sunstein and Adrian Vermeule refer to the movement as “the New Coke” in sarcastic reference to the legendary 17th century English judge who resisted despotism under the Stuarts. Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41-42 (2015) [hereinafter Sunstein & Vermeule, *New Coke*]; see also Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398-99 (2015) [hereinafter Sunstein & Vermeule, *Libertarian*].

27. Sunstein & Vermeule, *Libertarian*, *supra* note 26, at 402.

by the Constitution. Until recently, this movement had been dismissed as a passing phenomenon,<sup>28</sup> and recent judicial decisions had dampened its hopes of imminent constitutional renewal.<sup>29</sup> But with changes in the composition of the judiciary that could not have been predicted before the Trump Presidency, those dismissive conclusions may have been premature.

If it has not already arrived, the legitimacy crisis looms once again.<sup>30</sup>

### B. *Progressive Administrative Reformism*

While advocates of deregulation and libertarian jurists have long debated the legitimacy of the administrative state—both in functional and constitutional terms—a number of progressive scholars have joined the debate. Many contributions have been historiological, questioning the historical premises of the libertarian judicial movement.<sup>31</sup> Other scholars have directed efforts not to address the lawfulness of the administrative state, but to question its legitimacy in the sociological sense of the term,<sup>32</sup> rethinking

28. *Id.* at 471 (“But for the immediate future, the only significant question is whether, and how swiftly, libertarian administrative law will be stopped or undone.”); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1553 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (“If one [claims] that the administrative state will be essentially unchanged in its large institutional outlines for the foreseeable future and that administrative law will also, the observation is certainly correct.”).

29. Sunstein & Vermeule, *New Coke*, *supra* note 26, at 42 (discussing *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) and *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225 (2015) as “two important decisions in [which] a supermajority of the Court refused to embrace the *New Coke* . . . issu[ing] the long-awaited *Vermont Yankee II*, insisting that courts are not authorized to add procedures to those required by the Administrative Procedure Act . . . For now, the center holds.”).

30. See generally JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* (1978) (discussing the rise of the administrative state and how agency structures create concerns about separation of power and bureaucracy). *But compare* Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND, May 9, 2016, <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> (“[T]here is no need for even a moderate solution because there is no demonstrated problem to begin with.”) with Philip Wallach, *Our Simmering Crisis*, CATO UNBOUND, May 16, 2016, <https://www.cato-unbound.org/2016/05/16/philip-wallach/our-simmering-crisis> (“[P]erhaps [Vermeule] thinks that if the people are not revolting, there must not be a crisis. I may be living in a different world than Vermeule, but recent political developments convince me that a crisis is indeed upon us, if only in simmering form for now. When three of the four leading vote-getters in the presidential primaries call for dramatic departures from our current way of governing, we should be able to agree that something is afoot.”).

31. See Kessler, *supra* note 19, at 719 (describing a “recent proliferation of scholarly defenses of the historical pedigree of the administrative state”); see also *id.* at 772 (discussing weaknesses of history-based legitimations of the administrative state).

32. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-96 (2005) (“Legitimacy can be measured against three kinds of standards that produce different concepts of legitimacy—legal, sociological, and moral. . . . Legal legitimacy and

the federal bureaucracy's institutions and proposing reforms.<sup>33</sup> Many of these proposals involve democratizing agencies, opening up bureaucratic decision making to public participation.<sup>34</sup> The result, reformers claim, would be an improved regulatory response to the needs of the public as well as renewed legitimacy.

Several of these proposals have been gathered in the work of K. Sabeel Rahman, who sets proposals within a historically informed critique of the administrative state. Like other scholars upon whom he draws,<sup>35</sup> Rahman begins with a diagnosis of the administrative state's legitimacy crisis: there has been a "confluence of economic upheaval and governmental failure."<sup>36</sup> For Rahman, the legitimacy crisis arises primarily from the government's complacency and complicity in what he perceives as inequitable distributions of power. In contemporary America, the distribution of wealth and economic power results in "domination—the accumulation of arbitrary authority unchecked by the ordinary mechanisms of political accountability."<sup>37</sup> For Rahman, "accumulations of arbitrary authority" take two forms. Visible instances of "dyadic domination" occur in transactions between market actors with disparate bargaining power or informational resources. Less visible "structural domination" occurs where negative externalities of market activity—low wages, unemployment, market failures—constrain opportunities and cast an unchecked influence over Americans' lives.<sup>38</sup>

The "government failure" Rahman names refers to the administrative state's failure to counter and eliminate the two forms of domination.

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illegitimacy depend on legal norms . . . . When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward. . . . In the Weberian sense, legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.”).

33. See David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1461 (2013) [hereinafter Arkush, *Direct Republicanism*] (describing “[a] flurry of interest in regulation has arisen, as well as a near-simultaneous backlash”).

34. David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 613 (2012) [hereinafter Arkush, *Democracy*] (“[T]he democracy ideal should command more attention and energy. . . . [T]he democracy ideal may offer the best path to strengthening administrative legitimacy.”).

35. See *id.* at 611-12.

36. RAHMAN, *DEMOCRACY*, *supra* note 5, at 77.

37. *Id.* at 66, 80 (“[T]he problem of the market economy today is more centrally a problem of economic power, specifically of domination—the concentration of arbitration power that undermines economic freedom and opportunity for individuals and communities. This domination can take the form either of concentrated private power of firms, or of the diffuse structural power of the market as a system.”).

38. *Id.* at 80-86.

Rahman attributes the failure to the administrative state's "ethos" or "intellectual paradigm" of managerialism.<sup>39</sup> Managerialism entails a substantive commitment to "optimizing the market" and a procedural reliance on technocratic expertise to achieve this optimization and justify agency decisions.<sup>40</sup> Rahman dates the governmental failure to a "neoliberal turn in late twentieth century,"<sup>41</sup> which he understands as an ideational phenomenon: Influenced by the neoliberal "critique,"<sup>42</sup> administrators experienced "a discernable shift . . . from the New Deal-era faith in government, expertise and macroeconomic management to a stance that is more critical of government economic regulation and more solicitous of the benefits of free markets, privatization and business interests."<sup>43</sup>

## 1. Substantive Reform: Reclaiming the Goals of Regulation

According to progressive reformers, the administrative state has compromised its substantive goals. In fulfilling statutory directives from Congress, agencies are committed not to take sides in relationships of domination.<sup>44</sup> Instead, bureaucrats interpret their task as neutral "optimization" of the market through the pursuit of efficiency.<sup>45</sup> This narrow role forfeits what reformers consider the proper function of government: "to check domination [and] prevent unchecked private or systemic power."<sup>46</sup>

One proposed corrective from reformers is normatively worded statutory directives, for example, to commit agencies to "counteract domination . . . and yield outcomes that respond to the public's needs."<sup>47</sup> As a model, Rahman points to the Consumer Finance Protection Bureau's directive "to further the interests of consumers such as by protecting them from 'unfair, deceptive, or abusive acts and practices.'"<sup>48</sup> Rather than neutral searches for efficient legal rules, agencies should undertake "*seemingly* difficult and morally controversial 'line-drawing' " tasks, defining "socially desirable . . . activities that will be permitted" as well as "socially harmful practices that will

39. *Id.* at 32.

40. *Id.* (managerialists have "a narrow view of the goals . . . and the means of regulation").

41. *Id.* at 39.

42. *Id.* at 40.

43. *Id.* at 39.

44. See K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. ON LEGIS. 555, 584 (2011) [hereinafter Rahman, *Envisioning*].

45. RAHMAN, DEMOCRACY, *supra* note 5, at 17-19.

46. *Id.* at 117.

47. *Id.* at 98. See Rahman, *Envisioning*, *supra* note 44, at 580.

48. Rahman, *Envisioning*, *supra* note 44, at 581.

be restricted in a more categorical fashion.”<sup>49</sup> The distributive effects of legal rules should be used directly to “rebalance political power.”<sup>50</sup>

## 2. Procedural Reform: Addressing the Additional Problem of Technocracy

To bring about substantive changes in administration, reformers also desire procedural modification. According to the reformers, the administrative state has relied on technocrats since the New Deal era.<sup>51</sup> The New Deal model was tempered by the introduction of the Administrative Procedure Act’s notice-and-comment process and judicial review. But the APA’s reliance on periodic input by “organic civil society mobilization[s]” is not a sufficient democratic counterweight to the influence of technocrats.<sup>52</sup> The regulatory state remains governed by a “faith in expertise.”<sup>53</sup>

Progressive reformers insist that government by “expert-led regulatory agencies [in the place of] the democratic public” does not result in optimal regulatory actions.<sup>54</sup> “[I]n the face of complexity, and particularly when facing unexpected, contingent, and vague future benefits or uncertain catastrophic risks,” the returns of technical expertise are limited.<sup>55</sup> According to Rahman, benefits to expertise are even more limited in circumstances of technological and economic change: experts are well-versed in the knowledge of yesterday, but “[s]ocial and political concerns often outpace scientific consensus,” rendering the knowledge obsolete.<sup>56</sup> “Regulatory discretion and judgment are inescapable,”<sup>57</sup> Rahman states, but there is “no reason to think ordinary people are any less capable of responding to evidence and correcting prior errors than technocrats.”<sup>58</sup>

In the place of technocratic decision making, Rahman argues that the state should adopt a directed, participatory approach where decisions are made directly by members of the public. He advances several institutional arrangements to this end. One proposal is to subject regulatory decisions to referenda—possibly online—before final promulgation.<sup>59</sup> Rahman also pro-

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49. RAHMAN, *DEMOCRACY*, *supra* note 5, at 118, 122 (emphasis added).

50. *Id.* at 98.

51. *Id.* at 44, 114.

52. *Id.* at 114-15 (arguing for “a more meaningful form of political power than simply [the public] providing input to decision-makers”).

53. *Id.* at 126.

54. *Id.* at 32-33; *see also* Arkush, *Democracy*, *supra* note 34, at 617-18.

55. RAHMAN, *DEMOCRACY*, *supra* note 5, at 126.

56. *Id.* at 99.

57. *Id.* at 117.

58. *Id.* at 101.

59. *Id.* at 113.

poses the establishment of “deliberative micro-publics,”<sup>60</sup> rulemaking bodies on which lay citizens would wield final decisional authority. Their composition could be set randomly, as in David Arkush’s proposal for administrative juries.<sup>61</sup> Alternatively, a more carefully tailored group of decision makers could be selected to “promote equality for representation for different social interests and values identified as important *ex ante*.”<sup>62</sup> Rahman also presents an idea advanced by Wendy Wagner in which the government would “creat[e] . . . office[s] dedicated to [these] particular social interests” within the agencies to ensure that valuable perspectives are represented.<sup>63</sup> Experts would still be needed to “provide information, advice, and knowledge as inputs into democratic debate. . .”<sup>64</sup> But lay citizens would “hold sway to check, guide, and channel the use of expert knowledge.”<sup>65</sup> Progressive reformers are confident that the regulatory output from these bodies would be superior,<sup>66</sup> and simultaneously would promote the inherent value of “robust associational life.”<sup>67</sup>

## II. LIMITATIONS ON EFFECTUAL BUREAUCRATIC REFORM

### A. *Coming to Terms with Actually Existing Bureaucracy*

To evaluate where and how administrative agencies fail, and how they can be reformed in practice, it is imperative to return to their historically situated tasks and the associated practical imperatives.<sup>68</sup> Administrative reform addresses not a theory or an ethos,<sup>69</sup> but rather a centrally coordinated, million-person organization, issuing innumerable decisions every

60. *Id.* at 112-13.

61. Arkush, *Direct Republicanism*, *supra* note 33, at 1494.

62. Rahman, *Envisioning*, *supra* note 44, at 585.

63. *Id.* at 577-78; see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1414, 1414 n.342 (2010) (describing the origins of the idea in proposals considered in the 1970s).

64. RAHMAN, *DEMOCRACY*, *supra* note 5, at 100.

65. *Id.*

66. However, even if regulatory product is inferior, Rahman argues that the aim of such institutions is not merely better policy. See Rahman, *Envisioning*, *supra* note 44, at 587. Reductions in regulatory quality are offset by benefits of civic vivacity and associational ties: “participation is valuable for more than its epistemic or informational input . . . it is the core of democratic politics.” *Id.*

67. *Id.* at 586.

68. Some progressive reformers understate the importance of practical challenges, treating these as inherently superable. See, e.g., Arkush, *Democracy*, *supra* note 34, at 621 (“The principal challenges facing the democracy ideal are matters of practical design . . . . As a result, it should be possible to make progress toward realizing the democracy ideal in administration.”).

