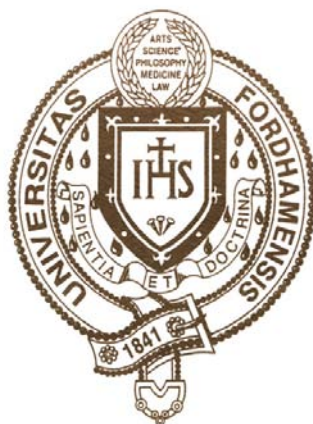


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Regleprudence – At OIRA and Beyond

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REGLEPRUDENCE – AT OIRA AND BEYOND

*Nestor M. Davidson & Ethan J. Leib**

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

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INTRODUCTION

Jurisprudence and legisprudence have had their days in the sun. But so much of law in its daily working – authoritative decisions by government officials with binding public policymaking functions – remains immune from systematic analysis. Of course, “administrative law” shines much light into the labyrinthine regulatory state. The subject has long illuminate ways that many governmental decisions neither judicial nor legislative can be thought of as law and need to be controlled through procedural and substantive oversight, often by judges and sometimes through structural design. There remain, however, significant domains of what we call “regleprudence” that continue to be hidden from view. Leveraging recent work on the role of precedent in the federal Executive Branch,¹ we focus on the Office of Information of Regulatory Affairs (OIRA), a component of the Office of Management and Budget (OMB) that oversees federal regulatory activity,² to introduce and explore some foundational questions of regleprudence: the “systematic analysis of regulation within jurisprudential accounts of the role and nature of law.”³

OIRA is a ripe case study for the development of the metes and bounds of regleprudence. This once-obscure institution has received substantial attention recently by legal scholars and political scientists,⁴ with academics and practitioners beginning a conversation about how to tie theories of regulation with the institutional design of regulatory review and oversight outside the courts. In this discourse, in part because its role in the Executive Branch is not subject to direct judicial review, OIRA’s work of centralized regulatory review is rarely understood to be jurisgenerative. But it is becoming increasingly clear that this is no longer a tenable way to think about the office, as it is equally clear that OIRA practices law. Much of the

¹ See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2008); see also MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111 (1998).

² OIRA was created by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. § 3501-3521, but its core *raison d’être* derives from a series of Executive Orders on regulatory review put in place by successive presidents since the Reagan Administration. See Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982); Exec. Order No. 12,866, 3 C.F.R. 638-39 (1994); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

³ This is a reworking of a standard definition of “legisprudence” from WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 587n.a. (4th ed., 2007).

⁴ See, e.g., Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2327554>; Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Cass R. Sunstein, Commentary, *The Office of Information of Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013); Michael A. Livermore & Richard L. Revesz, *Capture, Regulatory Review, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies*, 43 PRES. STUD. Q. 443 (2013); Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101 (2011); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011).

oversight process by OIRA and the larger OMB bureaucracy in which the office sits is a de facto layer of lawmaking.⁵ This is not to diminish from OIRA's role in aggregating dispersed information across the Executive Branch and serving as the locus of "alternative dispute resolution" among agencies and between agencies and the White House.⁶ Of course there is a way to supervise and manage an agency's notice-and-comment rulemaking or cost-benefit analysis that is shy of "law." Helping internal deliberations over time is not making law. Yet, OIRA regularly decides a variety of substantive and trans-substantive questions of administration, such as the proper parameters for cost-benefit analysis and notice-and-comment requirements throughout the administrative state that have coercive impact on citizens' daily lives. And the office also plays a sometimes decisive role in interpreting statutory questions.⁷ It is thus necessary to do more to establish how this lawmaking function is exercised and how OIRA should treat the law it is making.⁸

Here are some of the inquiries about OIRA that have framed our research: How do staff within OIRA approach the question of precedent in, for example, interpreting questions under Executive Orders 12,866 and 13,563, which structure OIRA's authority? Is there an "administrative common law" on questions such as what constitutes a "significant regulatory action" under the relevant Executive Orders or is drawing the boundaries of OIRA's jurisdiction routinely a "political" decision? How do office staff take into account past OIRA practice more generally? Is practice memorialized on these questions, as occurs in the Office of Legal Counsel (OLC) within the Justice Department?⁹ If there is a body of precedent, is it communicated to agencies in some way or does it arise only in the process

⁵ See, e.g., Lisa Heinzerling, *Statutory Interpretation in the Age of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006) (highlighting that OIRA has the capacity to displace statutory means and ends); Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House*, PACE ENVTL. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2262337> (same). OMB has a general counsel's office in recognition that law is made every day there, but beyond that office, hundreds of non-attorney line officers in constant communication with federal agencies are in the business of making law.

⁶ See Sunstein, *supra* note 4, at 1840 ("Outside of the White House, numerous agencies are also involved, and they may well be the driving forces in the process that is frequently misdescribed as 'OIRA review.' It would not be excessive to describe OIRA as, in large part, an information aggregator.").

⁷ See *infra* Part II.B.3.

⁸ As we discuss below, see *infra* Part II.A, this legal function has long raised concerns about the proper allocation of delegated authority to interpret statutes within the Executive branch. In 1981, the Justice Department's Office of Legal Counsel opined that OIRA's oversight of the regulatory process should be understood not to "include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation." Memorandum of Larry L. Simms, Acting Assistant Att'y Gen., Office of Legal Counsel to David Stockman, Dir., Office of Mgmt. & Budget, Re: Proposed Executive Order entitled "Federal Regulation," Feb. 13, 1981.

⁹ For details about OLC's memoranda on *stare decisis*, see Morrison, *supra* note 1, at 1452-53.

of individual regulatory reviews? Does OIRA produce some corollary of “interpretive regulations” that further define the operative terms in the Executive Orders? If so, through what process? Do occasional letters from Administrators amount to a “common law”?¹⁰ Assuming OIRA is not merely a place to sanitize brute political oversight of the administrative state, what are the norms of legality that constrain OIRA review?¹¹

These questions about what happens at OIRA descriptively also set our normative inquiries into what would be a desirable system for disclosure, transparency, and use of precedent. Administrative law has for ages sought to articulate principles of judicial review of agency action;¹² regleprudence focuses instead on immanent concerns of legality that ought to structure administrative action even in the absence of that judicial oversight.¹³ And we focus on *stare decisis* first – treating like cases alike – because it is often called “the most basic principle of jurisprudence,”¹⁴ with transparency operating as a counter-balance, necessitating reason-giving about departures from precedent.¹⁵

¹⁰ See *infra* Parts II.C and III.A (discussing OIRA return, review, and prompt letters and trans-substantive memoranda).

¹¹ Any discussion of OIRA as a lawmaking institution begs the predicate question of whether we have a theory of “law” to defend that description. This is a thicket that raises many interesting questions, but we are operating in what might be described as a defensible heartland. As we spell out, OIRA is deeply engaged in interpreting legal documents, enforcing the commands of statutes and Executive Orders, and even applying treaties and foreign affairs doctrines. See *infra* Part II.B. Whatever the conceptual outer bounds of regleprudence beyond OIRA – which we hope will be fertile ground for future scholarship – the descriptive reality is that the case for OIRA as a legal institution is relatively straightforward. As to the deeper jurisprudential issues about how to draw the concept of law here, see *infra* Part III.C.2.

¹² See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (arguing that the “body of jurisprudence we know as administrative law” is built is “on the appellate review model of the relationship between reviewing courts and agencies,” and tracing the history of that understanding of administrative law).

¹³ Regleprudence’s concern with legality has purchase not only for practices that are more than just politics, but also might be applicable to what Adrian Vermeule has described as “conventions,” a set of practices within the Executive Branch that have the property of regular observance. See generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013). These conventions are, Vermeule argues, more than politics but less than law. Our argument for regleprudence is, in part, an effort to theorize about the more law-like side of conventions that are, in Vermeule’s terminology, “moral constraints.” *Id.* at 1189. The regularity observed is not, we assert, a product of a “poorly understood” “psychological process” of “normative internalization,” *id.*, but flows from the logic of legality. Once it becomes clear that law is happening, behavioral regularity – precedent – follows.

¹⁴ See Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

¹⁵ Michael Livermore recently described the process of precedent within the bureaucracy at OIRA: “Given the many pressing demands faced by agencies and OIRA, and the need to avoid constant seeking of direction from political leadership, risk-averse and resource-conscious managers are likely to frown on attempts to raise issues that have already been dealt with in the past. If a prior decision can be cited as controlling the current matter, internal bureaucratic forces are likely to encourage that it govern, absent a compelling reason

The descriptive and normative questions we ask of OIRA limn the contours of regleprudence, and their answers have consequences for a much broader array of administrative practice. As to OIRA, regleprudential commitments to the core rule-of-law values of consistency and transparency can help sketch a reform agenda for the office.¹⁶ Perhaps because OIRA does not have a long tradition of articulated reason-giving, inquiries into *stare decisis* and the alternative legitimating function of transparency are especially pressing in this context. We thus endeavor to show what a focus on regleprudence can do to improve the process and substance of regulatory review, better calibrating political accountability and dynamic flexibility with the benefits of a deeper commitment to norms of legality.¹⁷

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

Ultimately, although we focus on OIRA as a case study, the analytic and normative efforts here should pay dividends throughout the work of the White House and the rest of the Executive Branch. All folkways and norms of agency practice that have real lawmaking functions (even when not

to revisit the matter." Livermore, *supra* note 4, at Part I.C (TAN57). Livermore then makes the analogy to courts in a footnote. *Id.* at n.57.

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

¹⁶ See *infra* Part III.B.

¹⁷ In suggesting a recalibration of precedent, transparency, and other rule-of-law values within OIRA, we recognize that there are costs as well as benefits to this shift. Indeed, at a time when critics are excoriating OIRA for its anti-regulatory bias and the ossification of regulatory review, see, e.g., Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. 39 (2012); see also Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992), it is fair to argue that more transparency and disclosure would simply raise additional frictions. However, there is a difference between improving the structure of regulatory review and adding costs to individual instances of oversight, and we are advocating the former in the hope of improving the latter. See *infra* Part III.B.3.

otherwise controlled by the tentacles of administrative law proper) might usefully be seen through the lens we develop here. A new regleprudence thus has the potential to promote stability, accountability, and rule of law within the entire administrative state.

I. WHY REGLEPRUDENCE?

In formulating the research agenda we aim to establish here, three foundational points are in order. Part I.A traces how we arrive at the concept of “regleprudence” from its forbearer in legisprudence and from legisprudence’s points of departure from jurisprudence. Part I.B then argues that regleprudence is not just a fancy way of talking about old administrative law themes. And Part I.C lays groundwork for the discussion to follow: we focus on *stare decisis*’s role outside the courts as a way to craft a regleprudential lens into the particular bureaucracy we explore in Part II.

A. From Legisprudence to Regleprudence

It is worth briefly reviewing why anyone thought we needed to focus on a category of “legisprudence” when we were seemingly doing just fine as legal scholars with conventional studies of jurisprudence. For that story, one has to revisit Julius Cohen’s classic, “Towards Realism in Legisprudence.”¹⁸ The seeds of the need for regleprudence become apparent when we explore the etiology of Cohen’s departure from jurisprudence in the first instance.

Some might think of legisprudence as merely another name for studying court decisions about statutory interpretation; it seems common enough to use the term as a stand-in for statutory interpretation theory.¹⁹ But its original ambition was somewhat grander.²⁰ Cohen sought nothing less than “a working partnership between ethics and science” in the domain of “legislative policymaking.”²¹ Admittedly, this gambit was taken against a background of a deeply realist way of thinking about judicial decision-

¹⁸ See Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950).

¹⁹ See, e.g., William N. Eskridge, Jr., *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 867-69 (2013); Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills*, 21 QUINNIPIAC L. REV. 907, 910, 915 (2003); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990). Others have different usages of the term. See, e.g., Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 140 n.26 (2011) (“My use of the term ‘legisprudence’ is different from that of William Eskridge, who uses the word to refer to the subset of jurisprudence that deals with the way judges should interpret statutes (i.e. statutory interpretation). . . . I use the term to refer to theories about how legislators should make law.”). Our conception of regleprudence is more consonant with Volokh’s invocation of legisprudence, which hews closer to Cohen’s original approach.