69. See *supra* note 39 and accompanying text.

day.<sup>70</sup> The managerialist model does not correspond to the actually existing regulatory apparatus. Expert-dominated agencies (as conceived by technocrats like James Landis) were modified early in the postwar period by passage of the Administrative Procedure Act (APA),<sup>71</sup> a compromise document reconciling opponents and proponents of the New Deal,<sup>72</sup> which constrained agency personnel by administrative process and judicial review.<sup>73</sup> The APA does not afford the public (or micro-publics) decisional authority. But agencies are legally bound to consider and respond to public comment. The administrative state has continued to evolve, changing dramatically in recent decades. Catalyzed by citizen-suit litigation, the courts in the 1960s and 1970s assumed a prominent role in policing agencies.<sup>74</sup> Since the 1980s, and especially during the 1990s, reigns of control were grasped most forcefully by the presidency.<sup>75</sup> Recently, scholars have observed a shift towards a plebiscitary control of the agencies. In the early 21st century, scholars argue, the necessary speed for governmental action, the volume of information to digest, and changes in the problems requiring coordination all increase the

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70. U.S. OFFICE OF PERS. MGMT., PPA-02502-6/2016, *SIZING UP THE EXECUTIVE BRANCH: FISCAL YEAR 2015* at 5 (2016).

71. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261-62 (2001) (“The need for expertise emerged as the dominant justification for this enhanced bureaucratic power. James Landis became the principal spokesman for the idea . . . . Expressed in this form, the idea today seems almost quaint, and even then it provoked strong opposition. . . . This new skepticism toward expertise resulted in dramatic changes in administrative process. . . . The passage of the Administrative Procedure Act (APA) of 1946 . . . curtailed the sway of administrative officials by subjecting their most important lawmaking mechanisms—rulemakings and (especially) adjudications—to stringent procedural requirements.”).

72. Sunstein & Vermeule, *Libertarian*, *supra* note 26, at 466 (“[T]he APA should be treated as an organizing charter for the administrative state—a super-statute, if you will—not because it is a grand statement of principles with a specific ideological valence, but precisely because it is a compromise document.”).

73. See generally DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE* (2014) (examining how the bar and the judiciary modified the administrative state in the first half of the 20th century). *But see* Arkush, *Democracy*, *supra* note 34, at 612-13 (arguing that “the rule of law ideal” has “little expression in contemporary reform debates and proposals”).

74. See Sunstein & Vermeule, *Libertarian*, *supra* note 26, at 394-95, 467 (describing progressive administrative law and its relationship with judicial review); Kagan, *supra* note 71, at 2265 (2001) (“Going beyond what the APA seemed to require, the federal courts in the 1970s imposed on agencies new rules designed to ensure the meaningful participation in agency process of all potentially affected interests.”).

75. Kagan, *supra* note 71, at 2284-2303 (comparing and contrasting techniques of presidential administration, including OMB review, rhetorical identification of the presidency with agency actions, and most importantly directives instigating administrative action, and how changes in technique modified administrative control).

need for a less-constricted executive discretion.<sup>76</sup> These changes are evident in the broad scope of recent legislative directives as well as in the judicial deference afforded to the agencies.

### B. *Discretion as an Ineradicable Feature of Executive Power*

One may agree with today's progressive reformers: it would be wonderful if citizens always provided valuable input on policy problems, if policy problems were rendered nontechnical, and if the government itself had the resources and time to close the knowledge gap between citizens and administrative experts on all policy matters. One can set aside the question of whether most American adults would be willingly commandeered into administrative decision making; they might not mind the commitment.<sup>77</sup> But proposals must face the "practical design" constraints of 21st century government.<sup>78</sup>

Executive power necessarily entails discretion.<sup>79</sup> Given the speed of change and complexity of 21st century economic life, administrative specialization is not only understandable, but also necessary.<sup>80</sup> It may be that

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76. Vermeule, *Optimal*, *supra* note 4, at 676 ("The main reason for the transformation of our government into an administrative state is that the rate of change in the policy environment . . . the state has been forced, willy-nilly, to speed up the rate of policy adjustment. And the main speeding-up mechanism has been ever-greater delegation to the executive branch"); *see generally* VERMEULE & POSNER, *supra* note 14 (examining the concentration of power in the executive and arguing that the executive faces fewer structural barriers to policy implementation).

77. Notwithstanding his demands on citizens in a "direct republican" approach David Arkush points to precisely this problem in "direct democracy" proposals. Arkush, *Direct Republicanism*, *supra* note 33, at 1492 ("The models may over-assume the interest of ordinary citizens in the administrative process. They also fail to respond adequately to the resource constraints that stymie meaningful participation by many citizens (not just financial resources but also education and free time)."). *But see* Cuéllar, *supra* note 3, at 468-69 ("[I]ndividual members of the public routinely participate, often sending in the vast majority of the comments, producing both form letters and distinctive contributions, and in all the three case studies raising concerns that were appropriate for the agency to consider given its legal mandate. . . . Members of the lay public make up the substantial majority of participants in notice and comment proceedings in the regulations I studied.").

78. *Cf. supra* note 68 and accompanying text; Arkush, *Democracy*, *supra* note 34, at 621.

79. Vermeule, *No*, *supra* note 28, at 1558, 1560-62 (describing theory accepted in American case law, legislative and executive practice since *Grimaud v. United States* that "[s]o long as agencies are guided by an 'intelligible principle,' they are exercising executive power, not legislative power, even when they issue binding commands. . . . The theory is that it is an indispensably executive task to 'fill in the details' of statutes with binding regulations.").

80. *Id.* at 1613 ("Much of the time, the central political debates in the United States and abroad turn, above all, on the facts. If the facts can be sorted out and agreed on, the likelihood of disagreement will diminish dramatically."); Sunstein, *Most Knowledgeable*, *supra* note 12, at 1608-10.

“there is no reason to think ordinary people are any less capable of responding to evidence and correcting prior errors than technocrats.”<sup>81</sup> Indeed, an “ordinary person” educated and immersed in the technical details of a problem could *become* an expert. But that is not a basis for sidelining experts. Expertise and administrative discretion are especially valuable and necessary when the non-specialist lacks time to play catch-up with rapid changes in society.

Reformers concede that democratization proposals cannot eliminate executive discretion.<sup>82</sup> But their proposals do not embrace this position. The proposal of administrative juries demonstrates the problem. In this proposal, originally advanced by David Arkush, and adopted by Rahman, randomly selected groups of citizen laypersons decide binary or multiple-choice questions that determine a policy decision.<sup>83</sup> The juries convene online, with agencies monitoring via webcams or prompts, “requiring feedback at regular intervals to ensure adequate attention.”<sup>84</sup> An administrative lawyer realizes that rulemakings or other policy choices seldom consist of discrete binary or multiple-choice questions. Therefore, Arkush proposes that “the most promising approach” would be for agency staff to define the alternatives available, select the criteria for choosing between them, and present juries with a simplified questionnaire with these choices already made.<sup>85</sup> In fact, it may even be necessary for administrative experts to narrow the list of questions posed, given constraints of time and attention.<sup>86</sup> Even then, Arkush “does not suggest that juries are fit to play a role in every type of administrative decision.”<sup>87</sup> Presumably administrators would make that choice too. As in other democratization proposals, the fundamental necessity of discretionary decisions cannot be eliminated from executive power.

81. RAHMAN, *DEMOCRACY*, *supra* note 5, at 101.

82. *Id.* at 117 (“Regulatory discretion and judgment are inescapable.”); *see* Arkush, *Democracy*, *supra* note 34, at 619.

83. Arkush, *Direct Republicanism*, *supra* note 33, at 1504 (“Examples of binary choices include an up-or-down vote on an agency proposal or, preferably, an important element within it.”).

84. *Id.* at 1501.

85. *Id.* at 1502, *Id.* at 1504 (“Administrative juries can have a role in rulemakings . . . so long as they are given narrow, discrete matters to decide.”); *Id.* at 1496 (“[T]he agency completes as much of the technical work as possible . . . . It then narrows the issues, making whatever decisions it believes are compelled by its statutory mandate and the scientific evidence . . . but it leaves one or more significant discretionary decisions unresolved.”).

86. *Id.* at 1504 (“Some rulemakings are highly complex . . . . A jury need not be presented with every policy question in this type of rulemaking; it should be presented with one or more discrete matters, preferably ones that can be framed as binary choices, multiple-choice questions, or a range of possibilities.”).

87. *Id.* at 1521.

### C. *Two Problems with Bureaucracy*

Because of the necessity of discretion, any reform of the regulatory state must come to terms with the two characteristic challenges endemic to bureaucratic decision-making.<sup>88</sup> These are the knowledge and incentives problems.

#### 1. The Knowledge Problem

The first problem is a structural limitation on the capacity of centralized organizations—like the administrative agencies and the federal executive as a whole—to gather, process, and respond to information regarding the activity or problem to be regulated. Whether these problems are market exchanges or environmental harms, the dispersal of information and the need for localized knowledge—some of which does not exist in ready, accessible, and transferable form—limits administrative agencies to at best rough approximate knowledge of what is happening.<sup>89</sup> Recognition of the knowledge problem is often equated with a deregulatory or libertarian political orientation. This connection is not necessary: the knowledge problem is of paramount importance for everyone involved in social life, including non-libertarians. The upshot is not that centrally coordinated activity (like regulation) should never occur, but that there may be tasks to which it is better and worse suited.<sup>90</sup>

To choose between addressing a social problem through centrally coordinated regulation or ceding the ground to private ordering is to consider a tradeoff, not perfect solutions. Bureaucracy offers the benefit of synoptic coordination and energetic response, albeit on the basis of partial knowledge; private ordering might in some cases occur on the basis of more localized (albeit not necessarily better) knowledge, but without the synoptic coordination or dynamism of the unitary actor.<sup>91</sup> The assumption that the superior choice in this tradeoff is always decentralized (spontaneous or emergent) ordering is incorrect. In many cases, coordination problems will

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

89. This insight is explained by F. A. Hayek in his seminal 1945 paper, “The Use of Knowledge in Society.” Hayek, *supra* note 88.

90. *Id.* at 521 (explaining that the choice “depends on whether we are more likely to succeed in putting at the disposal of a single central authority all the knowledge which ought to be used but which is initially dispersed among many different individuals, or in conveying to the individuals such additional knowledge as they need in order to enable them to fit their plans in with those of others . . . the position will be different with respect to different kinds of knowledge”).

91. Adrian Vermeule, *Local and Global Knowledge in the Administrative State*, in LAW, LIBERTY AND STATE: OAKESHOTT, HAYEK AND SCHMITT ON THE RULE OF LAW 313 (David Dyzenhaus & Thomas Poole eds. 2015) [hereinafter Vermeule, *Local and Global*].

arise in which the benefits of centralized organization outweigh the costs of inferior knowledge.<sup>92</sup> After all, not all spontaneous orders are good ones.<sup>93</sup> Thus, there are circumstances in which private ordering cannot succeed due to coordination problems and negative externalities.<sup>94</sup> The response to the knowledge problem is not that the administrative state should be deconstructed, but rather that the political system must exercise judgment regarding what kinds of tasks a bureaucracy is assigned.<sup>95</sup>

Progressive reformers call for administrative agencies to overcome the knowledge problem through democratization. For example, Rahman argues that “[t]he same knowledge-aggregating properties that Hayek attributed to the decentralized market as a mechanism for decision-making may well be present in democratic decision-making, since each individual can register his own impressions through the democratic process.”<sup>96</sup> Though the argument is not wholly novel in other areas of reform thinking,<sup>97</sup> it has been an increasingly prevalent argument in administrative law scholarship.<sup>98</sup>

92. See Andrew Gamble, *Hayek and the Left*, 67 POL. Q. 46, 51 (1996) (“Catalaxies cannot be relied on to solve all problems. . . . Particular crises, such as famines, wars or environmental catastrophes, demand the speed of response that a made order can provide. Problems of public goods and externalities often cannot be easily handled within catalaxies, and may require more direct government intervention.”).

93. ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 35 (2008) (“The Tragedy of the Commons is a spontaneous order, just a bad spontaneous order that produces a structured social pattern of depletion and waste.”) [hereinafter VERMEULE, *LAW AND THE LIMITS*].

94. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 38-39 (1944) (“There are . . . undoubted fields where no legal arrangements can create the main condition on which the usefulness of the system of competition and private property depends: namely, that the owner benefits from all the useful services rendered by his property and suffers for all the damages caused to others by its use. . . . [S]ome method other than competition may have to be found to supply the services in question. . . . [Among these are] certain harmful effects of deforestation . . . some methods of farming . . . the smoke and noise of factories . . . .”).

95. As Andrew Gamble puts it, “the real issue is to ensure that government is making use of both [spontaneous] and made orders in order to tackle the problems it faces effectively.” Gamble, *supra* note 92, at 51.

96. K. Sabeel Rahman, *Conceptualizing the Economic Role of the State: Laissez-Faire, Technocracy, and the Democratic Alternative*, 43 POLITY 264, 283 (2011) [hereinafter Rahman, *Conceptualizing*].