²⁰ To be fair, even Cohen showed signs of limiting his earlier ambitions when revisiting legisprudence three decades after his mission statement. See generally Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983).

²¹ Cohen, *supra* note 18, at 878.

making. But Cohen was also writing at a time when lawyers had “the ingrained habit of regarding law as genuine only if it is labeled ‘judge-made.’”²² So it seemed necessary to remind people that law was made, deliberated about, and implemented outside courts. He wanted “no longer [to] give continued support to the ‘monopoly of the judicial point of view.’”²³

Once Cohen made the – what to modern eyes is a banal – observation that law is made outside the courts,²⁴ he proceeded to worry quite reasonably about how to evaluate and constrain the forms of decision-making utilized by “Congress, [] the state legislatures, [] municipal councils, [and] administrative tribunals.”²⁵ Just as some realists (or those resisting them) tried to find ways to constrain judicial decision-making through ethics and science, Cohen saw that there was a need to do the same in the domain of legislative decision-making. To be sure, people are somewhat less disturbed by realism with respects to legislatures than they are about realism with respect to judges; but even in legislatures, legal principles must constrain lawmaking. Hence, legisprudence.²⁶

The administrative state, too, requires systematic analysis with reference to an account of law, although the case for it must be differently calibrated than it is for legislatures.²⁷ In some respects, the radical realism expected of political actors at the legislative level (republican theories requiring the seeking of the public good, notwithstanding)²⁸ makes the requirement for constraining principles with reference to the role and nature of law essential – but also natural and obvious. The administrative state is not as easy to

²² *Id.*

²³ *Id.* at 888.

²⁴ To be sure, even this banal observation could be missed by many first year law students who continue to develop their lawyering skills largely through common law classes and excessive attention to appellate judges. See generally Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166 (2008) (arguing that the first-year curriculum ought to include a course on legislation and regulation).

²⁵ Cohen, *supra* note 18, at 887.

²⁶ See Cohen, *supra* note 20. Although the reference to “administrative tribunals” in Cohen’s early articulation might suggest that legisprudence was already contemplated by Cohen, all of Cohen’s case studies that followed were in the domain of legislation. Indeed, in Cohen’s later exploration of the “problems and agenda” for legisprudence, the administrative state wasn’t much present at all.

²⁷ Ed Rubin might say that all legislative and regulatory work is “policy and implementation,” so the same kinds of inquiries might be necessary at the legislative and regulatory levels: it is all policy science. See generally EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005). But since we have different expectations of ethics and science in the different instrumentalities of governance, individualized attention seems well advised.

²⁸ One of us has developed arguments for constraining legislators through ethical principles of representation, which require pursuit of the public good. See generally Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596 (2013); Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178 (2012).

reconcile with standard legisprudential concerns to control and channel politics because it is most generally justified and legitimated through appeals to delegation and expertise.²⁹ These structural differences between legislators and administrators highlight why the animating principles or emphases of legisprudence and regleprudence might need to differ too.

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

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

At the conceptual level, it may be that the same underlying questions supervene over jurisprudence, legisprudence, and regleprudence: What is law? Who should be making it? When? Who has authority to decide what? How ought previous legal decisions be treated by future lawmakers? How much candor and transparency is appropriate? Are political considerations appropriate to legal decision-making? But because the institutional actors that are the subjects of the theories have such different role responsibilities within the tapestry of modern government, regleprudence will enable scholars and lawyers to focus on the unique kind of policymaking occurring

²⁹ See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Of course, judicial review was sometimes thought to provide legitimation to the administrative state, too, see generally DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014). But as with *Chevron*’s once popular theory of legitimation through the democratic accountability of agencies, these other legitimation themes seem secondary to (or subsumed by) expertise and congressional delegation.

in less obvious parts of the flowcharts of modern lawmaking that students of bureaucracy study more carefully than lawyers usually do – and should.

B. Isn't Regleprudence Less Awkwardly Called Administrative Law?

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

In the first place, identifying and explicating the theoretical *legal* core of the administrative state's activities still seems urgent. The disadvantage of assuming administration and implementation is "technical" rather than *legal* tends to distract attention from the ways in which the administrative state's instrumentalities are sources of coercion in the daily lives of citizens.³⁰ From that coercion flows the need for a justificatory and legitimating framework; "regleprudence" invites this focus. Surely, this theorizing will find a home in administrative law.³¹ Rules and adjudications are law-like enough to have already gained the attention of administrative law scholars. But highlighting regleprudence's continuity with developed principles of jurisprudence and legisprudence more neatly emphasizes its deep tie to theories of *law* in particular.

Although administrative law – the doctrines controlling the judicial review of the administrative state's processes and substantive decisions – should clearly be informed by regleprudential concerns, these central issues are too often secreted off in favor of doctrinal and positive questions about particular organic statutes, the requirements of the Administrative Procedure Act (APA),³² or other structural or constitutional requirements of notice or due process. And regleprudential values are no doubt articulated by courts all the time, albeit generally chiseled and crafted in a manner that presupposes the centrality of processes and decisions that can be reviewed by the judiciary. If legisprudence taught us anything, it taught us how to think about law without thinking like a court.

The realm of regleprudence, moreover, can encompass a variety of domains within the Executive Branch that administrative law tends to

³⁰ In Sunstein's recent article on OIRA, *supra* note 4, he uses the term "technical" twenty-three times in thirty-eight pages to describe the work done at the office. The word "technical" seems used to assuage us that the work is not lawmaking.

³¹ The closest category in the standard administrative law casebooks is "legal regularity," though it is unfortunately embedded within a discussion of the scope of judicial review. See PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 928-38 (11th ed. 2011).

³² Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

discount because they do not reflect final agency action subject to judicial review, in APA terms.³³ Administrative agencies engage in a wide variety of interpretive tasks – through guidelines, policy statements, opinion letters, manuals, circulars, and other avenues – that are not, in a formal sense, binding on the general public.³⁴ This often largely internally facing work of agencies nonetheless often operates in distinctly law-like ways, and can control agency actors even if they are not (again as formal matter) directly applicable to the general public or enforceable in any federal court. And there are a number of institutions within the Executive Branch – including OIRA, the subject of our case study, but many others – that similarly are discounted in administrative law scholarship in the legal work they undertake because such work is subsidiary to final agency action subject to judicial review.³⁵ To wit, direct presidential action is excluded from APA review because courts have decided that that President is not an agency. Yet Executive Orders and signing statements issued by the White House might be usefully viewed through a regleprudential lens.³⁶

A new conceptual framework under the banner of regleprudence, then, could supplement currently dominant modes of exploring lawmaking in the administrative state – and take as its first point of departure that the administrative state sometimes makes *law* throughout the Executive Branch, even when this law is not subject to judicial review most of the time. The fact that much of what regleprudence takes as its subject matter is not subject to routine judicial oversight does not, however, make it any less *legal*. That is not an embarrassment to the constitutional lawmaking of

³³ See 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”). Indeed, administrative law scholars argue that delegated agency authority in the realm of rulemaking is only legitimate to the extent that it is judicially reviewable. See, e.g., Peter L. Strauss, *Legislation That Isn’t—Attending to Rulemaking’s “Democracy Deficit,”* 98 CALIF. L. REV. 1351, 1357 (2010).

³⁴ See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992). Much ink – judicial and scholarly – has been spilt on the question whether a given agency pronouncement is binding on the public or falls outside the APA’s requirements for notice-and-comment because they are, in the APA’s terms, “interpretative rules,” “general statements of policy,” or come within other APA exceptions. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010); Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 569-85 (2012); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322-23 (2001). That there is a realm of non-binding agency action that is often understood to stand outside the formal bounds of administrative procedure does not mean that that realm does not possess important law-like characteristics in many instances. On the other hand, we are not arguing that all agency action is necessarily sufficiently jurisgenerative to warrant examination in regleprudential terms. Much of what agencies and other Executive Branch institutions do in their day-to-day work is genuinely ministerial or technical.

³⁵ We explore these and a number of other domains in greater depth after our case study has set the framework for a regleprudential perspective. See *infra* Part III.C.1.

³⁶ See *Dalton v. Specter*, 511 U.S. 462, 470 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

Schoolhouse Rock.³⁷ Rather, it is starting from where legisprudential theory left off: just as legal theorists needed to move off the judiciary as the sole source of law and welcome statutory law into the theoretical and practical core of what counts as law, so do we now need to move off thinking of the legislature and judiciary as exclusive sources of law and judicial oversight as the *sine qua non* of legality within the Executive Branch.

Once those concessions are made – and we expect few to reasonably reject them – our first order of business is placed squarely on the table: if the internal workings of the administrative state are law, to what extent must they be rendered consistent with traditional rule-of-law values: consistency, predictability, transparency, and perhaps even – to go back to Cohen’s starting point – rationality. This welcomes a brief discussion about the potential role of *stare decisis* within the Executive Branch.

C. A Prolegomenon to a Study of *Stare Decisis* in the Administrative State

The reason it is not clear that there might be a role for *stare decisis* within the workings of the Executive Branch is that although *stare decisis* seems essential to the rule of law in judicial practice,³⁸ it might not be a *general* feature of the rule of law outside the courts. Indeed, Mark Tushnet goes further: “It seems obvious to me that *stare decisis* is not an essential aspect of the rule of law generally: legislatures can radically change the law or repeal entire bodies of law without offending rule-of-law principles. The rule-of-law justification of *stare decisis* therefore must be confined to the judicial practice.”³⁹ The role of the Executive is so tied up with the permissibility of energetic discretion and responsive politics that it is perhaps hard to see why past practice ought to be a reason for consistent action in the future within the Executive Branch. And electoral transition, or even political winds changing, may provide reason enough to depart from earlier positions. Indeed, the “unitary executive thesis” – that the President is supposed to control policymaking in the entire administrative state – could be thought to rest on important democratic foundations that tie executive agency work to a democratically accountable chief executive.⁴⁰ Being bound to precedent is downright undemocratic, under this account.

³⁷ Schoolhouse Rock!, *I’m Just a Bill*, YOUTUBE (Sept. 1, 2008), <http://www.youtube.com/watch?v=tyeJ55o3E10>.

³⁸ Admittedly, some think precedent is oversold as a virtue, even when they think abstract rule of law values are important. See, e.g., Abner S. Greene, *The Fit Dimension*, 75 FORD. L. REV. 2912 (2007); ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY* Part III (2012).

³⁹ Tushnet, *supra* note 1, at 1339 n.2.

⁴⁰ See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). For an alternative view emphasizing the dangers of the concentration of power in a unitary executive, see, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

One could go further, from theory to practice, to make the point. Consider adjudication at the National Labor Relations Board, as an example. One might have thought that an administrative agency like the NLRB that has chosen to engage in the vast majority of its policymaking through adversarial litigation⁴¹ might feel constrained by the adjudicative quasi-judicial setting to adhere to *stare decisis*. Yet it is not truly contested that political shifts – which in turn lead to new appointments at the NLRB – change substantive labor law in the United States, without deep respect for *stare decisis*.⁴² Although this practice of adjudication without a commitment to *stare decisis* is not without its detractors,⁴³ it is some evidence that the Executive Branch – even when doing mostly adjudicatory work – can feel free to act without feeling the weight of precedent.⁴⁴ Thus, one needs an argument one way or another for whether *stare decisis* has a role within the workings of the administrative state.

Yet, Tushnet actually goes on to furnish reasons why the rule-of-law values that *stare decisis* embodies *do* have a place outside the judiciary. He explores, for example, the role of “superstatutes” that cannot easily be repealed or changed because of rule-of-law values that support the application of *stare decisis* in the legislative arena.⁴⁵ Indeed, the very legitimacy of governmental institutions can be tied up with their willingness to let past decisions stand undisturbed, enabling private parties and other governmental entities to rely on equal treatment in similar fact scenarios. Thus, just as *stare decisis* is a bedrock practice for the rule of law in courts, it may also serve a similar bedrock function within the Executive Branch.

⁴¹ See generally *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

⁴² See, e.g., *NLRB v. Weingarten*, 420 U.S. 251 (1975) (Board may change its mind abruptly); *NLRB v. Kostel Corp.*, 440 F.2d 347 (7th Cir. 1971) (Board policies do not need to abide by *stare decisis* because industrial conditions change over time); *NLRB v. Viola Indus., Inc.*, 979 F.2d 1384 (10th Cir. 1992) (Board may change its mind). For discussions of *stare decisis* at the NLRB, see Tanja L. Thompson & R. Bradley Mokros, *As the Pendulum Swings: The Role of Precedent in National Labor Relations Board Decisions*, ABA SEC. LAB. & EMP. L. SEC., Washington, D.C. (Nov. 6, 2009), available at <http://apps.americanbar.org/labor/1el-annualcle/09/materials/data/papers/159.pdf>; Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707 (2006). For some examples of issues at the Board that change rapidly with new political appointments, see *Brown Univ.*, 342 N.L.R.B. 483 (2004); and *Midland Nat’l Life Ins.*, 263 N.L.R.B. 127 (1982).

⁴³ See Administrative Conference of the United States, *Recommendation 91-5: Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33851 (July 24, 1991), available at <http://www.acus.gov/sites/default/files/documents/91-5.pdf>.

⁴⁴ Consider also the well-known practice of the Internal Revenue Service not to use prior “letter rulings” about specific taxpayer deduction claims as precedent. But “letter rulings” – unlike IRS “revenue rulings,” upon which taxpayers are supposed to rely – are self-consciously binding only on a specific taxpayer addressee. The “letter rulings” have little intra-agency review, and the Tax Court doesn’t recognize them as precedent in part because of their sheer numerosity. See generally STRAUSS ET AL., *supra* note 31, at 935-36; Davis v. Comm’r, 65 T.C. 1014, 1022-23 (1976).

⁴⁵ Tushnet, *supra* note 1, at 1343-46. See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); see also Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind. L. J. (forthcoming 2015).

Even at the NLRB, “[o]f course, all responsible [Board] Members realize the value of *stare decisis*,”⁴⁶ even if departure from that practice is sometimes necessary to acclimate to fast-paced changes in politics or the economy.⁴⁷ It isn’t that *stare decisis* is always the paramount value in the Executive Branch; but it is worth getting clear when it has a place to constrain decisions.⁴⁸ And when *stare decisis* has to give way, the NLRB example reveals one of the most important substitutes for *stare decisis* to ensure a legitimate, stable, and reliable regime: reason-giving. To wit, “so long as the Board explains the reasons for its departure from past precedent,”⁴⁹ it gets flexibility.⁵⁰ This is not to suggest that the NLRB has struck the right balance among precedent, consistency, and reason-giving, but it is an example where *stare decisis* fights for relevance and is weighed against other values within the administrative state.

The general justifications for *stare decisis* are easy to state. The reasons courts hold prior decisions to be binding “without regard to the apparent correctness of the prior decision”⁵¹ include: (1) the saving of decision costs;⁵² (2) the independent value of consistency in governance because it supports legitimacy;⁵³ (3) providing a “focal point” to help coordinate action by decision-makers and those living under law;⁵⁴ (4) the need to respect private parties’ reliance on settled law to order their affairs; and (5) the sense that law needs to be general and generalizable, something that is promoted when officials treat like cases alike. In short, the rule of law itself seems to command *stare decisis* in the courts and to recommend its application in certain areas of the legislative sphere.

⁴⁶ Testimony of Robert J. Battista, Senate Comm. on Health, Educ., Labor and Pensions, Subcomm. on Emp’t and Workplace Safety (Dec. 13, 2007), at 16.

⁴⁷ Notwithstanding courts’ routine passivity in the face of the fast pace of change of substantive law at the Board, there is sever judicial allergy to retroactive decisions. *See* *Epilepsy Found. v. NLRB*, 268 F.3d 1095 (2001); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (1987).

⁴⁸ *Cf.* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 *UCLA L. REV.* 112, 114 (2011) (“Like all decisionmakers, agencies operate against the backdrop of their previous rulings. Some of those rulings may have been issued when the agency was staffed with personnel different, in both identity and worldview, from those who currently populate it. But even as personnel turn over, the agency’s prior positions remain relevant.”).

⁴⁹ Thompson & Mokros, *supra* note 42, at 3.

⁵⁰ This is consistent with broader practice across the Executive Branch. Indeed, as the Supreme Court has made clear, while administrative agencies are not generally required as a formal matter of administrative law to adhere to precedent, *see* *FCC v. Fox*, 556 U.S. 502, 514-16 (2009), agencies are under an obligation to provide a reasoned explanation for a change in position that acknowledges the fact of departure from prior agency pronouncements, *id.* at 515. *See also* *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808-09 (1973) (agencies have a duty to explain departures from prior decisions); *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989) (same); *NLRB v. Int’l Union of Operating Eng’rs, Local 925*, 460 F.2d 589, 604 (5th Cir. 1972) (same).

⁵¹ Morrison, *supra* note 1, at 1449 (adapting Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987)).

⁵² *See* Tushnet, *supra* note 1, at 1339.

⁵³ *See id.* at 1339 n.2. The legitimacy is both sociological and normative.

⁵⁴ *See id.* at 1340 (drawing on THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57-58 (1980)).

One domain within the Executive Branch has recently received some attention, in the work of Trevor Morrison, for its internal norms of precedent: the Office of Legal Counsel.⁵⁵ In some ways, the case for *stare decisis* in OLC decision-making is straightforward. The actors in OLC – all lawyers – are self-consciously making legal decisions and writing legal opinions. These actors are intimately familiar with the jurisprudential firmament and emerge from a culture where people cite cases, statutes, and constitutional provisions and history to make arguments about legality. Standing by decisions made is the common law lawyer’s first principle. Indeed, there are many historical instances of Attorneys General essentially treating the views of their predecessors as having *stare decisis* effect.⁵⁶ OLC precedent is of a piece, as Morrison suggests.⁵⁷ More, OLC even writes memos trying to specify how it intends to respect precedent in future exercises of counsel.⁵⁸

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

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

It is also worth observing that there are many kinds of *stare decisis*, too, so the regleprudential question about precedent is not just a binary one. One can ask not only whether an agency should embrace precedent or transparency (surely sometimes it should embrace both!), but what mode of *stare decisis* is best for the policy space. For example, it is routine to think that the common law version of *stare decisis* is departed from more easily in constitutional interpretation (where judges have the last word), while it is departed from with greater constraints when courts are interpreting statutes, given that legislatures can fix interpretive mistakes if any are made.⁵⁹ These modes of *stare decisis* do not exhaust the possibilities for thinking about how to reason from precedent. But they show that *stare decisis* can carry

⁵⁵ See generally Morrison, *supra* note 1.

⁵⁶ See Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 44.

⁵⁷ See Morrison, *supra* note 1, at 1470-74.

⁵⁸ See *id.* at 1475.

⁵⁹ See ESKRIDGE ET AL., *supra* note 3, at 630-31.

several meanings within the Executive Branch – and that even judicial actors have multiple approaches to *stare decisis*.⁶⁰ Calibrating the right mix of precedent, reason-giving, and transparency is all on the agenda for regleprudence.

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

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

Just as judicial opinions are the most salient products of courts and statutes the embodiment of the work of legislatures, the most visible output of the administrative state is final agency action, subject to judicial review. This domain, which includes not only rulemaking, but also enforcement, grant-making, licensing, and similar agency activity, is the traditional purview of administrative law. Much of what the administrative state does, however, is never embodied in this type of definitive agency action, or, if it is judicially reviewable, only incidentally so. Instead, it operates through a significant institutional substrate, both vertically – through presidential oversight – and horizontally – through inter-agency relations.⁶¹

One of the most important institutions in this infrastructure of the administrative state is the Office of Management and Budget (OMB), a much-studied but still poorly understood arm of the White House.⁶² OMB develops the federal budget, supervises Executive Branch management rules, and, most controversially, coordinates regulatory review through its Office of Information and Regulatory Affairs (OIRA). In this Part we

⁶⁰ The role of precedent is even more complex institutionally within the judiciary, given the distinction between horizontal and vertical *stare decisis*, with courts at different levels and across the federal and state boundary treating prior decisions differently depending on those institutional relationships. There may be some analogy to this within the Executive Branch, given the formal (and informal) hierarchies within the administrative state.

⁶¹ For an excellent discussion of the landscape of contemporary interagency coordination, see Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); see also Bijal Shah, *Hidden Administrative Coordination: Interagency Adjudication in Immigration & Beyond*, 128 HARV. L. REV. (forthcoming 2015) (exploring interagency coordination in adjudication).

⁶² Although the most prominent, OMB is only one of a number of similar Executive Branch institutions. To pick one example, under the Small Business Regulatory Enforcement Fairness Act, the Environmental Protection Agency and the Occupational Safety and Health Administration are each required to convene inter-agency Small Business Advocacy Review Panels for proposed rules that will significantly impact a substantial number of small businesses. See Pub. L. 104-121, 110 Stat. 847 (Mar. 29, 1996). These panels review proposed rules and hear comments from small business representatives, then convey that input back to the promulgating agency, where the panel’s report is included in final rulemaking.

outline OIRA's history and contemporary functions and then explain the significant, if largely hidden, array of lawmaking that is involved in the oversight and coordination that makes up regulatory review.

A. OIRA and Its Discontents

1. History and Contemporary Functions

Every modern President has struggled with the simple reality that a relatively small White House staff must oversee a federal administrative apparatus of scores of agencies.⁶³ The historical method of interacting through the Cabinet and other agency heads is hardly equal to this task, and Administrations have for decades sought to rationalize their oversight.⁶⁴ In 1970, President Nixon established OMB as part of a sweeping effort to assert control over the federal bureaucracy.⁶⁵

OMB, as it has evolved through various Administrations, now serves as the primary institutional mechanism through which the President oversees the Executive Branch. OMB's responsibilities are divided roughly into three main functions, although there is much overlap among them.⁶⁶ The "management" side of OMB focuses on issues such as human resources, procurement policy, information technology, financial management, and performance.⁶⁷ OMB's "budget"-side staff, which are centered on five

⁶³ If, as Cass Sunstein has noted, White House oversight is undertaken by "a 'they' and not an 'it,'" Sunstein, *supra* note 4, at 1840, then "they" are quite outnumbered by an Executive Branch that employs nearly three million people. See OFFICE OF PERSONNEL MGMT., TOTAL GOVERNMENT EMPLOYMENT SINCE 1962 available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/> (indicating that in 2011, the number of civilian federal employees was 2.756 million).

⁶⁴ See Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272 (2001) ("From the point of view of administration, the history of the Presidency in the twentieth century has been the history of presidents' attempts to gain control of the sprawling federal bureaucracy.") (quoting FORREST MCDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 329 (1994)).

⁶⁵ President Nixon created OMB by reorganizing and expanding what had been the Bureau of the Budget, an agency originally established in the Treasury Department in 1921, and moved into the White House structure as part of the creation of Executive Office of the President in 1939. *See id.* at 2275.

⁶⁶ As one OMB official pithily noted, the "Government works using three things: money, people, and regulations; [federal agencies] must get all three through OMB." Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 66 (2011) (quoting an unnamed OMB official).

⁶⁷ *See The Mission and Structure of the Office of Management and Budget*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission (last visited Nov. 21, 2013). Much of OMB's management function is carried out through offices within OMB that, like OIRA, were established by statute. These other "statutory offices" are the Office of Federal Financial Management, the Office of Federal Procurement Policy, the Office of Electronic Government and Information Technology, and the Intellectual Property Enforcement Coordinator. *See id.*

subject-matter-focused Resource Management Offices, oversee budget submissions by agencies and develop a unified Administration budget.⁶⁸

OMB's third primary function is regulatory review, a process of agency oversight and inter-agency coordination that is managed by OIRA.⁶⁹ Congress established OIRA as an office within OMB in the Paperwork Reduction Act of 1980 (PRA),⁷⁰ which was one of a series of regulation-related statutes passed in the late 1970s and early 1980s. Congress initially tasked OIRA only with overseeing requests by federal agencies to collect information from the general public under the PRA.⁷¹ Shortly after taking office in 1981, however, President Reagan issued Executive Order 12,291, which for the first time enabled review of all rules by OMB,⁷² and the Reagan Administration placed responsibility for this process in OIRA's hands.⁷³ The Reagan Executive Order also required all "major rules,"

⁶⁸ See *id.* Other pockets within the reaches of OMB include the so-called "Credit Crew," a group of staff responsible for overseeing programs that involve federal credit and debt collection, and the Legislative Reference Division, which reviews and coordinates the steady flow of Executive Branch legislative proposals, statements of administrative policy, congressional testimony by Administration officials, and presidential signing statements. See *id.*

⁶⁹ Formal regulatory review had its origins with the Nixon Administration's efforts to curtail certain regulations by the Environmental Protection Agency and the Occupational Safety and Health Administration that Nixon considered overly burdensome. One tool that the Nixon Administration used for this was circulating such regulations for comment within the Executive Branch. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1057 (2013); see also Memorandum from George Schultz, Dir., Office of Mgmt. & Budget, to the Heads of Dep'ts and Agencies, Agency Regulations, Standards, and Guidelines Pertaining to Envtl. Quality, Consumer Prot., and Occupational and Pub. Health and Safety (Oct. 5, 1971) (establishing the "Quality of Life Review" program for "significant" proposed and final rules relating to "environmental quality, consumer protection, and occupational and public health and safety"). The Ford and Carter Administrations extended the practice of oversight and coordination to regulations that were projected to have an annual impact in excess of \$100 million. See William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76, 79 (2005). For an insider's history of regulatory review before OIRA's establishment, see Tozzi, *supra* note 66.