97. Other post-Marxist intellectuals had advanced this argument—to similar effect. See *infra* note 103—in the 1990s, see HILARY WAINWRIGHT, *ARGUMENTS FOR A NEW LEFT: ANSWERING THE FREE-MARKET RIGHT* 41-110 (1994); SIMON GRIFFITHS, *ENGAGING ENEMIES: HAYEK AND THE LEFT* 69-94 (2014) (describing Wainwright’s engagement with the knowledge problem).

98. Rahman seems to have been the first among administrative legal scholars to advance the argument. See, e.g., Rahman, *Conceptualizing*, *supra* note 96, at 283; Vermeule, *Local and Global*, *supra* note 91, at 305 (“The market is just one possible institutional mechanism for generating and then aggregating local knowledge.”) (citing Rahman, *Conceptualizing*, *supra* note 96, at 283); Cass R. Sunstein, *Cost-Benefit Analysis and the Knowledge Problem*, 9 (Mossavar-Rahmani Ctr. for Bus. & Gov’t., Working Paper RPP-2015-03, 2014) [hereinafter Sunstein, *Knowledge Problem*] (“In the modern era, regulators are in a far better position to collect

The democratization proposal merely transfers the problem of dispersed information and the need for aggregation and synthesis. In order to factor into a policy decision, information dispersed throughout the administrative state would have to be aggregated and processed within the mind of a single decision maker. The result is what Adrian Vermeule has described as the “epistemic bottleneck.”<sup>99</sup> The wider the net cast by the regulators, the more extensive the volume of information received, the more dramatic the bottleneck problem.<sup>100</sup> In practice, the real costs of this problem may be evident in what Wendy Wagner describes as “filter failures”: administrative officials are inundated with huge quantities of data that they cannot possibly process, digest, and factor into administrative actions.<sup>101</sup> Technological

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the dispersed information of the public. . . . Democratization of the regulatory process, through the comment process, has an epistemic value. It helps to collect dispersed knowledge and to bring it to bear on official choices.”); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) (“OIRA helps to collect widely dispersed information—information that is held throughout the executive branch and by the public as a whole. OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside the federal government.”); Sunstein, *Most Knowledgeable*, *supra* note 12, at 1623–24 (“OIRA often urges [agencies] to think . . . that the role of the comment process is to learn . . . . It is not much of a stretch to see the inspiration for this form of deliberative democracy in Friedrich Hayek, and especially his emphasis on the dispersed nature of knowledge in society. . . . [H]is work on widely dispersed information has helped inspire the effort to go outside of government and learn from what others know.”).

99. VERMEULE, *LAW AND THE LIMITS*, *supra* note 93, at 50 (“The judgments of many minds may be the input to a decisionmaking process, but if the structure of that process requires or allows few minds to accept or reject the many-minded judgment, or even just to interpret it, then the resulting decision may be little better than if the one mind had simply decided for itself, right from the start.”).

100. The knowledge problem would also apply where the agency selects representative members of the public or relevant “underrepresented” interest groups to serve on a decisional “micro-public” body. Rahman never explains how an official would know *ex ante* (as opposed to decide unilaterally) which members of the public have relevant information. *See* Kagan, *supra* note 71, at 2267–68 (describing similar risks in the context of negotiated rulemaking, in which “the agency establishes a negotiating committee thought to represent all affected interests and charges it with reaching consensus on the terms of a rule.”).

101. *See* Wagner, *supra* note 63, at 1353-62.

improvements, efficient processes, and smarter regulators undoubtedly help.<sup>102</sup> But they cannot eliminate the knowledge problem.<sup>103</sup>

Democratization proposals need to reckon with this inherent limitation of bureaucracy. In terms of epistemic improvements to regulation, aspirations should be more modest. Public participation can—and does—mitigate aspects of the knowledge problem, but it cannot eliminate them. For example, APA rulemaking procedures serve several purposes, foremost an epistemic one. Provided that notice is sufficient, and that parties with knowledge have incentives to participate, the APA's § 553 procedures can help the bureaucracy gather information from civil society, mitigating the knowledge problem as much as is possible.<sup>104</sup>

## 2. The Incentives Problem

The second limitation on bureaucracy is the “incentives problem,” the challenge in aligning bureaucrats’ incentives with their democratically determined directives.

Many scholars construe the relationship between agencies and the political branches as a variety of the principal-agent problem.<sup>105</sup> Due to the

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102. Sunstein discusses the e-rulemaking procedures implemented by the Obama White House during his tenure as Administrator at OIRA as an example of the democratization of regulation, though he concedes that even with such improvements participatory openness “might fail to solve the knowledge problem.” Sunstein, *Knowledge Problem*, *supra* note 98, at 8-10 (“We have now entered the age of e-rulemaking, thanks in part to Executive Order 13563, issued by President Obama in 2011 and serving as a kind of mini-Constitution for the regulatory state. . . . [E]ven in its most ambitious forms . . . the public comment process might fail to solve the knowledge problem”).

103. For a corresponding treatment of Wainwright’s theory, see John Meadowcroft, Book Review, 29 *REV. AUSTRIAN ECON.* 429, 431 (2016) (reviewing SIMON GRIFFITHS, *ENGAGING ENEMIES: HAYEK AND THE LEFT* (2015)) (“For all Wainwright’s engagement with Hayek’s ideas, it is apparent that she failed to understand the fundamentals of his epistemology.”).

104. As Cass Sunstein puts it, “[i]t would be extravagant to contend that notice-and-comment rulemaking can eliminate the knowledge problem, even in the modern era, but it can produce a great deal of help.” Sunstein, *Knowledge Problem*, *supra* note 98, at 17; see also Gamble, *supra* note 92, at 49 (“The logic of Hayek’s approach—even if he himself does not always follow it through—is that there should be constant efforts to reform organizations to allow the specialized knowledge held by each individual to be utilized in the way in which decisions are taken.”).

105. See, e.g., Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 *J.L. ECON. & ORG.* 243, 243 (1987) (“[P]olitical control of agencies is a principal-agent problem”); Kagan, *supra* note 71, at 2246 (“The history of the American administrative state is the history of competition among different entities for control of its policies.”); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 *GEO. L.J.* 671, 675 (1992) (“[T]he executive and Congress are involved in a healthy, ongoing tug of war over control of administrative agencies.”); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *TEX. L. REV.* 1443, 1487 (2003) (“[M]embers of Congress compete with each other, over time, to

breadth of subject matters to which they must attend, elected officials must entrust details of policy to specialists within the agencies, either by legislative directive or by top-down delegations of power within the executive.<sup>106</sup> As in other such relations, incentives of principals and agents can diverge,<sup>107</sup> and, because there is an informational asymmetry regarding the subject of regulation, the divergence can go undetected and uncorrected.<sup>108</sup>

Other alignment failures can emerge.<sup>109</sup> One of these is regulatory capture, the subversion and appropriation of the regulatory apparatus by regulated entities.<sup>110</sup> Progressive reformers largely focus on this problem,<sup>111</sup> but they might overemphasize the phenomenon's importance. Scholars agree that capture is less pressing a problem today than it was in the early post-New Deal era.<sup>112</sup> Indeed, with "the deregulation of the older forms of regu-

control delegated power. This places agencies in the uncomfortable position of having to respond to multiple legislative principals, whose preferences do not always align."); see generally Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010).

106. McCubbins et al., *supra* note 105, at 257 ("Delegation of authority makes it possible for agencies to adjust policies in directions desired by political leaders as more information is obtained. But this is only a possibility, not a certainty."). Max Weber, *Bureaucracy*, reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 232-33 (H. H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1948) ("The political master finds himself in the position of the 'dilettante' who stands opposite the 'expert', facing the trained official who stands within the management of administration.").

107. McCubbins et al., *supra* note 105, at 247.

108. *Id.*

109. See *id.* at 247 ("[S]everal consequences can emerge from this situation. . . . shirking . . . . corruption . . . . oligarchy: the peculiar political preferences of the agency override democratic preferences."); see also Macey, *supra* note 105, at 672 ("The problem facing Congress can be described as bureaucratic drift, which refers to changes in administrative agency policies that lead to outcomes inconsistent with the original expectations of the legislation's intended beneficiaries."); DeShazo & Freeman, *supra* note 105, at 1455 ("At a minimum, the perception of drift is pervasive.").

110. See Daniel Carpenter & David Moss, *Introduction to PREVENTING REGULATORY CAPTURE* 1, 13 (Daniel Carpenter & David Moss eds., 2013) ("Regulatory capture is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself."); Richard A. Posner, *The Concept of Regulatory Capture: A Short Inglorious History*, in PREVENTING REGULATORY CAPTURE 49, 53-54 (Daniel Carpenter & David Moss eds., 2013) [hereinafter Posner, *Regulatory Capture*] ("[T]he term regulatory capture, as I use it, refers to the subversion of regulatory agencies by the firms they regulate. This is to be distinguished from regulation that is intended by the legislative body that enacts it to serve the private interests of the regulated firms") (emphasis omitted).

111. RAHMAN, *DEMOCRACY*, *supra* note 5, at 126 (discussing efforts to address regulatory capture); see Arkush, *Democracy*, *supra* note 34, at 620-21.

112. See, e.g., Posner, *Regulatory Capture*, *supra* note 110, at 53-54 ("As a result of the deregulation movement, which began in the late 1970s mainly as a reaction to the economy's dismal performance in that decade . . . . [n]ew regulatory agencies were springing up to

lation and the rise of newer forms that are less susceptible of being (fully) captured, regulatory capture is no longer at the forefront of analysis.”<sup>113</sup> To the extent that it is a problem, the capture of concern may not be traditional capture by regulated interests.<sup>114</sup> Bureaucratic institutions suffer from other, more nefarious misalignments of incentives, like torpor.<sup>115</sup> The principals controlling the state no doubt would prefer it otherwise, but the informational asymmetry between the political leadership and the bureaucrats make the problem almost impossible to eliminate:<sup>116</sup> only agency officials know whether a slow tempo results from difficult, time-consuming work or torpor.<sup>117</sup> The bureaucracy’s capacity for foot-dragging was highlighted after

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enforce [ ] economy-wide or sector-wide regulatory programs . . . . The surviving regulatory programs have considerable public support, and because the programs are not comprehensive regulations of the competitive activities of specific industries . . . it is more difficult for the firms subject to the regulation to organize intense and focused efforts at capture. . . . The goal of business in dealing with the newer forms of regulation is to weaken regulation, not to make it a servant of business.”; Sunstein, *Knowledge Problem*, *supra* note 98, at 11 (“[A]cademic observers wildly overstate the role of interests groups”).

113. Posner, *Regulatory Capture*, *supra* note 110, at 54-55.

114. See DeShazo & Freeman, *supra* note 105, at 1501 (describing a “sub-majoritarian difficulty” in congressional oversight of agencies in which “individual committee members, acting without the approval of a congressional majority, might divert an agency from its legislative mandates”); Wagner, *supra* note 63, at 1362-72 (describing “information capture”); James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE 71, 78-79 (Daniel Carpenter & David Moss eds., 2013) (describing “cultural capture”).

115. Kagan, *supra* note 71, at 2263 (“[B]ureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor.”); Posner, *Regulatory Capture*, *supra* note 110, at 51 (describing the problems of “ossification” and agency stagnation). *But see* Sunstein, *Most Knowledgeable*, *supra* note 12, at 1609 (“If officials do not proceed on one task, their inaction might, in the abstract, seem objectionable or even scandalous. But the action might not be a product of neglect or dereliction, but rather of scarce resources and a belief that other tasks deserve priority. The real question might involve timing, and those in the executive branch are in a unique position to see why (and how) timing is important. . . . Government faces a constant bandwidth problem, and observers—focused on just one of a large number of issues—suffer from ‘bandwidth neglect.’”). For example, the GAO studied EPA rulemakings from May 31, 2008 to June 1, 2013: during this period, of the 32 major rules promulgated, 9 resulted following settlements of deadline suits, “finalized between about 10 months and more than 23 years after the applicable statutory deadlines.” U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA’S RULEMAKING IS LIMITED 9 (2014).

116. See Weber, *supra* note 106, at 234 (“The absolute monarch is powerless opposite the superior knowledge of the bureaucratic expert . . . . All the scornful decrees of Frederick the Great concerning the ‘abolition of serfdom’ were derailed, as it were, in the course of their realization because the official mechanism simply ignored them as the occasional ideas of a dilettante.”).