⁷⁰ Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501–21).

⁷¹ The PRA also assigned to OMB responsibility for "information policy ... statistical policy and coordination, records management, privacy, and automatic data processing and telecommunications," responsibilities that were all delegated to OIRA. Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1259 (2006).

⁷² See Exec. Order No. 12,291, *revoked by* Exec. Order No. 12,866 § 11, 58 Fed. Reg. 51735, 51744 (Oct. 4, 1993). Technically, Executive Order No. 12,291 merely authorized OMB to review regulatory impact analyses as well as proposed and final rules, and included a provision that deemed such review completed if OMB did not meet certain deadlines. See *id.* § 3(e).

⁷³ President Reagan further expanded OIRA's role in regulatory review in 1985, requiring Cabinet department and independent agencies to provide OMB with a "regulatory program" each year. See Copeland, *supra* note 71, at 1262 (citing Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 8, 1985)).

defined largely by economic impact, to be accompanied by a “regulatory impact analysis,” including a comparison of costs and benefits.⁷⁴

In 1993, President Clinton issued Executive Order 12,866, replacing and greatly expanding Reagan’s regulatory review Executive Order. The Clinton Executive Order established a framework that, with some modifications, still governs today.⁷⁵ Executive Order 12,866 required each agency to provide OIRA with a list of the agency’s planned regulatory actions, which was intended to set OIRA’s review agenda.⁷⁶ The Executive Order then mandated that each agency provide OIRA with the text of rules at the proposal stage, with an accompanying regulatory assessment, for review, and a second-round of OIRA review after the notice-and-comment period.⁷⁷ OIRA also reviews a variety of agency actions that are preliminary to rulemaking, such as advanced notices of proposed rulemaking, as well as agency notices related to grants and similar funding streams.⁷⁸

⁷⁴ Exec. Order No. 12,291, § 3(a).

⁷⁵ To give a sense of scale of regulatory review, OIRA conducted a total of 414 reviews in 2012, the most recent year data are available, including pre-rule, proposed rule, interim rule, final rule, and notices. See MAEVE P. CAREY, CONG. RES. SERV., COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 9 (May 1, 2013). This was a significantly lower number than previous years, which had 740 reviews in 2011, 690 reviews in 2010, and 595 reviews in 2009. *Id.* Of the 414 reviews OIRA conducted in 2012, 83 were of “economically significant” regulatory actions. *Id.* at 11.

⁷⁶ See Exec. Order No. 12,866, § 6(a)(3). The Executive Order called for agencies to identify which regulations were significant and provided that “those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order.” *Id.* The Executive Order further provides that “OIRA may review *only* actions identified by the agency or by OIRA as significant regulatory actions under subsection 3(a)(A) of this section,” with “regulatory actions,” again, being only those agency actions “that promulgate[] or [are] expected to lead to the promulgation of a final rule or regulation.” *Id.* § 3(e).

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

⁷⁷ See *id.* § 6(a)(3)(C), (E).

⁷⁸ Cf. Exec. Order No. 12,866, § 6(b)(2)(A). As noted, the scope of OMB oversight is much broader than what the Executive Order technically calls for. See *supra* note 76.

OIRA is supposed to review preliminary agency actions prior to rulemaking within ten days, and then review regulatory actions at each stage within ninety days, although the office is technically allowed a thirty-day extension. OIRA review, however, has slowed in recent years, and currently regularly fails to meet the Executive Order’s deadlines. See generally CURTIS W. COPELAND, ADMIN. CONF. OF THE U.S., *Length of Rule Reviews by the Office of Information and Regulatory Affairs* (Dec. 2, 2013) (draft report). Copeland notes that in the first half of 2013, the average period of time OIRA took to review regulatory actions was 140 days, with a number of rules languishing significantly longer. *Id.* at 23-24. See also NEW

OIRA review largely takes place through informal communications with the agencies involved, but the office is empowered under Executive Order 12,866 to issue “return letters.”⁷⁹ These are formal documents designed to apprise an agency of the grounds for OIRA’s concerns about a given regulatory action. Although the Executive Order mandates return letters whenever OIRA requires an agency to give further consideration of some agency action,⁸⁰ this mechanism for articulating concerns about the substance of regulations under review has traditionally been used rarely. Its use in the current Administration has almost entirely ceased, with one return letter issued in the Obama Administration’s first five years.⁸¹

The Clinton Executive Order was recently reaffirmed and modified by President Obama’s Executive Order 13,563,⁸² which has the potential to add to both the complexity of agency regulatory process and the interpretive tasks facing OIRA in overseeing its mandates.⁸³ As a statement of overarching Executive Branch regulatory policy, the Obama Executive Order provides that agencies should:

- (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
- (2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- (3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

YORK TIMES EDITORIAL BD., *Stuck in Purgatory*, THE N.Y. TIMES (June 30, 2013) (decrying the length of OIRA review).

⁷⁹ See Exec. Order No. 12,866, § 6(b)(3). The Executive Order also provides for similar communication notifying agencies in writing at the end of the review period. *Id.* § 6(b)(2). As discussed below, in addition to these return and review letters, OIRA also issues “prompt” letters on OIRA’s initiative to suggest regulatory action by an agency. *See infra* Part II.C.

⁸⁰ See Exec. Order No. 12,866, § 6(b)(3) (“For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying.”).

⁸¹ See Letter from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Lisa P. Jackson, Adm’r, Env’tl. Prot. Agency (Sept. 2, 2011), *available at* http://www.reginfo.gov/public/return/EPA_Return_Letter_9-2-2011.pdf. For the practice in prior Administrations, see *OIRA Return Letters*, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eoReturnLetters> (last visited Feb. 10, 2014); *see also* Sunstein, *supra* note 4, at 1846 n.37 (noting that the use of return letters is “highly unusual in any administration”).

⁸² Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3833 (Jan. 21, 2011).

⁸³ Cass Sunstein has described Executive Order 13,563 as “a kind of mini-constitution for the regulatory state.” Sunstein, *supra* note 4, at 1846.

(4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and

(5) Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.⁸⁴

OIRA primarily undertakes case-by-case regulatory review, but also occasionally is part of an OMB process of promulgating general, forward-looking guidance to agencies on issues that pertain to regulatory issues.⁸⁵ For example, in 2003, OMB issued Circular A-4, providing general direction to all executive agencies and establishments “to assist analysts . . . by defining good regulatory analysis . . . and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”⁸⁶ The Circular sets forth what OMB (and presumably OIRA) considers the core elements of regulatory analysis, providing detailed guidance for each of the elements.⁸⁷

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

2. Critiques of OIRA

OIRA – and the larger OMB oversight structure in which the office operates – has come under sustained criticism almost since the inception of regulatory review. The full panoply of these critiques does not bear

⁸⁴ Exec. Order No. 13,563, § 1(b). One long-time career OIRA staffer has noted that ensuring compliance with the predecessor statement of regulatory philosophy in Executive Order 12,866 is as much a part of OIRA oversight as ensuring compliance with the Executive Order’s analytical requirements. See Donald R. Arbuckle, *OIRA and Presidential Regulatory Review: A View from Inside the Administrative State* 39 (2008) (unpublished manuscript) (on file with authors).

⁸⁵ OIRA also occasionally, although rarely, enters into memoranda of understanding with specific agencies. See, e.g., Office of Info. & Regulatory Affairs and U.S. Commodity Futures Trading Comm’n, Memorandum of Understanding (May 9, 2012), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf (governing sharing of technical assistance); Office of Advocacy, U.S. Small Business Administration & Office of Info. & Regulatory Affairs, Memorandum of Understanding (March 19, 2002), available at http://www.sba.gov/sites/default/files/MOU_OIRA.pdf.

⁸⁶ OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 1 (2003), available at <http://www.whitehouse.gov/sites/default/files/omb/omb/a004/a-4.pdf> [hereinafter CIRCULAR A-4]; OFFICE OF MGMT. & BUDGET, CIRCULAR A-94, available at http://www.whitehouse.gov/omb/circulars_a094; see also OFFICE OF INFO. & REGULATORY AFFAIRS, *Regulatory Impact Analysis: A Primer*, http://www.whitehouse.gov/omb/inforeg_regpol_agency_review.

⁸⁷ See CIRCULAR A-4, *supra* note 86, at 2 (calling for each regulatory impact analysis to include “(1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs – quantitative and qualitative – of the proposed action and the main alternatives identified by the analysis”).

extensive rehearsing, but to understand OIRA's legal interpretive functions, it is useful to outline three of the most prominent.

The first is that OIRA undertakes regulatory review with an anti-regulatory bias. This is hardly surprising, given the roots of regulatory review in the Nixon Administration's hostility to environmental, occupational safety, and consumer regulation.⁸⁸ But the charge continues to have significant salience across Administrations. OIRA is frequently seen as an institution inclined to slow, water down, or block regulation, ostensibly under the banner of cost-benefit analysis.⁸⁹ This concern is bolstered by the comparative expertise that agencies tend to have in their areas of particular focus, compared to an oversight institution that is tasked with trying to rationalize almost the entire range of Executive Branch subject matters.⁹⁰

Closely related to this critique is the concern that the seemingly neutral process through which OIRA oversees the regulatory process involves an inappropriate degree of political interference from the White House.⁹¹ This argument privileges the idea of regulation as the realm of expertise, with rulemaking understood as a process of informed, technical decision-making, as opposed to the expression of any Administration's political preferences. This has generated a significant debate over the relative political insulation of OIRA versus the agencies that is difficult to resolve empirically.⁹² Regardless of whether OIRA or the agencies are more subject to capture, however, OIRA has always been viewed with some suspicion for acting as the face of naked political preferences in the regulatory arena.

Finally, especially under recent OIRA Administrators, the office has come under attack for its lack of transparency and consistency. As Lisa Heinzerling has noted, Executive Order 12,866 imposes a number of requirements on OIRA designed to mandate disclosure of critical aspects of its decision-making, yet OIRA regularly and blithely ignores these mandates.⁹³ OIRA is often seen as a black box, not only to the general

⁸⁸ See *supra* note 69.

⁸⁹ OIRA's defenders take the opposite view, arguing that OIRA review actually improves, rather than undermines, the regulatory work of the agencies. See, e.g., Sunstein, *supra* note 4. A related argument in favor of OIRA review is that the office's function is less to improve the quality of regulation or coordinate potential conflicts among agencies, but to police fidelity to the President's policy agenda. See Livermore, *supra* note 4, at 5.

⁹⁰ Again, the obverse of this concern is that OIRA's panoptical perspective may add value in reviewing and modifying any individual regulation. Cf. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1084-85 (1986) (defending the office's substantive regulatory input). Moreover, much of OIRA review actually involves inter-agency coordination, which allows the office to draw on the expertise of cognate agencies particularly focused on the subject matter of any given regulation.

⁹¹ See Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083 (2007).

⁹² See, e.g., Livermore & Revesz, *supra* note 4; see also Livermore *supra* note 4 (arguing that cost-benefit analysis actually serves to preserve agency independence).