117. There may be a tradeoff between the speed of administrative action and the extent to which the knowledge problem can be mitigated. See Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483-84 (1997) (“Articles lamenting the recent ‘ossification’ of

the recent inauguration of Donald Trump, with reports of civil servants subverting government policy through intentional foot-dragging and small-scale sabotage.<sup>118</sup>

#### D. *Addressing the Knowledge and Incentives Problems with Political Control*

While elected representatives are disciplined at the ballot box, bureaucrats are insulated from direct democratic checks.<sup>119</sup> Moreover, elected officials are incapable of comprehensively monitoring agency activity and disciplining non-compliance.<sup>120</sup>

Further directives to agencies are unlikely to remedy the situation.<sup>121</sup> Progressive reformers have sought to insert “the question of the social value . . . at the center of the regulatory question” in order to “motivate regulatory approaches that . . . can help prevent social harms.”<sup>122</sup> But legislation already includes the broad directives that these reformers desire. A closer look would indicate why: such language may in some instances be attractive because it is so open to interpretation, allowing for directives where Congress “could not reach agreement on specifics, given limited time and diverse interests” or allowing legislators “to pass on to another body politically difficult decisions.”<sup>123</sup> An agency official tasked with discerning how he or

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notice and comment rulemaking seem to be the fashion in administrative law scholarship today. The term ‘ossification’ refers to the inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules. To a large extent, developments in administrative law over the past two decades that were meant to expand public participation and influence in administrative decision making have unintentionally put these hurdles in place.”)

118. See, e.g., Michael D. Shear & Eric Lichtblau, ‘*A Sense of Dread*’ for Civil Servants Shaken by Trump Transition, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/politics/a-sense-of-dread-for-civil-servants-shaken-by-trump-transition.html?mcubz=1> (reporting on the basis of interviews with federal agency staff); Juliet Eilperin et al., *Resistance from Within: Federal Workers Push Back Against Trump*, WASH. POST (Jan. 31, 2017) [https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.5a3dd8cd3590](https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.5a3dd8cd3590).

119. McCubbins et al. *supra* note 105, at 247.

120. *Id.* at 243 (“[T]he possibility arises that bureaucrats will not comply with [elected officials’] policy preferences.”).

121. *Id.* at 272.

122. RAHMAN, DEMOCRACY, *supra* note 5, at 126 (“By putting the question of the social value of finance at the center of the regulatory question, we can motivate regulatory approaches that rely not on sporadic technocratic oversight or minimalist regulation, but instead on structural changes that can help prevent social harms . . .”).

123. Kagan, *supra* note 71, at 2255-56; see also DeShazo & Freeman, *supra* note 105, at 1452 (“[W]hy does Congress delegate? The reasons, according to political scientists, are many. First, as a body, Congress lacks the requisite information or expertise to make

she would go about pursuing “the public’s needs,<sup>124</sup> or the interests of “main street” and or the “middle class,” would have innumerable interpretations at his or her disposal. The indeterminacy problem is equally applicable to the organizing concept of the burgeoning civic republican reformism: domination.<sup>125</sup>

The American federal state has ex post monitoring and correction controls to supplement organic directives, but these too are insufficient. For example, the President oversees the bureaucracy and its regulatory output via review by the Office of Management and Budget.<sup>126</sup> He or she also wields the removal power as a stick to punish runaway bureaucrats, and can organize their activity via directives.<sup>127</sup> Congress retains the ability to punish agencies via legislation.<sup>128</sup> Congress can also use the Congressional Review Act to excise particular regulatory output and potentially foreclose substantially similar rules.<sup>129</sup> “Nevertheless, by itself, a system of rewards and punishments is unlikely to be a completely effective solution to the control problem. This is due to the cost of monitoring, limitations in the range of rewards and punishments, and, for the most meaningful forms of rewards and punishments, the cost to the principals of implementing them.”<sup>130</sup>

Where the government chooses to use centralized coordination instead of decentralized private ordering, procedural innovations can render bureaucracy more accountable and informed, especially when coupled with ju-

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thousands of specific decisions. Second, the transaction costs of coming to agreement on contentious issues are high. Third, delegation ‘expand[s] the scope of politically relevant activity available’ to political actors. Finally, members wish to avoid responsibility for hard decisions with political costs.”).

124. RAHMAN, *DEMOCRACY*, *supra* note 5, at 98.

125. *See id.* at 124; *see also, e.g.*, Philip Petit, *The Domination Complaint*, 46 *NOMOS* 87, 94 (2005) (“Domination . . . is not an on-or-off condition but one to which a person may be subject at higher or lower degree of intensity.”).

126. McCubbins et al., *supra* note 105, at 272 (“Substantive legislative specificity is a substitute for monitoring and punishment as a means of assuring bureaucratic compliance. In a large, complex government operating in a world of economic, technical, and political uncertainties, and subject to shifting coalitions of questionable stability, widespread practice of substantive legislative specificity is as impractical as widespread use of monitoring and sanctions.”).

127. *See supra* note 75 and accompanying text; *see also* Kagan, *supra* note 71, at 2293-94, 2298.

128. McCubbins et al., *supra* note 105, at 248 (“Appropriations and reauthorization bills also provide a means for either general or programmatically targeted rewards and punishments.”).

129. 5 U.S.C. §§ 801-808 (2012).

130. McCubbins et al., *supra* note 105, at 249.

dicial review.<sup>131</sup> “[P]rocedures can be used to mitigate informational disadvantages faced by politicians in dealing with agencies,”<sup>132</sup> preventing the agencies from “secretly conspir[ing] against elected officials by presenting them with a *fait accompli*”<sup>133</sup> while retaining the flexibility necessary for administration.<sup>134</sup> Procedures can also “enfranchise important constituents in agency decision-making processes, thereby assuring that agencies are responsive to their interests” by creating opportunities for their input into the formulation of policy.<sup>135</sup> The most obvious example is the procedural structure of the APA’s provisions for notice-and-comment rulemaking and judicial review of final agency actions. Though some have argued that the APA enthrones another undemocratic ruler in the place of the bureaucrat—namely the lawyers and judges who employ procedure to jockey over policy<sup>136</sup>—the APA at root is “written to enhance [democratic] political control” of the bureaucracy.<sup>137</sup>

### E. *Successful Reform without Ideological Blinders*

Successful administrative reform cannot ignore the knowledge and incentives problems. The progressive left has resisted acknowledging problems inherent in bureaucracy, likely because of an oversimplified dismissal of its initial observer, F.A. Hayek.<sup>138</sup> Today Hayek is “generally only

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131. *Id.* at 272 (“Administrative procedures can be viewed as an ‘indirect’ means by which politicians, in anticipation of judicial encroachment, use the courts to maintain political control.”).

132. *Id.* at 244, 255 (arguing that procedures can create a coalition to make durable the bargain struck at that time of the legislative decision), 264-65 (NEPA as an example of deck stacking).

133. *Id.* at 258.

134. *See id.* at 244 (“[P]rocedural controls . . . enable political leaders to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest.”).

135. *Id.* at 244, 255 (arguing that procedures can create a coalition to make durable the bargain struck at that time of the legislative decision); *id.* at 264-65 (describing NEPA as an example of deck stacking). Participatory process might also aid in allowing less well organized interests to coalesce and participate by virtue of its braking effect on bureaucratic activity. *See* Macey, *supra* note 105, at 675-76 (arguing that administrative procedures “create the sort of delay that can help to even the playing field between relatively diffuse, poorly organized groups, and highly organized, well-financed special interests,” but that the longer delays generated by judicial review and reversal “can benefit highly organized groups relative to poorly organized groups because the comparative advantage of the highly organized groups lies in their ability to retain their cohesiveness over a long period of time.”).

136. *See* Kessler, *supra* note 19, at 770-71.

137. McCubbins et al., *supra* note 105, at 256.

138. Rahman, *Conceptualizing*, *supra* note 96, at 272 (“Hayek . . . rejected the viability or desirability of centralized state control and regulation over the market because of a central-

studied by his ideological sympathizers” on the political right.<sup>139</sup> But Hayek’s insights on bureaucracy not only can, but also should, be separated from the 19th-century style *laissez-faire* governance associated with Hayek’s politics and his followers’.<sup>140</sup>

Today’s progressive reformers do not contest the basic liberal governance model, in which the state primarily oversees and sets parameters for private transactions, which remain the predominant form of economic activity. Though Rahman, for example, bemoans the reigning managerialist governance model’s “commitment to . . . optimizing of markets,” where the “the self-optimizing mechanisms of the market” are insufficient,<sup>141</sup> Rahman’s proposals are of the same mold. His democratic-watchdog administration still presides over private economic activity, and does not seize the economic commanding heights. To the extent regulators define legal parameters for any activity outside of the government, they are optimizing the market.<sup>142</sup> Reform proposals thus concede the existing liberal governance model, but fail to address its fundamental problems.

There are reform paths, however, that can address the problems Hayek identified.<sup>143</sup> A historical example is the National Environmental Policy Act, emerging from the environmental movement of the 1960s.

ized apparatus like the state can never have the totality of information necessary to make wise decisions about economic allocations.”).

139. GRIFFITHS, *supra* note 97, at 95-120 (discussing Andrew Gamble’s critique of the left’s reception of Hayekian theory).

140. The association of Hayek with a strictly deregulatory and *laissez-faire* policy is not as straightforward as it may seem. See F. A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME 3: THE POLITICAL ORDER OF A FREE PEOPLE 55 (1979) (“The assurance of a certain minimum income for everyone, or a sort of floor below which nobody need fall even when he is unable to provide for himself, appears not only to be a wholly legitimate protection against a risk common to all, but a necessary part of the Great Society in which the individual no longer has specific claims on the members of the particular small group into which he was born.”); see also, Gamble, *supra* note 92, at 51 (“Hayek wished to restrict the role of government to a minimum. However, to the dismay of many libertarians he identified numerous areas where it was legitimate for the government to have a role.”); cf. David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 440 (2003) (“[R]edistribution might act as a form of social insurance. Any of us could easily be down and out someday due to misfortune. Redistribution hedges this risk.”).

141. See RAHMAN, DEMOCRACY, *supra* note 5, at 167, 170.

142. See Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J.L. ANALYSIS 121, 125 (2016) (“The differentiation of ‘economic’ and ‘social’ regulation, which began to appear in the 1970s, is imprecise. Just as utility regulation may be thought of as correcting the market failure of monopoly, so environmental regulation may be thought of as correcting the market failure of external costs; just as utility regulation standardizes prices, so health and safety regulation standardize production methods and product designs.”).

143. Hayek himself at times articulated the compatibility of a political arrangements conforming to his diagnosis of the ills of bureaucratic governance and aims of social justice, for example in his endorsement of a redistributive policy of universal income and effectively

### III. NEPA AS BUREAUCRATIC CONTROL

The possibility of improving the decisions of bureaucratic organizations without deconstructing the administrative state is apparent from the environmental movement.

#### A. *The Environmental Movement as Critique of Bureaucracy*

The environmental movement emerged in a “republican moment”<sup>144</sup> in the late 1960s. Two factors were notable in that political conjuncture. First, the era was marked by prominent environmental degradation. A series of particularly visible instances of environmental degradation in the late sixties heightened the desire for centralized regulation of environmental pollution and destruction.<sup>145</sup> Events like a huge fish kill in the Mississippi River, DDT contamination, the burning of the Cuyahoga River, and the Santa Barbara oil spill, as well as the documentation and higher visibility of widespread species extinction, brought the problem of environmental destruction from industrial activity to the fore of public consciousness.<sup>146</sup>

The second factor was that the awareness of an environment under threat merged with a developing political backlash against administrative experts in federal agencies.<sup>147</sup> Concern about the reliability of agency experts and the extent to which they were protecting the public’s welfare initially arose from scandals concerning the effects of radiation fallout from nuclear-weapons tests. Various public hysterias followed, notably regarding

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a social safety net, see GRIFFITHS, *supra* note 97, as well as explicitly stating the need for synoptic centralized regulation to address market failures, such as with industrial pollution and environmental degradation, see *supra* note 94 and accompanying text.

144. Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66-67 (1992) (describing the beginning of 1970 as a republican moment, that is, “extraordinary periods when broad segments of the public are intensely involved with an issue, legislators find themselves in the spotlight, and their positions shift closer to those of the public at large,” in this case environmental protection).

145. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 61, 79 (2004) [hereinafter LAZARUS, *MAKING*] (“By the 1960s . . . increased public awareness of the potentially catastrophic environmental consequences of certain new technologies and industrial processes had rendered the finiteness of life on Earth a matter of ongoing concern.”).

146. *Id.* at 58-59, 63.

147. William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 30 (Daniel Carpenter & David Moss eds., 2013); Kagan, *supra* note 71, at 2264-65; cf. Teles, *Scourge*, *supra* note 24, at 88 (describing pollution as a form of upwardly redistributive rent “because it extracts uncompensated benefits from those who pay its costs in the form of despoiled air and water” and describing the environmental movement of the 1960s and 70s as an “anti-rent-seeking mobilization”).

contamination of consumer products and water.<sup>148</sup> In some of these situations “the authoritative reassurances of government scientists were proved false,”<sup>149</sup> and the ultimate result was “a gradual discrediting not merely of individual scientists or agencies, but of the Progressive philosophy of governance itself.”<sup>150</sup>

The political origin of the environmental movement, often overlooked, is evident in an often cited founding document of the environmental movement: Rachel Carson’s *Silent Spring*.<sup>151</sup> The book not only addressed absent birds and poisoned fish, but also directed a political critique at the administrative state, most notably in Carson’s repeated calls for opportunities for citizen participation in the regulation of pesticide manufacture and application.<sup>152</sup> The book was directed at members of the public, not administrators or the legislators, but Carson’s political message was more direct when she was called to testify before the Congress months after *Silent Spring* was published.<sup>153</sup>

Political forces coalesced in the wake of environmental controversies, seeking a reassertion of political control over the agencies. The political system in turn responded via Congress<sup>154</sup> and then the courts.<sup>155</sup> The demo-

148. See RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 211-21, 238 (2d ed. 2006); LAZARUS, *MAKING*, *supra* note 145, at 58.

149. ANDREWS, *supra* note 148, at 212.

150. *Id.* at 218.

151. See RAMACHANDRA GUHA, *ENVIRONMENTALISM: A GLOBAL HISTORY* 1-9, 69-89 (2000) (describing the growth of environmentalism and *Silent Spring* as the founding document of an environmental age); JOACHIM RADKAU, *THE AGE OF ECOLOGY: A GLOBAL HISTORY* 75-78 (Patrick Camiller trans., 2014) (likewise discussing the impact of *Silent Spring*).

152. “With an equally revolutionary effect, [*Silent Spring*] documented the excessively cozy relationships . . . among government agencies and powerful pesticide manufacturers, user constituencies, and even scientists beholden to them for research funding.” ANDREWS, *supra* note 148, at 217.

153. See Rachel Carson, Statement of Rachel Carson before the Senate Subcommittee on Reorganization and International Organizations (June 4, 1963), <http://rachelcarsoncouncil.org/about-rcc/about-rachel-carson/rachel-carsons-statement-before-congress-1963/>.

154. The federal legislative response in some cases was not dampened by the encouragement of large industrial concerns that valued the predictability of federal level regulatory schemes. See ANDREWS, *supra* note 148, at 209 (“[A]s a few leading states and cities began to toughen their air pollution control regulations . . . key industries themselves acquired a powerful new interest in obtaining moderate and uniform federal standards that would preempt more stringent and inconsistent state and local standards.”).

155. Kagan, *supra* note 71, at 2265 (“Congress likewise passed a set of statutes providing, in select areas of regulation, enhanced participatory opportunities. The goal was to put in place procedures that would create a broadly pluralist system of agency decision making, thus replicating the process of interest group representation and bargaining thought responsible for legislation.”). Some of the judicial aspects of this response figure into what Sunstein and Vermeule describe as the moment of “progressive administrative law.” See *infra* note 171.

cratic impetus of the late 1960s and early 1970s produced the institutions of contemporary “legalistic” environmentalism: the Clean Water Act, Clean Air Act, and Endangered Species Act. Laws resulted from popular pressure to constrain agencies by having elected representatives directly define objectives and allowing the public (environmental organizations and academic experts, but also industry) to hold agencies accountable through public comment and citizen-suit litigation.<sup>156</sup>

## B. *The National Environmental Policy Act*

The most prominent example of legislation originating in the environmental “republican moment” is the regulatory review regime established under the National Environmental Policy Act of 1969 (NEPA). NEPA is the United States’ “basic national charter for protection of the environment.”<sup>157</sup> The law emerged from discussions in Congress about the need for a statute setting a policy for the federal government, committing it to the protection of the environment. Several proposals were offered, including the creation of a new agency devoted to environmental protection. But the proposal that ultimately prevailed was the brainchild of Senator Henry Jackson of Washington and of Lynton Caldwell, a political scientist from the University of Indiana.

### 1. Action-Forcing Under NEPA

Jackson and Caldwell’s idea was to commit existing agencies to procedural steps that would further environmental protection. This was done by procedures binding agencies to consider and internalize scientific expertise specifically on the environmental impacts of agency decisions.<sup>158</sup> The path was inspired by previous ad hoc consultations, in which agencies undertook studies of environmental consequences and decisions changed accordingly. An early example was the congressionally ordered study of environmental

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156. ANDREWS, *supra* note 148, at 221, 238; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1287 (1986); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1970-1960: THE CRISIS OF LEGAL ORTHODOXY* 240-42 (1992).

157. 40 C.F.R. § 1500.1(a) (2017). Regulations promulgated by CEQ to instruct agencies on the implementation of NEPA have helped to define its statutory regime. *See also* Oliver A. Houck, *Is That All? A Review of the National Environmental Policy Act: An Agenda for the Future* by Lynton Keith Caldwell, 11 DUKE ENVTL. L. & POL. F. 173, 184 (2000) (book review).

158. *See* S. REP. NO. 91-296, at 9 (1969) (“A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail . . . . But, if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain ‘action-forcing’ provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.”).

impact associated with “Project Chariot”—the Federal Atomic Energy Commission’s proposal to excavate a deep-water port at Cape Thompson, Alaska by detonating five thermonuclear bombs.<sup>159</sup> Rather than establishing an agency substantively focused on environmental protection, the idea animating NEPA was to commit existing agencies to internalize environmental protection into their normal regulatory activity.

Under the statute and implementing regulations, an agency proposing a “major federal action” must assess whether the action could have significant adverse impacts on the environment.<sup>160</sup> If the agency excludes such effects, it must issue a brief summary of its analysis, called an environmental assessment, and an official finding of no significant impact after notice and comment.<sup>161</sup> If it finds potential of significant impacts, the agency must undertake “an early and open process for determining the scope of issues to be addressed,” by proposing significant issues, and then taking public comment on these proposed issues at a stage called “scoping.”<sup>162</sup>

The agency then issues a provisional document for purposes of public comment, a draft environmental impact statement (“EIS”). This document begins by stating the “underlying purpose and need” for the proposed action;<sup>163</sup> it then defines a range of reasonable alternatives that would meet this purpose and need, including its preferred proposed action and a no-action alternative. The statement provides a comparative analysis of the alternatives, providing “full and fair discussion” with respect to each of the parameters or subject matters defined in the scoping process,<sup>164</sup> “sharply defining the issues and providing a clear basis for choice among options.”<sup>165</sup> After publishing the draft EIS, the agency must solicit comment from agencies and the public.<sup>166</sup> The agency then finalizes the document, responding to comments by modifying alternatives in the EIS, developing new unconsidered alternatives, modifying its analysis, or explaining why comments do not warrant further agency response.<sup>167</sup> The agency promulgates its final rule via a record of decision, stating its policy and identifying all alternatives considered. It must also explain whether all practicable means to mini-

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159. Dan O’Neill, *Project Chariot: How Alaska Escaped Nuclear Excavation*, BULL. ATOMIC SCIENTISTS, Sept. 2015, at 28, 28 (“Chariot was possibly the first government project challenged on ecological grounds, and occasioned the first integrated bioenvironmental study—the progenitor of the modern environmental impact statement.”).

160. 40 C.F.R. § 1501.3 (2017).

161. *Id.* § 1508.13.

162. *Id.* § 1501.7.

163. *Id.* § 1502.13.

164. *Id.* § 1502.1.

165. *Id.* § 1502.14.

166. *Id.* § 1503.1(1), (4).

167. *Id.* § 1503.4.

mize environmental harms were adopted, and if not, the justifications for its decision.<sup>168</sup>

While NEPA's statutory language describes substantive policy goals, under courts' interpretations "its mandate to the agencies is essentially procedural."<sup>169</sup> The Section 102 procedural requirements—for a preliminary determination of significant impacts and the subsequent preparation of an EIS—have been described as "action-forcing" in the sense that they necessitate that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."<sup>170</sup>

## 2. Decentralized Enforcement

The bite of the statute comes from its decentralized enforcement. NEPA includes no provision for judicial review,<sup>171</sup> and therefore its procedural safeguards can only be enforced via the APA's judicial review provisions.<sup>172</sup> The requirements can be—and routinely are—enforced by lawsuits, at an average of around 130 cases a year.<sup>173</sup> A rich body of case law has

168. *Id.* § 1502.2(d).

169. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Some scholars argue that this exclusively procedural interpretation is unduly narrow. *See, e.g.,* Nicholas C. Yost, *NEPA's Promise-Partially Fulfilled*, 20 ENVTL. L. 533 (1990).

170. *Robertson*, 490 U.S. at 349; 40 C.F.R. § 1502.1.

171. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1515 (2012) [hereinafter Lazarus, *NEPA*] ("What was noticeably missing from NEPA's language, however, was any suggestion that its mandate was subject to judicial enforcement through litigation. NEPA contains no hint of such an enforcement mechanism in either the language of the law or its accompanying legislative history.").

172. Some scholars argue that the prominent role that judicial review and NEPA litigation play in the overall NEPA regime resulted from the path-breaking decision by Judge Skelly Wright in the *Calvert Cliffs* decision. *See, e.g.,* Lazarus, *NEPA*, *supra* note 171, at 1515-18. Sunstein and Vermeule discuss and quote from Judge Skelly Wright's *Calvert Cliffs* opinion as a paradigmatic instance of "progressive administrative law." Sunstein & Vermeule, *Libertarian*, *supra* note 26, at 394-95.

173. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 20 (2014) ("In 2011, the most recent data available, CEQ reported 94 NEPA cases filed, down from the average of 129 cases filed per year from calendar year 2001 through calendar year 2008. . . . [T]he number of NEPA lawsuits is relatively small when compared with the total number of NEPA analyses.").

developed in the federal courts<sup>174</sup> regarding how agencies must comply with NEPA procedures. Here, civil society plays an important role, since organized and frequent litigation have given NEPA its teeth<sup>175</sup>: “litigation and—far more often—the threat of litigation, nip[ ] at the heels of federal decision-making, surfacing greener alternatives.”<sup>176</sup>

### 3. NEPA’s Success: “Making Bureaucracies Think”

NEPA has been largely successful in changing agency behavior and generating improved environmental protection.

NEPA processes come with costs<sup>177</sup>: an EIS costs between \$250,000 and \$2 million to complete.<sup>178</sup> Analysis also takes time and can generate voluminous information, which may create its own epistemic bottlenecks.<sup>179</sup> For this reason, critics contend that “EISs are . . . too thorough, overstuffed to the point of uselessness.”<sup>180</sup>

But costs must be assessed relative to benefits. NEPA has “had a massive impact on governmental decision-making.”<sup>181</sup> Even critics of “ossified” administration concede that the NEPA regime has improved regulatory

174. Notably, however, the Supreme Court has been unwilling to rule against the federal agencies on NEPA claims. *See generally* Lazarus, *NEPA*, *supra* note 171, at 1521.

175. Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 72 (1992) (“[E]nvironmental groups play a crucial role. Since early in the emergence of modern environmental law, these groups have been the major sources of litigation on behalf of environmental quality.”).

176. Houck, *supra* note 157, at 188 (“NEPA lives on in agency practice and in litigation and—far more often—in the threat of litigation, nipping at the heels of federal decision-making, surfacing greener alternatives, employing its own cadre in every federal agency, and providing access for thousands of individuals and community groups who count on the impact statement process to give them notice and a fighting chance.”).

177. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1712 (1993) (discussing the NEPA regime’s “built-in difficulties that might loosely be lumped together as problems of manageability”).

178. U.S. GOV’T ACCOUNTABILITY OFF., NATIONAL ENVIRONMENTAL POLICY ACT, GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 12 (2014).

179. Herz, *supra* note 177, at 1713 (“Herbert Simon, the guru of ‘bounded rationality,’ has suggested that one important boundary on rationality is simply limited attention. The sprawling, unfocused, thousand-page EIS with twenty-eight appendices might be Simon’s Exhibit A.”).

180. *Id.* (emphasis omitted from original).

181. Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law’s First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77 (2001); *see also* Lazarus, *NEPA*, *supra* note 171, at 1519 (“[T]he process of preparing EISs can itself change agency behavior. It is one thing to resist expending resources to acquire information about adverse environmental impacts. It is quite another to ignore such information once it is available and part of the decision-making record. It is the rare government official who would do the latter . . .”).

output.<sup>182</sup> “Projects that make it through the NEPA process are financially and environmentally improved,” allowing agencies to “avoid the multiyear cost of mitigating a project’s potential adverse effects up front.”<sup>183</sup> NEPA’s procedures “are almost certain to affect the agency’s substantive decision.”<sup>184</sup> This is because, as expressed by Serge Taylor’s famous analysis of NEPA’s effects on the Army Corps of Engineers and the Forest Service,<sup>185</sup> the regime has *made bureaucracies think*: the process of environmental impact analysis has resulted in better informed agency decisions,<sup>186</sup> and has forced agencies to develop in-house sensitivity specifically on the environmental impacts of regulated conduct.<sup>187</sup> The mere anticipation of NEPA analysis, and the knowledge that decisions can be scrutinized by the public and possibly the courts, has disciplined agency practice.<sup>188</sup>

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182. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 68 (1995) (“The duty to consider the environmental effects of agency actions, imposed in the National Environmental Policy Act of 1969, seems to have had this type of broad beneficial effect. This potential culture-changing effect of the duty to engage in reasoned decision making may have enough value to justify retention of some version of the judicially enforced duty notwithstanding the doctrine’s high costs.”).

183. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 17 (2014); see also LINDA LUTHER, CONG. RESEARCH SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 28 (2008) (“Some agency representatives feel that the NEPA process, when implemented as required by the CEQ regulations, actually facilitates a more efficiently executed project.”).

184. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). See also ENVIL. LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT (2010).

185. See generally TAYLOR, *supra* note 6.

186. Lazarus, *NEPA*, *supra* note 171, at 1519 (“NEPA also had the effect of prompting agencies to change the background and expertise of those hired and appointed to include agency personnel more knowledgeable about environmental impact.”).

187. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 689 n.364 (1986) (“[U]ndoubtedly one of NEPA’s most significant long-term impacts has been the hiring by agencies of personnel with expertise in the environmental area and, consequently, personnel usually sensitive to environmental concerns.”); Herz, *supra* note 177, at 1711-12 (“One result of NEPA’s enactment has been the large growth of environmental professionals within agencies, including many whose basic mission has nothing to do with environmental protection.”); see generally TAYLOR, *supra* note 6; see also JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 65 (1989) (citing reforms undertaken following NEPA, and concluding “[e]ven established bureaucracies with strong professional traditions already in place can be altered by inserting a new profession”).

188. Lazarus, *NEPA*, *supra* note 171, at 1519; see also Houck, *supra* note 157, at 190-91 (“NEPA’s great contribution . . . is the environmental impact statement. It is not what the statement says that is important. It is in what comes before, in what agencies have to investigate and learn and listen to, in what they have to fear from other agencies and from environmental groups, the press, and reviewing courts, and in the everyday responses and

Additionally, NEPA has induced agencies to invest in and accumulate environmental expertise, yielding better policy at lower informational costs. Outside of the agencies, NEPA provides civic interests—citizens organizations, NGOs, public interest groups—an institutional framework around which to organize: scientists, lawyers, civil society organizations and regulated industry have developed practices to mobilize for and against administrative action.<sup>189</sup>

The NEPA regime provides an example of administrative reform that seeks to improve regulatory output by rendering the bureaucracy's decision making more accessible and transparent. NEPA does not directly address the epistemic critique of bureaucracy; the statute has nothing to say about whether there should be bureaucratic action in the first place. However, where centralized coordination is undertaken, the regime provides powerful tools to mitigate the knowledge problem and correct misaligned incentives. NEPA turns the bureaucracy's synoptic view to concerns that would otherwise go unconsidered. The statute compels analysis while preserving the agency's flexibility with respect to substantive decisions. Simultaneously, outside the government, civil society has the opportunity to intervene, participate, and enforce. The regime has thus been successful in advancing environmental protection. In short, the NEPA regime demonstrates that process can reform the bureaucracy.<sup>190</sup>

#### IV. MAKING BUREAUCRACIES THINK DISTRIBUTIVELY

Insights from the environmental republican moment can be adapted to address the legitimacy crisis of the administrative state today. Specifically, the NEPA approach can direct the government to prioritize and address contemporary populism's animating source: American society's slippage into oligarchic levels of inequality. Currently, the administrative state does not consistently engage in adequate processes of distributional analysis. The following section advances a proposal for legislative application of the NEPA

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accommodations that they have to make.”); *NEPA Litigation: The Causes, Effects and Solutions: Hearing Before the H. Comm. on Res.*, 109th Cong. (2005) (statement of Hon. Tom Udall, Member, H Comm. On Res.) (“[I]n more than 99 percent of those cases where an agency is taking major federal action, NEPA serves to avoid a court fight. Through collaboration, extensive public involvement and thorough analysis, NEPA inoculates the vast majority of agency plans from legal challenge.”).

189. LYNTON K. CALDWELL, *SCIENCE AND THE NATIONAL ENVIRONMENTAL POLICY ACT: REDIRECTING POLICY THROUGH PROCEDURAL REFORM* 110-13 (1982); Houck, *supra* note 157, at 188 (describing the “APA-like enfranchising power that this statute has brought to the (one million? easily more) Americans who have participated in the NEPA process over the past thirty years, as well as the effect of this power on the federal establishment.”).

190. Herz, *supra* note 177, at 1698.

approach to the problem of distributive inequity, and describes potential implications for regulatory policy.

### A. *The Need for Distributional Analysis*

The administrative state still lacks adequate processes for distributional analysis of regulatory output, despite the acknowledged importance of distributional impacts.

#### 1. Distributional Analysis in Environmental Law

Distributional analysis of regulatory action occurs in environmental law, though it is not comprehensive. On its face, NEPA mandates review of all impacts to the human environment. Despite NEPA's broad language, however, courts have confined its application to environmental considerations narrowly conceived.<sup>191</sup>

Environmental regulators have some limited tools to address inequities in environmental policy. An executive order issued by President Clinton in 1994 requires limited distributional regulatory analysis with respect to "environmental justice."<sup>192</sup> Under the order, federal agencies must "make achieving environmental justice part of [their] mission" by identifying the effects of agency action on "minority populations and low-income populations"<sup>193</sup> and "address[ing] disproportionately high and adverse human health or environmental effects of its programs, policies, and activities" on these populations.<sup>194</sup>

But the ability of the regulatory state to address distributions of wealth and power via environmental policy alone is limited, since "[t]he distributional inequities that appear to exist in environmental protection are undoubtedly the product of broader social forces."<sup>195</sup>

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191. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983) ("If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply."). There have been proposals to include distributional "environmental justice" analysis in federal environmental policymaking, including proposed legislation in the 102d Congress. See Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U.L. REV. 787, 843 & n.255 (1993) [hereinafter Lazarus, *Pursuing*] (explaining and advocating these proposals). Lazarus seems to have concluded that a better approach was to resurrect existing statutory and regulatory language "to infuse environmental justice concerns" into environmental rulemaking. Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 717-22 (1997).

192. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

193. *Id.* at § 1-101.

194. *Id.* at § 1-103(a).

195. Lazarus, *Pursuing*, *supra* note 191, at 825.

## 2. Distributional Analysis in the Cost-Benefit State

Under existing presidential directives, agencies are supposed to consider distributive impacts when undertaking regulatory action, but existing mechanisms of review are inadequate.

Under executive orders issued by Presidents Clinton and Obama, agencies are directed to consider distributive impacts of regulatory action in the course of regulatory cost-benefit analysis. Both Clinton's Executive Order 12,866<sup>196</sup> and Obama's Executive Order 13,563<sup>197</sup> authorize consideration of distributional impacts in OIRA review. Executive Order 12,866 includes among its "Regulatory Philosophy and Principles" a directive that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including . . . distributive impacts; and equity), unless a statute requires another regulatory approach."<sup>198</sup> Obama's Order 13,563 retains Clinton's directive,<sup>199</sup> advising that agencies "may" "[w]here appropriate" consider distributive impacts.<sup>200</sup> The administrative state has had difficulty integrating these directives for distributive impacts review.

In practice, distributional impacts are not examined adequately.<sup>201</sup> Agencies often include pro forma distributional analyses or simply state,

196. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) ("[A]gencies should assess all costs and benefits of available regulatory alternatives").

197. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011); Obama's OIRA further extended the reach of the CBA process, adding "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome." *Id.*; see also Sunstein, *Most Knowledgeable*, *supra* note 12, at 1607, 1636 n.86, 1648.

198. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, at § 1(a) (Oct. 4, 1993).

199. See Exec. Order No. 13,563, 3 C.F.R. 215, at § 1(b) (2012).

200. *Id.* at § 1(c).

201. Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1408 (2003) ("Single-rule analyses are able, in principle at least, to take account of the distributive impacts. Indeed, widely agreed canons of cost-benefit analysis call on analysts to examine such impacts wherever they are significant—though actual examples of this happening are rather hard to find."); Arden Rowell, *Allocating Pollution*, 79 U. CHI. L. REV. 985, 1001-02 (2012) ("How are distributional fairness issues addressed in risk regulation? Despite repeated calls for a clear process of distributional analysis, implementation remains haphazard, and no dominant approach has emerged. Under Executive Order 12866, which was the primary order governing regulatory analysis for many years, distributional impacts were incorporated into regulatory analyses only with a breezy exhortation to count 'distributive impacts' and 'equity' in with other 'benefits.' . . . The Obama administration's response to this critique has been to include a separate provision in Executive Order 13563 explicitly permitting distributional concerns—and other difficult-to-quantify values—to be considered . . . agencies have yet to determine the best way to operationalize it."); Richard Williams & James Broughel, *Principles for Analyzing Distribution in Regulatory Impact Analysis*, MERCATUS ON POLY, May 2015, at 1 ("With the exception of the legally required analysis for small entities (called regulatory flexibility analysis), agencies rarely conduct a general distributional analysis of the

without showing, that they have analyzed distributional impacts.<sup>202</sup> A study found that “federal agencies largely ignore” the orders’ guidance regarding distributional impact analysis.<sup>203</sup> Where distributional analysis of regulation does occur, agencies restrict their review to select groups of concern—for example, children or racial minorities—and assess whether the regulation imposes detriments on these groups.<sup>204</sup> Agencies do not undertake comprehensive distributional analysis examining the ways both costs and benefits are allocated across the entire spectrum of affected groups. One study attributes the omission to bureaucratic disincentives to generate information that could sustain political pushback or “cause new groups to coalesce in opposition to the regulation.”<sup>205</sup>

In theory, distributional impacts could be integrated directly into cost-benefit analysis. Matthew Adler and Eric Posner have explained that cost-benefit analysis could employ a social welfare function to account for the declining marginal utility of income—that is, for an incremental dollar of income resulting in less benefit to persons as they get wealthier.<sup>206</sup> If analysis could be undertaken so as to weight cost and benefits for different income groups, distributive effects of a policy could be integrated directly into cost-benefit analysis.<sup>207</sup> Despite proposals to implement this idea in practice, “[w]elfare economists have not proposed a practical way of determining the appropriate method of weighting” people’s marginal utilities of income.<sup>208</sup> In light of the current infeasibility of integrating distributional analysis into cost-benefit analysis, where distributional analysis is pursued,

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parties likely to receive benefits and bear costs.”); Lisa A. Robinson et al., *Attention to Distribution in U.S. Regulatory Analyses*, 10 REV. ENVTL. ECON. & POLY 308, 316 (2016).

202. Robert W. Hahn et al., *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENVTL. L. REV. 377, 405 (2003) (“In practice, agencies have responded to the two EOs by including a separate distributional impact analysis within RIAs. Subsequent to EO 12,898, environmental justice was mentioned in RIAs for rules in which agencies were required to address the issue, but only infrequently was quantitative analysis included. In no case did the Administration’s explicit concern for equity clearly alter proposed policies.”).

203. Robinson et al., *supra* note 201, at 316.

204. *Id.* at 318.

205. *Id.* at 320-21.

206. *Id.* at 320; cf. Weisbach, *supra* note 140, at 440 (“[I]ndividuals have declining marginal utility of income. All this means is that as individuals get wealthier, each dollar is less important. One reason that individuals might have declining marginal utility of income is simply that individuals tend to satisfy their most important needs first.”); Parker, *supra* note 201, at 1407.

207. Robinson et al., *supra* note 201, at 320.

208. MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 23-24 (2006); see also Michael A. Livermore & Jason A. Schwartz, *Analysis to Inform Public Discourse on Jobs and Regulation*, in DOES REGULATION KILL JOBS? 250 (Cary Coglianese, Adam M. Finkel & Christopher Carrigan, eds., 2013).

it occurs as a second-step, supplemental, qualitative consideration.<sup>209</sup> Admittedly, “estimating the appropriate weights for marginal utility can be challenging.”<sup>210</sup> But even if distributional analysis were feasible and practically integrated into cost-benefit analysis, there would be the remaining concern of enforcement. Both the Clinton and Obama executive orders explicitly insulate regulatory impact analysis from judicial review.<sup>211</sup> There may be a movement within the courts to subject cost-benefit analyses to judicial review under the APA, but at present, review is limited to circumstances where Congress has directed the agency to conduct the analysis.<sup>212</sup>

To summarize, in the absence of a legislative mandate—analogue to NEPA—the federal bureaucracy will not undertake comprehensive distributional analysis within extant processes of regulatory review.

### 3. The Imperative of Distributional Analysis

Where regulations are evaluated on the basis of efficiency, it is all the more important to ensure that there is also an adequate distributional analysis.