⁹³ See Heinzerling, *supra* note 5.

public, but more immediately to the agencies whose day-to-day work requires OIRA approval.⁹⁴ There are few mechanisms under which OIRA provides public reasons for its regulatory decisions, which ultimately can undermine whatever legitimacy OIRA might otherwise have.

All of these concerns have direct bearing on why rule-of-law values matter in the internal workings of the administrative state, particularly with respect to the legal work undertaken by OIRA – and similar institutions within the Executive Branch – as we shall now explore.

B. *Legal Interpretation in Regulatory Review*

Scholars have largely focused on OIRA’s coordination and policy oversight functions, but much of what OIRA does as a functional matter implicates questions of law on a range of substantive and procedural issues.⁹⁵ Although Congress has formally delegated to OIRA only responsibility for the PRA,⁹⁶ a statutory role that requires some measure of interpretive discretion, a much broader swath of OIRA’s work involves legal interpretation. Indeed, Executive Order 12,866 specifically tasks OIRA with ensuring that “each agency’s regulatory actions are consistent with applicable law,”⁹⁷ placing legal interpretation at the core of regulatory review, although largely outside of judicial review.⁹⁸

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

1. *Interpretations of OIRA Jurisdiction and Authority*

As noted, Executive Orders 12,866 and 13,563 establish the parameters of OIRA oversight and raise a number of textual questions that determine whether, to what extent, and with what kind of scrutiny a given agency action will be reviewed. For example, the question of whether an action is subject to review at all turns on the definition of “regulation” or “rule” in Executive Order 12,866, as well as the meaning of the term “regulatory action.” The Executive Order echoes the definition in the APA of “rule”

⁹⁴ See, e.g., GENERAL ACCOUNTABILITY OFFICE, IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (2009).

⁹⁵ Cf. Sunstein, *supra* note 4, at 1842 n.18 (“OIRA helps to ensure that . . . legal issues receive careful attention and that those within the executive branch believe that regulatory actions are consistent with law. Indeed, this responsibility is central.”).

⁹⁶ See *supra* note 70.

⁹⁷ Exec. Order No. 12,866 § 6(b).

⁹⁸ See Livermore & Revesz, *supra* note 4, at 1339 (“The OIRA oversight process is entirely internal to the executive branch: it was established by executive order . . . and is not subject to judicial review.”).

(and, in turn, “rule making”), although there are some differences.⁹⁹ The Executive Order’s definition of “rule,” like the APA’s, has several exceptions, including rules “that pertain to a military or foreign affairs function of the United States,”¹⁰⁰ and rules “that are limited to agency organization, management, or personnel matters.”¹⁰¹ The Executive Order’s definition of “regulatory action,” moreover, covers “any substantive action . . . that promulgates or is expect to lead to the promulgation of a final rule or regulation,”¹⁰² a sweeping scope that is, again, open to interpretation.

Beyond the threshold jurisdictional question of regulatory action *vel non*, Executive Order 12,866 nominally divides OIRA oversight into two categories.¹⁰³ A subset of regulatory actions is defined as “significant,” a determination of which can be triggered by four criteria:

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

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.¹⁰⁴

If a rule is deemed “significant” under any of these standards, the determination triggers OIRA review and the requirement for regulatory

⁹⁹ The APA generally defines a “rule” to be “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency,” 5 U.S.C. § 551(4), while Executive Order 12,866 defines a “rule” or “regulation” to be “an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.” Exec. Order No. 12,866, § 3(d).

¹⁰⁰ Exec. Order No. 12,866, § 3(d)(2).

¹⁰¹ *Id.* § 3(d)(3).

¹⁰² *Id.* § 3(e).

¹⁰³ Under the Congressional Review Act, moreover, Congress may disapprove “major” regulations through a theoretically expedited legislative process, 5 U.S.C. § 801(a)(3), and the statute delegates the task of delineating “major” rules to OIRA based on a definition that parallels President Reagan’s Executive Order’s definition, *see id.* § 804(2); Exec. Order No. 12,291, § 1(b). *See generally* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009).

¹⁰⁴ Exec. Order No. 12,866, § 3(f).

impact analysis. Further, if a rule is determined to be economically significant under the first set of criteria, the required scope of cost-benefit analysis is more extensive.¹⁰⁵

These are all important definitional issues because whether an agency action constitutes “regulatory action” and, more importantly, whether that regulatory action is “significant” or “economically significant” determines OIRA jurisdiction (or at least should, if the office is following the Executive Order with any fidelity), and agencies can have legitimate reasons for checking OMB overreach. Not surprisingly, OIRA and the agencies it oversees do, in fact, disagree about the interpretation of these terms.¹⁰⁶

2. *Trans-substantive Administrative Process*

The APA and individual statutory regimes govern many aspects of agency process.¹⁰⁷ But OIRA polices a variety of administrative processes not addressed by the APA or other statutes, forming a body of law that is comprised of a combination of quasi-statutory law based in Executive Orders and administrative common law in practice.

a. *Cost-Benefit Analysis*

Since OIRA’s founding, one central focus of regulatory review has been the requirement that agencies prepare, and OIRA review, regulatory impact analyses.¹⁰⁸ Executive Order 12,866 and OMB’s Circular A-4 specify requirements for this exercise. Under the Executive Order, all significant rules must include an “assessment of the potential costs and benefits of the

¹⁰⁵ Roughly one-sixth to one-seventh of the regulatory actions OIRA reviews fall into this category of extra scrutiny for economic significance. *See* Copeland, *supra* note 71, at 1257.

¹⁰⁶ As some evidence of this tussle, one can look to the FAQ that OMB has issued to clarify the scope of the Executive Order. Under the question of economic significance, OMB has clarified that the “\$100 million threshold applies to the impact of the proposed or final regulation in any one year, and it includes *benefits, costs, or transfers*. (The word “or” is important: \$100 million in annual benefits, or costs, or transfers is sufficient; \$50 million in benefits and \$49 million in costs, for example, is not.)” OFFICE OF INFO. & REGULATORY AFFAIRS, *Regulatory Impact Analysis: Frequently Asked Questions*, available at http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf [hereinafter FAQ]. The alternative trigger for economic significance – that a regulation would “adversely affect in a material way” the economy or sectors of the economy – is even harder to pin down and open to interpretation. OIRA has noted that “[t]here are no hard-and-fast rules here,” *id.*, but has not offered much general guidance beyond that.

¹⁰⁷ The APA sets forth procedures for the most common form of rulemaking, called “informal” in the nomenclature of the statute for its notice-and-comment requirements, as well as formal rulemaking and various forms of hybrid and negotiated approaches to rulemaking. *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

¹⁰⁸ *See* Exec. Order No. 12,291 § 3 (Regulatory Impact Analysis and Review); Exec. Order No. 12,866 § 6(a)(3); CIRCULAR A-4, *supra* note 86.

regulatory action,”¹⁰⁹ while economically significant regulations must be elaborated in much greater depth.¹¹⁰

Although regulatory impact is a process dominated by economists and public policy generalists, both at OIRA and the agencies, the terms and nuances of cost-benefit analysis presents a core *legal* interpretive exercise. What counts as a “cost”? How are regulatory “benefits” determined? Over what period of time and with how much uncertainty should any of these factors be measured?¹¹¹ Moreover, under the Executive Orders and related guidance, cost-benefit analysis involves sometimes quite difficult tradeoffs between quantifiable and non-quantifiable values. As Executive Order 13,563 notes, “each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”¹¹² All of these issues not only raise deeply contestable normative questions,¹¹³ but are also exactly the kinds of determinations that legal actors are typically called upon to make in other contexts.¹¹⁴

b. *Structural Administrative Management and Policy*

OIRA oversight also includes the management of the mechanics of regulation at the agencies. Agencies are required, for example, to develop a unified agenda of all pending regulations and a “regulatory plan” that should specify “the most important significant regulatory actions.”¹¹⁵ The idea of this, and related authority under the two primary regulatory review Executive Orders, is to create a planning mechanism that, if operating

¹⁰⁹ Exec. Order No. 12,866 § 6(a)(3)(B).

¹¹⁰ Specifically, for this subset of regulations, agencies must provide greater detail on, and quantification of, “benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias),” as well as a similar analysis of anticipated costs “such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment.” *Id.* § 6(a)(3)(C). Finally, the Executive Order requires an assessment of “potentially effective and reasonably feasible alternatives” and “an explanation why the planned regulatory action is preferable to the identified potential alternatives.” *Id.*

¹¹¹ CIRCULAR A-4 and related documents, *see, e.g.*, FAQ, *supra* note 106; OFFICE OF INFO. & REGULATORY AFFAIRS, *Agency Checklist: Regulatory Impact Analysis*, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf, elaborate in some detail on these questions.

¹¹² Exec. Order No. 13,563, § 19(c).

¹¹³ There is a significant literature on the normative valence of cost-benefit analysis. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

¹¹⁴ Cost-benefit analysis, as such, is not subject to direct judicial review, but to the extent that the quality of an agency’s RIA is a factor in APA review, then unlike much of what OIRA does, its handiwork in this context has an external check.

¹¹⁵ Exec. Order No. 12,866 § 4(c)(1).

according to their description, places OIRA at the center of a coordination process that includes elevating conflicts between agencies to the Vice Presidential level.¹¹⁶

OIRA likewise manages government-wide deregulatory exercises that implicate questions of law. Executive Order 13,563, for example, instructs federal agencies to develop a plan for reviewing – and possibly modifying or repealing – existing rules, both immediately after the Executive Order’s effective date and on an on-going basis.¹¹⁷ Specifically, the Executive Order mandates that “agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”¹¹⁸ This process, overseen by OIRA, requires legal interpretation about statutory commands, not only the costs and benefits of rules.¹¹⁹

There are a number of structural or process-oriented statutes, moreover, that are regularly implicated in OIRA review, regardless of the substantive domain of any given regulatory exercise. These include the National Environmental Policy Act,¹²⁰ the Regulatory Flexibility Act,¹²¹ the Unfunded Mandates Reform Act,¹²² and others.¹²³ Again, all of these

¹¹⁶ Originally, the Clinton Executive Order placed this conflict-resolution responsibility with the Vice President. *See id.* § 4(c)(5). In 2002, President Bush issued Executive Order 13,258, removing this responsibility from the Vice President, but in 2009, President Obama revoked the Bush-era Executive Order, restoring Executive Order 12,866 to its prior form. *See* Exec. Order No. 13,497, §§ 1-2, 3 C.F.R. 218, 218 (2010) (revoking Exec. Order No. 13,422, 3 C.F.R. 191 (2008), and Exec. Order No. 13,258, 3 C.F.R. 204 (2003)).

¹¹⁷ Executive Order 13,563, although relatively recent, has the potential to add to both the complexity of agency regulatory process but, more immediately for our purposes, the interpretive tasks facing OIRA in overseeing its mandates. Cass Sunstein has described Executive Order 13,563 as “a kind of mini-constitution for the regulatory state.” Sunstein, *supra* note 4, at 1846.

¹¹⁸ Executive Order 13,563, § 6(a).

¹¹⁹ For an earlier version of this deregulatory mandate, see Executive Order 12,866, § 5. The Obama Administration followed up Executive Order 13,563 with Executive Order 13,579, which urged independent agencies to conduct the same kind of retrospective review of regulations. *See* 76 Fed. Reg. 41,587 (July 14, 2011).

¹²⁰ 42 U.S.C. § 4321 *et seq.*

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

¹²² 2 USC § 1501 *et seq.* The Unfunded Mandates Reform Act requires agencies to assess the costs and benefits of federal mandates that could require expenditures by state, local, and tribal governments or by the private sector of more than \$100 million in any one year.

¹²³ Similarly, several cross-cutting Executive Orders can be implicated in regulatory review. For example, Executive Order 13,132, on “Federalism,” *see* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999), contains procedural and substantive requirements for agency regulation that raise questions of interpretation. It mandates that agencies “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” *Id.* at 43,257. It also requires agencies to interpret statutes that have “federalism implications” to narrow the scope of potential preemption when issuing rules, *id.* as well as to grant states as much “administrative discretion” as allowed under the terms of any cooperative federalism regime.