Efficiency is an important attribute, and in some cases is a precondition of regulatory action in the administrative state. Efficiency is not the ends of government; it does not predetermine the subjects of regulation or define the substantive direction of regulation. But it is a criterion against which regulatory output can be and is judged. One of the main tasks of the White House Office of Information and Regulatory Affairs (OIRA) is to rationalize regulatory output on the basis of efficiency—that is, to determine when a regulation’s benefits exceed its costs. Though the practice has a longer

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209. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 74 (1995) (“A third possible approach, also making sense of some of the ambiguities in the Clinton Order, would be an explicitly two-stage decision process. The first stage should consist of a cost-benefit analysis, limited to the kinds of costs and benefits that can reasonably be quantified. This first stage will generate valuable information that can be used for many purposes, including threshold comparisons of policies in different risk-regulating areas. In a second stage, decision makers should explicitly address and articulate the other values, if any are relevant, that the CBA cannot take into account. These may include the equitable and distributional considerations referred to directly in Executive Order 12866, as well as the conflicts between expert and lay valuations and concerns for expressive issues we have discussed here. Through this two-stage process, both the benefits of CBA and its limitations can be recognized.”).

210. Robinson et al., *supra* note 201, at 320; *see also* ADLER & POSNER, *supra* note 208, at 23-24.

211. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, at § 10 (Oct. 4, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821, at § 7(d) (Jan. 21, 2011).

212. *See generally* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, (Harvard Pub. Law, Working Paper No. 16-12, 2016).

history, cost-benefit analysis rose to prominence in the Reagan Administration.<sup>213</sup> The use of cost-benefit analysis was consolidated when Democrats took the White House under Bill Clinton,<sup>214</sup> and was further refined a decade and a half later by President Obama's Executive Order 13,563.<sup>215</sup> By the end of the Clinton Administration the federal government had already become a cost-benefit state.<sup>216</sup>

Regulatory cost-benefit analysis occurs with the implicit goal of achieving or pursuing Kaldor-Hicks efficiency.<sup>217</sup> A Kaldor-Hicks efficient transaction is one that generates sufficient benefits for regulatory "winners" (those who benefit from a regulatory action) to make a transfer to compensate the regulatory "losers" (those who bear its costs), potentially leaving no one worse off, and at least some better off.<sup>218</sup> In such a scenario, the hypothetical compensatory transfer would render the transaction Pareto superior (at least one person is better off, and no person is worse off).<sup>219</sup> But to be Kaldor-Hicks efficient, a transaction does not require *actual* compensation; it only requires that such compensation is possible. For this reason, it is sometimes referred to as the "potential Pareto superiority" standard.<sup>220</sup>

213. See, e.g. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, at 13,194 (Feb. 19, 1981); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080 (1986); Kagan, *supra* note 71, at 2277 ("The sea change began with Ronald Reagan's inauguration.").

214. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, at § 1(a) (Oct. 4, 1993) ("[A]gencies should assess all costs and benefits of available regulatory alternatives").

215. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011); Obama's OIRA further extended the reach of the CBA process, adding "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome." *Id.*

216. CASS SUNSTEIN, *THE COST BENEFIT STATE*, at ix (2002) ("Gradually, and in fits and starts, the American government is becoming a cost-benefit state. By this I mean that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation.").

217. See ADLER & POSNER, *supra* note 208, at 21-23. Strictly speaking, it only approximates Kaldor-Hicks efficiency, since analysis is conducted in monetary terms. Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L. REV. 385, 435 n.178 (2004).

218. Allan Feldman, *Kaldor-Hicks Compensation*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 417-21 (Peter Newman ed., 1998); see also Gordon Tullock, *Two Kinds of Legal Efficiency*, 8 HOFSTRA L. REV. 659, 663-64 (1980) ("[T]here may be changes in the law that benefit some yet directly injure others. . . . Another simple way of lowering the cost to those injured is to compensate them. . . . If a law must necessarily injure some group of people, then the calculation is whether the benefits are great enough so that in theory those injured could be compensated. If so, then there is an improvement in efficiency, even though it will injure these people.").

219. See Tullock, *supra* note 218, at 663-64.

220. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (3d ed. 1986) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*].

Where a regulation is efficient, regulators generally avoid making off-setting compensatory transfers via the regulation itself (i.e., by including a compensation scheme within a regulation). Offsetting transfers via the regulation itself usually would be less efficient than making the same transfer via the tax system<sup>221</sup>: redistribution as such distorts incentives associated with labor (at the margins, transferees will experience reduced incentives to seek income from work relative to a world without transfers); but tinkering with an otherwise unrelated regulation to bring about redistribution “affects two margins: the decision to work and the decisions relevant to the [regulation].”<sup>222</sup> Moreover, compensation by means of the tax system would likely have lower incremental administrative costs,<sup>223</sup> and would allow for broader redistributive policies (i.e. compensating regulatory net losers as defined from the totality of federal regulation, as opposed to piecemeal and potentially cross-cutting transfers made with respect to individuated regulatory actions).<sup>224</sup> Redistribution through taxation also allows for the compensatory decision to occur with higher visibility, mitigating risks of rent-seeking.<sup>225</sup> Therefore, many efficient policies will not include immediate redistribution to compensate regulatory losers.

The prioritization of Kaldor-Hicks efficiency rules makes a great deal of sense, but only if compensation actually occurs at some point. But in many cases there may be reason to doubt that it will. As with any reciprocal arrangement that unfolds over time, the incentives for parties to commit to the arrangement *ex ante* are dissipated as soon as agreement has been elicited. A time inconsistency problem, in which parties must be held *ex post* to their *ex ante* commitments, is precisely why in the domain of private transactions societies have developed contract law to guarantee performance (or its equivalent), by force if necessary.<sup>226</sup> But no analog to contract enforce-

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221. Tullock, *supra* note 218, at 660-61; Livermore & Schwartz, *supra* note 208, at 250-51; see generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994).

222. Weisbach, *supra* note 140, at 446-47; Kaplow & Shavell, *supra* note 221, at 677.

223. Kaplow & Shavell, *supra* note 221, at 675 n.12.

224. See Weisbach, *supra* note 140, at 449 (describing the haphazardness problem); Kaplow & Shavell, *supra* note 221, at 675.

225. Tullock, *supra* note 218, at 661 (“[W]hen one begins this indirect and covert type of egalitarian behavior, it is likely that other people will take advantage of it. The net effect is that some special interest group will get significant benefits and the poor will receive little or none.”).

226. See THOMAS HOBBS, *LEVIATHAN* 105 (1929) (“[H]e that perform[s] first, has no assurance the other will perform [ ] after; because the bonds of words are too weak to bridle mens [sic] ambition, avarice, anger and other [p]assions, without the fear[ ] of some coercive power . . . . [W]here there is a [p]ower set up to constrain those that would otherwise violate their faith, that fear[ ] is no more reasonable”); Richard A. Epstein, *From Natural Law to Social Welfare: Theoretical Principles and Practical Applications*, 100 IOWA L. REV. 1743, 1753

ment exists to ensure that Kaldor-Hicks efficiency is eventually converted to Pareto superiority in the regulatory context.<sup>227</sup> For example, no agency has authority to bind parties to compensatory arrangements, even though they routinely make Kaldor-Hicks-efficient regulatory policy choices.<sup>228</sup> The authority to order transfers resides in the legislature, via its control of the tax code. But tax transfers to distribute slices of a now bigger pie may never occur. It may be exceedingly difficult to identify who has incurred costs, even when regulators are confident costs exist.<sup>229</sup> More likely, deferral of compensation is justified by the high transaction costs of redistributive regulation, but only by ignoring high political costs and frictions associated with a subsequent transfer by tax.<sup>230</sup> Once these costs are taken into account, the tax-and-transfer compensation method may be the less efficient choice.<sup>231</sup> Moreover, tax policy itself may be justified on Kaldor-Hicks efficiency terms (i.e. the tax system would be designed to “maximize the pie”), leading to interminable deferrals of redistributive compensation, which for all intents and purposes may never occur. In such a context, the Kaldor-Hicks efficiency gains may be irrelevant.<sup>232</sup>

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(2015) (“[T]his enforcement element is critical, for without it the only kind of agreements that work are those that call for (near) simultaneous performance . . . . No one will go first unless he is assured that the second party will keep his promise when the time comes.”); POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 220, at 81 (citing Hobbes).

227. The welfare implications of trade, as justified on Kaldor-Hicks efficiency terms, and redistributive policy have been discussed with respect to trade. *See, e.g.*, Dani Rodrik, *Too Late to Compensate Free Trade’s Losers*, PROJECT SYNDICATE (Apr. 11, 2017), <https://www.project-syndicate.org/commentary/free-trade-losers-compensation-too-late-by-dani-rodrik-2017-04?barrier=accessreg>; Pol Antràs et al., *Globalization, Inequality and Welfare*, 108 J. INT’L ECON. 387 (2017).

228. ADLER & POSNER, *supra* note 208, at 144 (“We know of no agency in the U.S. government that has the authority to order wealth transfers, and there are many good reasons for denying agencies this authority.”). This absence of congressional directive is probably for good reason: authorizing agencies to order offsetting wealth transfers would lead to administrative chaos and rent-seeking.

229. Tullock, *supra* note 218, at 664 n.12 (“Ideally, the cost of the compensation should be paid by the people who gain from the change in law. In practice this will be difficult or impossible to arrange in many cases. . . . [I]t should be emphasized that we are unlikely to be able to exactly measure the cost and hence the compensation will be approximate at best.”).

230. Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1055 (2016) (“It is plausible that the presence of political action costs would necessitate second-best methods of governmental redistribution”); Weisbach, *supra* note 140, at 451-52 (“[T]hat adjustments to the tax system are not feasible . . . is correct to some extent. . . . If our only alternative is legal rules, we may want to use them. But there is no particular reason to believe that legal rules will be more available than taxes.”).

231. *See id.*

232. *See* ADLER & POSNER, *supra* note 208, at 145.

Distributive analysis can help in this situation. Distributive analysis would not substitute for an enforcing “leviathan”<sup>233</sup>—policy makers could still tout a policy’s efficiency *ex ante*, only to renege on compensatory transfers once it is adopted. But distributive analysis could identify precisely where compensatory transfers would be due; such a step would significantly increase the political costs of renegeing. Regulatory losers would be able to keep tabs on the sum of hypothetical Kaldor-Hicks efficient transfers they were “owed.” Citizens and politicians would be able to monitor cost-benefit allocations that were “due” among different social and demographic groups.<sup>234</sup> With interests now well-defined and visible, there would be an opportunity for regulatory losers to organize, and express themselves politically as a countervailing force against incumbent regulatory winners—ideally cancelling out incentives of any socially wasteful lobbying. The political price of imposing costs against one group while lavishing benefits on another could be high.

Pressure could mount on the Executive to employ the levers of presidential administration to pursue socially beneficial regulatory policies not only in the conventionally economic areas, but in areas of public health, environmental regulation, and more. Distributive review could also create pressure on the Executive to present its regulatory policy accurately. Pressure would also affect Congress. As the branch empowered to impose and modify budgets and tax policy regimes, Congress would bear the duty to transform efficient policies into Pareto superior ones: it could directly make compensatory transfers to regulatory cost-bearers or instruct agencies to make such transfers. Distributional analysis of regulatory output would indirectly generate pressure on Congress to correct statutory directives where regulation produced disproportionate benefits to narrow interest groups.

The following section considers how the administrative state could adopt a regime of distributive impacts review.

### B. *The Distributive Impacts Review Act*

This section proposes a statute, the Distributive Impacts Review Act, which would establish a procedural regime in which agencies are required to review an action’s distributional effects as part of rulemaking.<sup>235</sup> By legislat-

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233. See HOBBS, *supra* note 226.

234. Cf. Teles, *Scourge*, *supra* note 24, at 93 (recommending that “OMB . . . add some form of distributive analysis to the cost-benefit analyses it requires for regulations, which would highlight cases where new rules would enrich already powerful interests.”) *But see supra* notes 196-211 and accompanying text (discussing existing OMB distributional analysis and this inadequacies).

235. The closest mention I have seen to a NEPA-like approach to distribution features in Serge Taylor’s mention in an endnote of conversation with “a staffer at the Congressional

ing against the background of NEPA (and NEPA case law developed over the past 49 years), Congress could relatively easily draw upon an existing legal framework to establish a regime of distributive impacts review.

### 1. The Proposal: Action-Forcing Distributional Analysis

A hypothetical Distributive Impacts Review Act could establish a multi-stage review process for regulatory actions.

Initially, the Distributive Impacts Review Act would require agencies to determine whether a contemplated agency action had potentially significant distributive impacts, meaning that the absolute value of costs and benefits generated by the law exceeded a certain threshold, say \$100 million. Paralleling NEPA's EA process, the agency would conduct a preliminary cost-benefit analysis, subject to notice and comment, and issue a resulting "distributional assessment" (DA) document that presents the absolute value of costs and benefits. Where the threshold was not met, the agency would also issue a finding of no significant impact, and distributive analysis would end there.

Where, however, the preliminary assessment concluded that potential impacts cleared the significance threshold, the statute would require preparation of a distributive impact statement ("DIS"), paralleling NEPA's EIS process. The agency would first issue a draft DIS. The document would describe the action's purpose and need; it would define a range of reasonable alternatives.<sup>236</sup> The agency would analyze each alternative, monetizing the costs and benefits of each (already done for the preferred alternative in the DA process) and thus evaluating its efficiency. It would then identify the likely allocation of these costs and benefits, defining allocatee groups by geography, income, wealth, industrial sectors, racial and gender categories, and whichever other demographic groups were relevant to those particular costs and benefits. The agency would be required to give a reasoned evaluation of the distribution of costs and benefits. Lastly, the agency would define the confidence associated with economic projections, explicitly identifying uncertainties involved in defining costs, benefits, and their distribution.

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Research Service" who listed distributional impacts as one of 30 to 40 areas in which there had been proposals "bear[ing] a family resemblance to the environmental impact statement concept." See TAYLOR, *supra* note 6, at 395 n.10. Similar in concept, though not in application nor in result, Michael Herz proposes a thought experiment "remak[ing] procedural due process doctrine in NEPA's image," forcing preparation of an EIS-like impact analysis for the determining of individualized welfare entitlements. Herz, *supra* note 177, at 1718, 1723-24.

236. This section would be identical to the corresponding section in an EIS, if the agency had to prepare such for the same action.

The DIS would consider cumulative impacts as well as impacts from connected actions. These would include the anticipated effects of other major rules and legislative programs. The scope of review would ensure that allocations of costs and benefits to a group were viewed in the context of the net allocations of other governmental interventions. The agency could be required provisionally to identify how compensatory modifications in the tax code or other legislative measures could offset distributional impacts of the regulation.

Notice of each draft assessment and statement would be published in the Federal Register, commencing a public comment period. Potential allocatees would have incentives to participate. Specifically, each group would be motivated to clarify the magnitude of the cost or benefit allocated to it, and to share data that would help the agency refine its estimate. As a result of the comment period, the agency's understanding of quantified costs and benefits as well as their distribution across groups could change. Following the comment period, the agency would respond to comments in a final DIS. Informed by exchanges during the comment period, and distributional impacts in its decision, the agency would ultimately choose a policy from within the range of considered alternatives within the DIS and publish notice of this decision in a record of decision.

The statute would make its procedural requirements enforceable via judicial review under the APA "arbitrary and capricious" standard. Judicial review would be confined to procedural claims, meaning that parties could challenge the adequacy of the agency's analysis and consideration of impacts. Analysis would not be judged against the actions' actual distributional effects as measured *ex post*. However, the agency would be required to have considered distributive impacts *ex ante* and to justify its decision.

## 2. Procedure without a Decision Rule

Distributive impacts analysis would be action-forcing as to procedure, but would provide no decision rule (e.g., mandating that all regulatory decisions achieve Pareto superiority). The restriction to procedural measures would be important for at least three reasons.

First, there are compelling policy reasons (e.g., moral or civic republican ones) to avoid a rigid decision rule requiring compensatory transfers to convert all rules to Pareto superiority, i.e. to include compensatory transfers to regulatory losers. Some agency actions might be intentionally and desirably redistributive in that they are remedying some past inequitable government allocation of costs. Take for example regulatory actions taken pursuant to the large environmental statutes: studies show that these actions overwhelmingly redistribute value (i.e. monetized benefits, less costs) from rich

to poor demographic groups, often by cleaning an environment in which poorer Americans live with tax dollars disproportionately provided by the rich. If such actions were subjected to a decision rule mandating a compensatory transfer, the result would be either a tax transfer from the poorest members of society to the more affluent, or more likely an effective bar on such regulatory actions (poor individuals likely lack means to make such transfers).<sup>237</sup> Actions desirable for moral or civic-republican reasons might be foreclosed by a strict Pareto-superiority decision rule.

Second, even where compensatory transfers are desirable, arguments against regulatory action as the vehicle for such transfers have merit. Direct administrative redistributions might not be permissible as a legal matter, for example, where transfers are beyond the remit of the agency's statutory directive.<sup>238</sup> Even where lawful, transfers are often better made via the tax system. Besides the usual efficiency arguments,<sup>239</sup> a redistributive transfer via tax policy could aggregate the necessary compensatory transfers associated with multiple agency actions. Congress would be able to benefit from logistical economies in making the transfer and the administrative state would avoid a wasteful series of "kludges" required to shift compensation among the winners and losers under particular regulations.<sup>240</sup>

Third, perhaps most important, distributional analysis will often be subject to inherent uncertainties, and might not be conclusive, making a rigid redistributive decision rule a clumsy solution. Public participation in distributional analysis of an agency proposal would help to mitigate the knowledge problem; however, it cannot eliminate the bureaucracy's epistemic bounds. The reason for this inability has been described above: the bureaucracy is incapable of aggregating sufficient information to make precise determinations of how individuals will be directly and indirectly affected by an action.<sup>241</sup> Therefore, agencies should retain discretion not to act where information is insufficient to justify action.

For these reasons, distributive impact analysis as an action-forcing procedure is superior to a redistributive decision rule.

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237. Pildes & Sunstein, *supra* note 209, at 46 ("Actual willingness to pay in real market settings—the typical criterion for calculating costs and benefits—depends on ability to pay, and in this sense it can incorporate a kind of bias against the poor.").

238. Such ultra vires transfers would be vulnerable to challenge under the APA as agency actions arbitrary and capricious or otherwise contrary to law or under a constitutional argument depending on what mechanism the agency used to allocate monies to the regulatory losers and draw contributions from regulatory winners.

239. See *supra* at notes 221-25 and accompanying text.

240. Steven M. Teles, *Kludgeocracy in America*, 17 NAT'L AFF. 97 (2013).

241. For an overview of this argument, applying the Hayekian epistemic critique to law-and-economics approach to private law, see Edward Stringham, *Kaldor-Hicks Efficiency and the Problem of Central Planning*, 4 Q.J. AUSTRIAN ECON. 41, 41-50 (2001).

### C. *Effects of Action-Forcing Distributional Analysis*

The distributive impacts review process would address the two fundamental challenges inherent in bureaucratic governance: the knowledge problem and the incentives problem.

#### 1. Addressing the Knowledge Problem

As a regime of procedural control, the proposed requirements define how regulatory actions should take place, not *whether* and where administrative action is warranted. In this sense, it does not resolve the knowledge problem, which is fundamentally about determining *whether* a given problem would benefit from centrally coordinated regulatory intervention.

Nonetheless, the distributive impacts review process would address a second-order knowledge problem once the decision had been taken to regulate. Like NEPA's enhancement of the APA's notice-and-comment process in the environmental context, the distributive impacts review process would mitigate the epistemic limitations inherent in centrally coordinated agency.<sup>242</sup> Because the projection of costs and benefits is a prerequisite to the evaluation of how these values are allocated across the population, the distributive impacts review process would effectively introduce a detailed cost-benefit analysis into the APA rulemaking process, subjecting it to public scrutiny. The would-be allocatees of an action's costs and benefits would be able to share information, data, and arguments to inform or challenge the agency's projections in a proposed rule. Assumptions could be questioned, data refined. Judicial review could follow.

The process would incur costs. But as with NEPA, the distributive impacts review process would also improve the agencies' distributional knowledge. The prospect of laboriously reworking faulty analysis in response to public comments—with the threat of judicial review at the back end—would discipline agencies, leading them proactively to aggregate information. Currently, agencies may lack the data necessary to conduct distributional analysis of regulation.<sup>243</sup> But repeated preparation of submissions and responses would induce the agencies to develop expertise on the distributional impacts of their actions, and as a prerequisite to this knowledge, a more detailed and comprehensive knowledge of the baseline distributive picture involved in their area of regulation.

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242. See *supra* note 136 and accompanying text.

243. Robinson et al., *supra* note 201, at 322.

## 2. Addressing the Incentives Problem

In general, the distributive impacts review process would reduce the informational asymmetries from which the incentives problem arises. The public would have one more locus for oversight of the agency's activities. This would also raise the costs of capture by increasing the risks of detection and expanding opportunities for review of agency reasoning.<sup>244</sup>

The process would also increase incentives for tightened political control, particularly from the presidency. The most obvious effect would be to increase the political costs of policies that distribute costs to a majority of the electorate while allocating benefits to narrow interest groups without offsetting compensatory transfers. The transparency of the allocative formula associated with regulation would likely create a disciplining pressure on members of Congress; but the brunt of the political pressure would fall on the presidency.

By mandating distributive analysis, the law would effectively disclose which interests were principally benefitted by agency decisions. Moreover, because the distributional impact analysis would require contemplation of a range of alternative policies, the spoils of special interests' advocacy could be viewed relative to a world without such advocacy; correlations between industry's investment in the rulemaking process and policy outcomes would become more visible.<sup>245</sup> It would also disclose at whose expense the regulation was promulgated. The organization of regulatory losers as such would counteract the collective action problem that skewed policy in the first place.<sup>246</sup> Policies skewed in the rulemaking process could be identified, and, if not changed in the rulemaking process, then nullified legislatively.

Ultimately, the process would generate more "paper" in the agencies. But like NEPA,<sup>247</sup> it would render agencies more accountable to the public and more attentive to congressional directives.<sup>248</sup>

244. Revesz and Livermore make a similar argument about OIRA's cost-benefit analysis. Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 420, 421 (Daniel Carpenter & Daniel A. Moss eds., 2014).

245. Unless informational capture were so extensive that the DIS process would be completely co-opted towards proving the necessity of the final industry-favoring rule and the impossibility of any other regulatory route.

246. Cf. Teles, *Scourge*, *supra* note 24, at 88.

247. See *supra* notes 176-89 and accompanying text.

248. It is interesting to consider how regulatory review provisions relate to concerns over filter failure. Wendy Wagner does not mention the NEPA process as a source of filter failures, except for a single reference to a CEQ report that indicating NEPA "cannot completely counteract filter failure." Wagner, *supra* note 63, at 1394. Wagner states that centralized analysis "still might provide valuable mechanisms for the . . . high-level political officials to gain purchase on regulatory issues and intervene more directly in ways that offset par-

## CONCLUSION

The contemporary political feasibility of a statute creating a distributional review requirement is a topic beyond the scope of this Article. But it is worth highlighting that such a statute has much to recommend to potential legislative champions across the political spectrum.

The merits of the proposal are probably most immediately appealing to legislators of a progressive egalitarian orientation. The DIS process would bring distributive justice considerations to the fore of bureaucratic practice, increasing the salience of distributive justice causes and the politicians who champion them. Progressive egalitarian legislators would reap the reputational benefits of having introduced and championed a law that revolutionizes regulatory practice to consider the circumstances of the less well-off. Information gathering from DIS analysis could generate valuable data for progressive egalitarian legislative work and political mobilization. Perhaps most importantly in the long term, forces in civil society could coalesce around advocacy and litigation associated with distributional analysis, potentially creating organizations on which progressive political forces might draw for support.

But many associated with the political right<sup>249</sup> should also find much to like in the Distributive Impacts Review Act. First, to the extent those of the right organize around acceptance of Hayekian principles of social organization, they should embrace the proposal. The distributive impacts review process would necessitate no particular decisions regarding what the government should regulate, a decision that should be made democratically, hopefully informed by considerations of what the administrative state can do efficaciously. Fiscal conservatives and the champions of efficient regulation should like this proposal: Distributional review would bring clarity to the costs of government intervention and would test agency cost estimates in the crucible of expert scrutiny and public comment—subject to the threat of judicial review. While the review process would have administrative costs, by clarifying the social benefits of particular policies, the process would create pressure for the *ex ante* promises of Kaldor-Hicks efficiency to be converted into *post facto* Pareto superiority. Applied repeatedly over the long run, the distributive impacts review process would build public confidence in the social benefits of efficient legal rules, with the net effect of reducing the transaction costs for their adoption.

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tipatory imbalances arising from information capture,” especially where “this political counter pressure . . . take[s] place in the light rather than outside public oversight . . .”). *Id.*

249. But see Steven Teles, *How to Get to Liberalitarianism from the Left*, NISKANEN CTR. BLOG (June 12, 2017), <https://niskanencenter.org/blog/get-liberalitarianism-left/>.

The importance of improving the administrative state should be shared across the political spectrum. While the advocates of democratization—and indeed the populists—are correct that there is great room for improvement, the solution should be to build institutions that work. In the case of bureaucracy, the United States has decades of history and a wealth of experience. Drawing on models that work, like NEPA, and directing them to the problems that concern Americans, the administrative state can respond without compromising the integrity of sound, efficacious, and efficient government.