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

c. Administrative Procedural Common Law

Although the APA sets the framework for specific administrative procedures,¹²⁴ OIRA has undertaken through a kind of administrative common law to push agencies to undertake various forms of notice and comment or other public input for actions that would not otherwise formally require such public input.¹²⁵ For example, OIRA regularly encourages agencies to seek comment on agency guidance and other sub-regulatory pronouncements, as well as when agencies are drafting regulatory impact analyses.¹²⁶ Similarly, when the Obama Administration promulgated Executive Order 13,563, then-OIRA Administrator Cass Sunstein outlined public-outreach procedures that he recommended accompany each agency's look-back review of existing rules.¹²⁷

3. Substantive Legal Interpretation

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

Id. Similar cross-cutting Executive Orders potentially at issue in rulemaking cover issues such as takings, *see* Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988); environmental concerns, *see* Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (1997); and energy impacts, *see* Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (2001), among others.

¹²⁴ For an argument that courts regularly engraft procedural requirements in contravention of the simplicity contemplated by the APA, *see* Kovacs, *supra* note 45, at 10-11.

¹²⁵ Moreover, OIRA sets – and monitors closely – the form and format of proposed and final rules, requiring, for example, statements that proffer “a reasonably detailed description of the need for the regulatory action,” Exec. Order No. 12,866, § 6(a)(3)(B), and CIRCULAR A-4 has elaborated on the possible justifications at length, *see* CIRCULAR A-4, *supra* note 86, at 3-7 (detailing the range of possible market failures and other justifications that might prompt regulation, including “improving the functioning of government, removing distributional unfairness, or promoting privacy and personal freedom”).

¹²⁶ *See, e.g.*, CIRCULAR A-4, *supra* note 86, at 3 (“As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues.”).

¹²⁷ *See* Memorandum from Cass R. Sunstein, Adm’r, Office of Mgmt. & Budget, for the Heads of Exec. Dep’ts and Agencies, and of Ind. Regulatory Agencies 5 (Feb. 2, 2011). We will discuss the lawmaking function of OIRA-issued memoranda below. *See infra* Part III.A.

The [Executive] Order does not empower the Director [of OIRA] . . . to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions. . . . [The Director's] power of consultation would not . . . include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation.¹²⁸

Although this analysis predated the Supreme Court's *Chevron* decision, it is consistent with one foundational principle the Court identified in that case as undergirding deference, which is that Congress selects specific agencies to be "entrusted to administer" particular statutory regimes.¹²⁹ The principle is also reflected in Executive Order 12,866, which explicitly disclaims the displacement of agency legal authority.¹³⁰

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

To give one example, Lisa Heinzerling has written about modifications made by OIRA to a rule promulgated by the Environmental Protection Agency interpreting the Clean Air Act. The rule covered water-intake structures used to cool power plants, and was being issued under Section 316(b) of the Act. That provision requires, in relevant part, that any standards governing such structures "reflect the best technology available for minimizing adverse environmental impact."¹³¹ Through OIRA review, the agency's proposal to use what was, Heinzerling argues, the best available technology for certain particularly harmful power plants was withdrawn based on a cost-benefit interpretation of the statute that took a significantly different view of the meaning of the operative statutory clause than EPA's initial view upon entering OIRA review.¹³²

OIRA involvement in the interpretation of primary substantive legislation that Congress delegates to the agencies to elucidate through

¹²⁸ Dep't of Justice, Office of Legal Counsel Memorandum, Proposed Exec. Order Entitled "Federal Regulation" (Feb. 13, 1981).

¹²⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). On *Chevron's* structural implications for presidential oversight, compare Kagan, *supra* note 64 (arguing in favor of presidential authority to direct administrative action under statutory delegations to agencies), with Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that congressional delegation to an agency does not imply delegation to the President).

¹³⁰ Exec. Order No. 12,866 § 9 ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.").

¹³¹ 33 U.S.C. § 1326(b).

¹³² See Heinzerling, *supra* note 5, at 1104-06.

rulemaking can be innocuous or not, depending on the nature of OIRA's intervention, and there is a long-standing debate about comparative institutional competence that we need not rehearse presently.¹³³ Our observation here is simply that weighing in on substantive statutory questions in the course of regulatory review is part and parcel of the day-to-day work of the office. Indeed, OIRA's internal institutional organization reflects this fact in so far as the "desks" within the office are divided along subject matter lines, with desk officers on the front line focused only on individual clusters of statutes and subject areas. Although regulatory review is "trans-substantive" at a conceptual level, OIRA's interactions with the agencies it oversees at a practical level is very statute and subject specific,¹³⁴ inevitably involving OIRA in a wide range of statutory questions.

C. *Traces of OIRA Common Law*

Having laid the foundation for understanding OIRA's lawmaking function at the conceptual level, it is possible to find clear and telling traces of this aspect of the office's functioning in the letters it publishes and makes public, which together give some indication of a type of "common law" produced by the office.¹³⁵ Since 2001, OIRA has kept a repository of letters online, ostensibly to enable the public to better understand its work.¹³⁶ The repository includes three types of letters: prompt letters, which are written to encourage agencies to undertake an action or repeal an existing regulatory requirement; return letters, which communicate when OIRA believes a rule must be withdrawn or delayed; and review letters, which are written when OIRA does not delay or reject a rule but still wants an agency to engage in further consideration or deliberation about issues pertinent to a rulemaking.¹³⁷

¹³³ See, e.g., DeMuth & Ginsburg, *supra* note 90, at 1084-85 (defending OMB substantive regulatory input).

¹³⁴ See Sunstein, *supra* note 4, at 1845; GENERAL ACCOUNTING OFFICE, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003), available at <http://www.gao.gov/assets/160/157476.pdf>.

¹³⁵ For another effort to describe "the common law of 13,563," see Heinzerling, *supra* note 5, at Part II.

¹³⁶ See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 34 (4th ed. 2006); Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, CQ WEEKLY 520 (Feb. 23, 2002); Brian Mannix, *A Mid-Term Grade for the Bush Administration*, 26 REGULATION 12 (2003).

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

¹³⁷ All three categories of letters in the repository can be accessed at the following link: <http://www.reginfo.gov/public/jsp/EO/letters.jsp>. As noted above, see *supra* Part II.A, the repository reflects those provisions of Executive Order 12,866 that require OIRA to provide statements in writing to agencies when completing a regulatory review or returning a

Here, we peer into OIRA's nearly three-and-a-half decade experience overseeing regulatory review, with an emphasis on the second Bush Administration, when the office appeared to take somewhat more seriously the mandate in Executive Order 12,866 to provide written statements on return and review.¹³⁸ Although much of what OIRA does – including its lawmaking work – is “informal” and does not leave a public paper trail, there is still good reason to pursue the more “formal” actions it takes that are publicly memorialized in the repository of opinion and decision letters.¹³⁹

A careful reading of the entire repository, despite the limitations of this empirical record, yields several insights into OIRA's legal function.¹⁴⁰ As a threshold matter, many of the letters confirm that OIRA focuses its review

proposed regulatory action to an agency for further review. *See* Exec. Order No. 12,866 §§ 6(b)(2), (3).

¹³⁸ There are no letters in the repository prior to 2001 and two since 2009: a 2010 review letter regarding a rule from the National Highway Traffic Safety Administration on tire fuel efficiency consumer information and, as noted above, a 2011 letter to the EPA on ambient air quality standards. As a result, the overwhelming bulk of the evidence in the repository comes from the two terms of the second Bush Administration. It should be noted that the entire repository contains twenty-eight return letters, sixteen review letters, and sixteen prompt letters, representing a tiny fraction of the regulatory review underway during the relevant period. For a thorough look at the data on OIRA's review work, see Acs & Cameron, *supra* note 4.

¹³⁹ Although this repository constitutes the best publicly available evidence of an articulated rationale behind OIRA's work product, the lack of detail in the letters is striking. The rules that OIRA was reviewing were often lengthy and no doubt in many cases required months, if not years, of staff work at the agencies seeking to promulgate them. This suggests that the real substance of OIRA's review even in an era during which return and review letters were more common was conveyed through the kinds of informal and in-person communications that dominate the OIRA-agency relationship. The record can only provide surface traces of much more complex underlying dynamics.

¹⁴⁰ The repository also sheds some light on common misperceptions about OIRA. For example, although OIRA is sometimes thought to have special target agencies for its work, the repository shows letters addressed to a diverse set of agencies: the FDA, EPA, Interior, the National Highway Traffic Safety Administration, the National Institutes of Health, the Office of Federal Housing Enterprise Oversight, Marine Administration, OSHA, USDA, Homeland Security, Department of Energy, NASA, HUD, Defense, GSA, the Department of Veterans' Affairs, the Small Business Administration, the Social Security Administration, Federal Railroad Administration, the FAA, and the National Oceanic and Atmospheric Administration.

Moreover, as some evidence that not all of OIRA's actions are deregulatory despite the office's reputation, several prompt letters (all of which, as noted, were promulgated during the second Bush Administration) could be classified as supportive and inviting of more regulation rather than less regulation. *See* http://www.reginfo.gov/public/prompt/epa_beach-act-2000.pdf (encouraging federal regulation to create safe beaches rather than waiting for state-based standard-setting); http://www.reginfo.gov/public/prompt/doi_mapping_prompt.pdf (encouraging an initiative to provide more information to the public); http://www.reginfo.gov/public/prompt/prompt_dietary_052703.pdf (encouraging the USDA and HHS to update dietary guidelines and the food pyramid); http://www.reginfo.gov/public/prompt/prompt_ofheo052902.html (encouraging more rules to control the corporate governance of Fannie Mae and Freddie Mac, as well as new disclosure obligations); http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html (encouraging the FDA to pay more careful attention to the regulation of trans fatty acids); http://www.reginfo.gov/public/prompt/osha_prompt_letter.html (encouraging OSHA to require automatic external defibrillators in the workplace).

on cost-benefit analysis and often asks agencies for more careful or different regulatory impact analysis, occasionally challenging the methodology employed by the expert agency.¹⁴¹ Recent efforts by scholars, moreover, to peer into OIRA have emphasized the degree to which the office focuses on interagency coordination in the Executive Branch.¹⁴² There is substantial evidence in the repository that this is indeed a focus of OIRA's work.¹⁴³ And scholarly work on OIRA's role in promoting public participation in notice and comment processes and elsewhere¹⁴⁴ is also vindicated by the repository.¹⁴⁵

Yet what is most relevant for repleprudence are the many and varied traces of engagement with legal questions across the repository. In terms of trans-substantive administrative process, several prompt letters acknowledge that the kind of analysis OIRA wants to see from regulatory agencies is not necessarily required by the organic statutes that agencies administer.¹⁴⁶ This record highlights the way the Executive Orders that structure OIRA's work are sources of law that affect the application of statutory law. In some cases, OIRA presses against statutory commands and even considers legislative fixes for rules it disfavors.¹⁴⁷

¹⁴¹ See http://www.reginfo.gov/public/postreview/spark_engines_epa_sep2001.html (disagreeing with the way the EPA decided how to measure costs, citing earlier OMB guidelines that should control); http://www.reginfo.gov/public/return/opm_return_letter.pdf (returning rule on federal employee health benefits because of cost-benefit analysis inadequacies); http://www.reginfo.gov/public/return/dot_revised_tire_rtnltr.pdf (returning rule on tire pressure for cost-benefit analysis inadequacies); http://www.reginfo.gov/public/return/usda_ee_for_nonhuman_primates_rtnltr012902.html (returning rule for agency's failure to address "likely significant economic impacts"); http://www.reginfo.gov/public/return/boeing737_return_letter.html (returning rule for cost-effectiveness analysis); http://www.reginfo.gov/public/return/wetlines_return_letter3.html (returning rule for agency's failure to justify the costs of a regulation); http://www.reginfo.gov/public/return/Epa_Return_letter_7_03.pdf (returning rule to justify costs of pesticide container recycling regulation).

¹⁴² See Sunstein, *supra* note 4, at 1840, 1850; see generally Freeman & Rossi, *supra* note 61.

¹⁴³ See http://www.reginfo.gov/public/postreview/OIRA_letter_to_EPA_7_10_08.pdf (encouraging interagency coordination on greenhouse gas emission regulation); <http://www.reginfo.gov/public/return/return-dot061303.pdf> (returning rule for failure to coordinate on ocean vessel regulation); http://www.reginfo.gov/public/return/usda_ee_for_nonhuman_primates_rtnltr012902.html (encouraging interagency coordination); http://www.reginfo.gov/public/return/va_exclusions_rtnltr.html (enforcing VA-DOJ interagency coordination in VA rulemaking); http://www.reginfo.gov/public/return/faa_repair_stations_rtnltr-dot.html (returning rule to encourage interagency coordination).

¹⁴⁴ See Sunstein, *supra* note 4, at 1846, 1870.

¹⁴⁵ See http://www.reginfo.gov/public/return/return-dot_rspa.pdf (returning rule for public comment); http://www.reginfo.gov/public/return/epa_water_quality_rtnltr.html (returning rule for more input from the states); http://www.reginfo.gov/public/return/ssa_4rules_rtnltr.html (returning rule to enable the SSA to seek comments).

¹⁴⁶ See, e.g., http://www.reginfo.gov/public/prompt/Prompt_Letter_to_EPA.pdf.

¹⁴⁷ See http://www.reginfo.gov/public/postreview/ltr_to_william_hawks_on_cool.pdf (recognizing that the relevant "statute severely restricts USDA's discretion in crafting this rule," but still pressing the agency to focus more on costs to consumers than the statute requires and considering "legislative relief"); http://www.reginfo.gov/public/postreview/faa_tca_s_rtn10-22-01.html (recognizing that the "FAA has limited alternatives available under

Indeed, a substantial number of letters take explicit positions on statutory interpretation, using the leverage the office has during regulatory review to enforce particular (and potentially contestable) interpretations that may have been congressionally delegated to the agency being reviewed rather than to OIRA.¹⁴⁸ Sometimes OIRA is seeking to enforce statutory commands under statutes such as the Unfunded Mandates Act¹⁴⁹ or the Paperwork Reduction Act that gave birth to OIRA.¹⁵⁰ But more often the office seems to be using its power under relevant Executive Orders or OMB Circulars to interpret substantive statutes within an agency's expertise.¹⁵¹

To give some examples, in an October 30, 2007 return letter addressed to the General Counsel of the Department of Commerce regarding a rule about coastal fisheries proposed by the National Oceanic and Atmospheric Administration (NOAA), the then-OIRA Administrator stated that one ground for returning the rule was that it was "not consistent with NOAA's authority to regulate the fishery under the Magnuson-Stevens Act."¹⁵² Similarly, in a September 14, 2001 return letter addressed to the General Counsel of the Veterans' Administration, one ground for rejecting a proposed rule that would have created presumptions about whether a potential beneficiary was entitled to disability benefits was that the rule "would contradict the statutory authority and intent of the program."¹⁵³ This goes beyond what Lisa Heinzerling observed when she was able to obtain

the statute," but still urging it to focus more on costs and consider whether implementing the statute is reasonable); *see also* http://www.reginfo.gov/public/postreview/coastguard_tank_level_rtnltr.html (recognizing that the agency is trying to meet a judicial deadline for a rule required by statute, but still focusing on the failure to establish net benefits with the rule choice and considering "legislative relief").

¹⁴⁸ *See* <http://www.reginfo.gov/public/return/return-dot061303.pdf> (returning rule because regulation "establish[es] requirements inconsistent with Congressional intent"); http://www.reginfo.gov/public/return/sba_eidl_rtnltr.html (returning a rule in part because the proposal threatens to take a congressional program beyond its "original intent"); http://www.reginfo.gov/public/return/permanent_and_total_disability_va_return_letter.html (returning rule because of concerns about the right interpretation of statutes administered by the VA); http://www.reginfo.gov/public/return/dot_return_vessels.pdf (returning rule because of inconsistency with congressional intent); http://www.reginfo.gov/public/postreview/OIRA_letter_to_EPA_7_10_08.pdf (taking a position on the substantive reach of the Clean Air Act); http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf (same).

¹⁴⁹ 2 U.S.C. § 1501 *passim*; *see* http://www.reginfo.gov/public/return/dot_revised_tire_rtnltr.pdf (enforcing Unfunded Mandates Act but also appealing to the authority of Executive Order 12,866).

¹⁵⁰ *See* http://www.reginfo.gov/public/return/ssa_4rules_rtnltr.html (returning rule to the Social Security Administration to enforce compliance with the Paperwork Reduction Act).

¹⁵¹ *See* http://www.reginfo.gov/public/return/sba_eidl_rtnltr.html (returning rule to encourage agency to comply with OMB CIRCULAR A-129); http://www.reginfo.gov/public/return/DHS-CBP_Coastwise_Cruises_Return_Letter.pdf (returning rule to enforce agency compliance with Executive Order 12,866 and OMB CIRCULAR A-4); http://www.reginfo.gov/public/return/return_doc_20071030.pdf (returning rule to enforce compliance with Executive Order 12,866, as amended by Executive Order 13,422).

¹⁵² www.reginfo.gov/public/return/return_doc_20071030.pdf.

¹⁵³ http://www.reginfo.gov/public/return/permanent_and_total_disability_va_return_letter.html.

the record of OIRA's review of EPA's power-plant cooling rule,¹⁵⁴ in that these traces of OIRA's substantive interpretation of agency statutes do not involve engrafting cost-benefit analysis in statutory regimes where it does not apply, but rather take (and enforce) positions on questions such as the scope of delegation and an enacting Congress's legislative intent.

The repository also suggests OIRA involvement in the quasi-constitutional domains of federalism and preemption.¹⁵⁵ Although these matters are covered by an Executive Order and a guidance document from OMB,¹⁵⁶ OIRA is technically responsible for their enforcement. Accordingly, OIRA's preferences on federalism and preemption can be superimposed upon agency decision-making.¹⁵⁷

OIRA also takes upon itself enforcement of treaties and consideration of other international concerns. Thus, in a September 20, 2001 return letter to the Deputy General Counsel of the Department of Transportation, OIRA relied primarily on potential inconsistency between the proposed rule and the obligations of the United States under the North American Free Trade Agreement.¹⁵⁸ Similarly, OIRA returned another proposed DOT rule because of potential "adverse international consequences" and because of a need to comply with "applicable international trade agreements."¹⁵⁹ And these examples are not the only instances of OIRA insinuating international legal considerations into its regulatory review.¹⁶⁰ It is not entirely clear these matters fall within the jurisdictional grants to OIRA under Executive Orders 13,563 and 12,866. But OIRA is making law in these domains, nevertheless.

What this repository confirms, with its fish-eye lens into OIRA review (which we perfectly well concede may project a distorted image), is that OIRA's legal function is wide ranging, covering procedural and substantive matters across a number of domains. Together with other evidence and the foundational structure of OIRA review, it is clear that OIRA represents an

¹⁵⁴ See *supra* text accompanying notes 131-132.

¹⁵⁵ See *supra* note 123.

¹⁵⁶ See Exec. Order No. 13,132; Memorandum from the Office of Mgmt. & Budget on Guidance for Implementing E.O. 13132, "Federalism," available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/m00-02.pdf>.

¹⁵⁷ For examples from the repository, see http://www.reginfo.gov/public/return/epa_water_quality_rtnltr.html (federalism and tribal lands); http://www.reginfo.gov/public/post_review/hud_response9.pdf (preemption). Cathy Sharkey has offered a careful assessment of OIRA's role in these matters based on in-depth interviews with agency officials and OIRA personnel. See Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012). Sharkey argues that OIRA does very little to enforce the relevant Executive Order – but there is at least some evidence of attention to federalism and preemption in the letters from the repository. Rather than insisting that a sentence or two in the repository letters is itself a cause for direct concern about what OIRA is doing about enforcing the Executive Orders on federalism and preemption, we observe only that an OIRA unbound – unmoored from regleprudential norms – could be engaging in a lot of jurisgenerative action in the domains in which it has legal enforcement authority.

¹⁵⁸ See http://www.reginfo.gov/public/return/fra_dispatching_rtnltr-dot.html.

¹⁵⁹ http://www.reginfo.gov/public/return/faa_repair_stations_rtnltr-dot.html.

¹⁶⁰ See, e.g., http://www.reginfo.gov/public/return/dot_return_vessels.pdf (returning rule because it "undermine[s] foreign policy objectives").

important and active legal institution within the Executive Branch, no less significant (and arguably much more significant) than OLC and other offices that have received the lion's share of attention by scholars and practitioners. Recognizing this legal function now allows us to return to the questions we raised at the outset about how to analyze this kind of law and whether it ought to be considered precedential in future legal reasoning or otherwise constrained by institutional design techniques sensitive to rule-of-law values like consistency and transparency.¹⁶¹

III. REGLEPRUDENCE, *STARE DECISIS*, AND ITS ALTERNATIVES

Because regulatory review places OIRA in the position to interpret important legal questions, we have warrant to ask whether traditional jurisprudential concerns can be applied to this lawmaking function.¹⁶² In this Part, we return to the role of precedent in OIRA's legal function, as well other techniques of constraining the law made at OIRA with rule-of-law considerations. To do so, we explore different conceptual modalities of lawmaking at OIRA because different institutional approaches may counsel for different treatment from a regleprudential perspective. The question, then, is whether OIRA's (different kinds of) lawmaking carries any precedential effect and what kinds of *stare decisis*-like treatment the law made there ought to receive. After that discussion, we recommend some reforms to improve OIRA's role in controlling a legitimate administrative state from a regleprudential perspective. We conclude with some observations about regleprudence beyond OIRA, outlining a research agenda that can highlight how this project connects with mainline jurisprudential concerns.

¹⁶¹ One objection to our characterization of OIRA as an institution engaged in law making might be that OIRA's role is inchoate and ultimately advisory, as the OLC memo on regulatory review and the text of Executive Order 12,866 seem to suggest. There is plenty of evidence, however, that OIRA's pronouncements on legal matters carry significant – indeed, perhaps determinative – weight within the Executive Branch. Moreover, the simple realpolitik of OIRA's gate-keeping function suggests that it carries great leverage in conflicts with agencies. Finally, the kinds of regleprudential questions we think appropriate to ask of OIRA's legal function are not dependent on that legal function having finality in the sense of a judicial decision, enacted legislation, or even final agency action. Given OIRA's inherently predicate role in the regulatory process, its influence on the law within the Executive Branch – and ultimately beyond – will always take place through the iterative process it oversees.

¹⁶² In a forthcoming article, Cathy Sharkey suggests that courts ought to take a harder look at agency action when that action has not been first reviewed by the executive through its mechanisms of regulatory oversight like OIRA. See Catherine M. Sharkey, *Agency Oversight: Heightened Judicial Review in the Absence of Executive Oversight* (forthcoming 2015). If OIRA review is to be taken to have legal relevance (and the hydraulics of deference and judicial review is going to be responsive to OIRA oversight), that is all the more reason not to accede to the view of OIRA review as merely political; conformity with regleprudential norms at OIRA could help reinforce the institution's jurisprudential significance.

A. Modalities of Lawmaking at OIRA: Quasi-adjudication, Quasi-enforcement, and Quasi-rulemaking

For the most part, OIRA's legal interventions occur through individualized reviews of other agency's rule-making processes. One might call this mode of review *quasi-adjudication*. From another perspective, to the extent that OIRA is engaging in enforcing and implementing various Executive Orders,¹⁶³ the Paperwork Reduction Act,¹⁶⁴ the Unfunded Mandates Act,¹⁶⁵ and OMB Circulars and guidance documents,¹⁶⁶ we might conceptualize its work as *quasi-enforcement*, with enforcement aimed at other Executive Branch instrumentalities. Both quasi-enforcement and quasi-adjudication naturally prime consideration of the extent to which precedent ought to play a role in decision-making in these modalities of OIRA action precisely because the workaday use of precedent in adjudication and enforcement inside and outside the judiciary (and the Department of Justice) is hardly controversial. Recall that even at the NLRB – where *stare decisis* is extremely light – some special hoop-jumping is necessary to move off matters already decided.¹⁶⁷ Thus, although these modalities of lawmaking – quasi-adjudication and quasi-enforcement – recommend some form of *stare decisis*, much more work would be necessary to calibrate just the right form: neither absolute *stare decisis* that statutory decisions get in the courts makes sense; nor does *ad hoc* decision-making with no reference to prior decisions that controlled agencies in the past make sense either.

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

¹⁶³ *E.g.*, Exec. Order No. 12,866; Exec. Order No. 13,422; Exec. Order No. 13,132; Exec. Order No. 13,563.

¹⁶⁴ 44 U.S.C. § 3501-3521; *see, e.g.*, http://www.reginfo.gov/public/return/ssa_4rules_rtnltr.html (returning rule to enforce compliance with Paperwork Reduction Act).

¹⁶⁵ 2 U.S.C. § 1501 *passim*; *see, e.g.*, http://www.reginfo.gov/public/return/dot_revised_tire_rtnltr.pdf (enforcing Unfunded Mandates Act but also appealing to authority of Executive Order 12,866).

¹⁶⁶ *E.g.*, OFFICE OF MGMT. & BUDGET, OMB CIRCULAR A-129; OMB Circular A-4; OFFICE OF MGMT. & BUDGET, OPEN GOVERNMENT DIRECTIVE, *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf; *see* http://www.reginfo.gov/public/return/sba_eidl_rtnltr.html (returning rule to encourage agency to comply with OMB CIRCULAR A-129); http://www.reginfo.gov/public/return/DHS-CBP_Coastwise_Cruises_Return_Letter.pdf (returning rule to enforce agency compliance with Executive Order 12,866 and OMB CIRCULAR A-4).

¹⁶⁷ *See supra* I.C.

The Obama Administration's OIRA has thus far chosen to issue very few "formal" letters in their quasi-adjudicative processes. Although OIRA's work remains principally the review of agency rulemakings, only one return letter appears from 2011.¹⁶⁸ Given that public interactions with agencies provide a source of law to help agencies anticipate and plan for OIRA review and understand its priorities, we might have expected a law professor OIRA Administrator – Cass Sunstein – to contribute more than one letter to the repository of common law. To be sure, a previous Administrator observed that OIRA "ha[s] witnessed some agencies simply withdrawing rules rather than face a public return letter,"¹⁶⁹ so it could be that agencies are trying to avoid public flogging with return letters or post-review letters.

Yet Sunstein chose to communicate formally with agencies through trans-substantive memoranda rather than through the letter form: quasi-rules, as it were, rather than the quasi-adjudications contained in the repository.¹⁷⁰ These also provide guidance and are a source of law for agencies to follow—but they are less easy to find, less focused on specific statutory commands, and less calibrated to specific decision-making tasks agencies are already in the process of facing.¹⁷¹ It is hard to tell on the cold record if anything informal changed under Sunstein – he certainly published many speeches to give some insight into how he was running the office¹⁷² – but his "formal" actions differed in their effective withdrawal from the repository of letters collected, published, and publicized since the Bush Administration,¹⁷³ preferring the form of the memorandum.¹⁷⁴

To give a feel for what we are calling "quasi-rulemaking," consider Sunstein's memorandum of June 18, 2010 on "Disclosure and Simplification as Regulatory Tools."¹⁷⁵ Drawing on OIRA's presumptive authority under Executive Order 12,866 – and relevant directives issued by

¹⁶⁸ See *supra* note 81.

¹⁶⁹ See Mannix, *supra* note 136, at 14 (quoting John Graham).

¹⁷⁰ See, e.g., http://www.va.gov/ORPM/docs/EO_OIRA_Guidance_M11-10.pdf; <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effectsguidance.pdf>; <http://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/testing-and-simplifying-federal-forms.pdf>; <http://www.regulationwriters.com/downloads/OIRA-M-11-07-Facilitating-Scientific-Research-by-Streamlining-the-PRA-Process-12-9-10.pdf>; <http://www.regulationwriters.com/downloads/OIRA-PRA-Generic-ICRs-5-28-2010.pdf>; <http://www.regulationwriters.com/downloads/OIRA-Social-Media-Guidance-4-7-10.pdf>; <http://www.regulationwriters.com/downloads/OIRA-PRA-Primer-4-7-10.pdf>.

¹⁷¹ As noted, there are other memoranda and Circulars promulgated by OMB that govern aspects of rulemaking and agency practice. See *supra* text accompanying notes 85-87. These could also be considered quasi-rulemaking in our typology.

¹⁷² Sunstein's speeches are collected at http://www.whitehouse.gov/omb/inforeg_speeches/.

¹⁷³ See *supra* note 137.

¹⁷⁴ At this stage of our research, we cannot discern whether acting through memorandum rather than letter makes a difference on the ground. For now, we observe these different modes of lawmaking, so they can be subjected to comparative analysis in the future.

¹⁷⁵ See http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf.

President Obama and OMB¹⁷⁶ – Sunstein issued “principles” about disclosure and simplification that “agencies should follow.”¹⁷⁷ Although a later clarifying memorandum (of September 8, 2011 on “Informing Consumers through Smart Disclosure”¹⁷⁸) was said to be a product of “input from, among others, the National Science and Technology Council’s Task Force on Smart Disclosure,”¹⁷⁹ there is no evidence of any process – notice-and-comment or otherwise – that led to these trans-substantive disclosure and simplification principles Sunstein announced by memorandum.

From one standpoint, the substance of the principles on summary disclosure seem intuitive: agencies should know why they are forcing disclosure; agencies should promote simple and specific disclosure, accurate and in plain language; agencies should consider timing and placement of disclosed information; ratings and scales should be easy to understand and have reference to benchmarks that matter; agencies should test the effects of disclosure and monitor disclosure’s effects over time; and agencies should do cost-benefit analysis about disclosure strategies.¹⁸⁰ Yet there is no doubt that these are substantive and normative choices, and an agency’s command from a statute may recommend a different set of principles that might be derived in a way that trans-substantive principles cannot always easily accommodate. Notwithstanding a disclaimer in the memorandum that “[a]gencies should follow the principles outlined here in accordance with their own authorities, judgments, and goal, to the extent permitted by law,”¹⁸¹ there is no doubt that the memorandum sets the agenda for OIRA’s analysis of proposed rules involving summary disclosure. When the FDA or NHTSA take to rulemaking about tobacco labeling, food nutrition labeling, or energy efficiency labeling, for example, the Sunstein memo becomes the document to comply with or to contend with, rather than a focus on the role of disclosure in the organic statute or comprehensive statutory scheme. The agency will now need to explain why it is departing from the “Sunstein principles,” if it chooses to.

The “simplification” principles are even more clearly substantive and normatively contestable. In these norms of guidance to agency heads, Sunstein informs regulators that they ought to be considering “opt-out” default rules to help nudge people to make the choices regulators may prefer, as well as “active choosing” to mitigate the effects of bias towards default rules.¹⁸² The memorandum also encourages agencies to consider

¹⁷⁶ See President Barack Obama, Memorandum on Transparency and Open Government (Jan. 21, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900010.pdf>; OFFICE OF MGMT. & BUDGET, OPEN GOVERNMENT DIRECTIVE, available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

¹⁷⁷ See http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf, at 2.

¹⁷⁸ See <http://www.whitehouse.gov/sites/default/files/omb/inforeg/foragencies/informing-consumers-through-smart-disclosure.pdf>.

¹⁷⁹ See *id.* at 2.

¹⁸⁰ See *id.* at 3-6.

¹⁸¹ *Id.* at 3.

¹⁸² See *id.* at 9-10.

default rules instead of mandates or bans.¹⁸³ One could be forgiven for thinking that Sunstein – with an identical disclaimer here that “[a]gencies should follow the principles outlined here in accordance with their own authorities, judgments, and goals, to the extent permitted by law”¹⁸⁴ – is writing into law a version of one of his own recent books.¹⁸⁵ One can celebrate and admire Sunstein’s (and Thaler’s) *Nudge* and still think some public participatory procedure ought to have been followed before it got pride of place in a memorandum all federal executive agency heads must follow or justify departing from. In any case, the Sunstein memoranda and the Sunstein principles articulated therein are modes of lawmaking that take the form of quasi-rules.

B. *Calibrating Stare Decisis in OIRA’s Legal Function*

Whichever modality of regleprudential development is more effective or democratically justifiable – quasi-adjudications and quasi-enforcement actions through letter-writing or quasi-rulemaking through memoranda – OIRA is developing a law of sorts. The question for this section is whether these methods of lawmaking are entitled to any precedential effect and what kinds of *stare decisis*-like treatment they ought to receive. In the alternative, when *stare decisis* seems like the wrong approach, is there another technique that can help tame this law being made by commonly-held rule-of-law values?

1. *The Role of Precedent in Three Modalities of Lawmaking*

In Part I.C above, we introduced the idea of applying *stare decisis* – to stand by things decided – into the inner workings of the administrative state, especially in domains outside the regular scope of judicial review. We provided reasons to think that corners of the Executive Branch that actually issue authoritative decisions that bind governmental and private actors, structuring their primary conduct, could benefit from a regleprudential commitment to the same rule-of-law values prevalent within the judicial system that underwrite the doctrine of *stare decisis*. For many of the same reasons that the use of precedent as binding makes sense in courts, the Executive Branch might be seen as subject to a general principle to stand by things decided, even if the contours of the form of *stare decisis* have yet to be articulated. Whether it is to save decision costs, promote the independent value of consistency, provide a “focal point” for coordination, respect and channel reliance, or because something about the concept of “law” requires it, domains of the administrative state mostly immune from judicial review still need to be thinking about the law they are making as law. As such, law

¹⁸³ See *id.* at 10.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

of this sort should be refracted through the value (and costs) of adhering to precedent. It is not, of course, our view that all law is the same and that all law must respect precedent in the same way to vindicate rule-of-law values. The role of precedent will likely vary across the three different modalities of lawmaking at OIRA, as will the trade-offs between standing by things decided and competing values of creativity, flexibility, and the political accountability that comes from being able to depart from such precedent in response to democratic shifts.

Consider what we have called quasi-adjudication, which has at times been memorialized in the letters that OIRA writes when it returns rules to agencies and when after a review it wishes for the agency to continue to think through its regulatory approach. Should the legal order OIRA imposes through these reviews be considered a system of precedent that future quasi-adjudications should respect in some form? We think that makes a lot of sense. Such a legal order would save decision costs for decision-makers with many different jobs and tight deadlines; it would promote the independent value of consistency; it would facilitate coordination; it would help respect and channel agencies' reliance; and it would pay homage to the reality that many quasi-adjudications involve (contestable) interpretations of statutes, executive orders, circulars, and guidance memoranda.

This does not, of course, mean that *stare decisis* ought to function identically within OIRA as it does in a Court of Appeals, binding future panels and requiring elaborate processes – like *en banc* review¹⁸⁶ – to overturn a decision already made. There is no denying that OIRA is, in part, a political office with an obligation to represent the views of the President, views that can (and do) legitimately change between and even within Administrations.¹⁸⁷ And some of the arguments against the relevance of precedent grounded in rationales of expertise apply to aspects of OIRA's oversight.¹⁸⁸ But it does mean that, with that caveat, the arguments that make *stare decisis* a good rule of thumb in courts can carry over to quasi-adjudications within OIRA. And this is the bulk of OIRA's work day to day. If OIRA's view about what NAFTA requires changes day to day with no notice or reason-giving, this could upset the smooth functioning of the bureaucracy and the attendant reliance of private ordering.

Given that we began by comparing OIRA to the Office of Legal Counsel, we can see now that although OLC presents itself as an easy case

¹⁸⁶ See Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* (forthcoming 2014).

¹⁸⁷ Cf. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

¹⁸⁸ Cf. Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 604 (1987) (“[A]t least one version of the ideal of the administrative process holds that an agency should be free to consider the fullness of certain problems without the constraints of following its or another agency's prior handling of a different array of highly complex facts.”).

for a practice of *stare decisis*, there are reasons that OIRA might be an even better locus for respecting *stare decisis* in the Executive Branch. First, the role-identity that OLC lawyers assume is one of counsel and *prediction*. By contrast, OIRA's work in overseeing regulatory review, enforcing relevant Executive Orders, and controlling the bureaucracy at the highest level by adjudicating disputes among agencies about which has jurisdiction over certain kinds of activities under a cluster of complex statutes takes on a more immediate character of legal practice. It may be that OLC similarly sees itself as an adjudicator of sorts in sensitive political cases where courts are actually very unlikely to intervene. But OIRA is a front-line decision-maker; it does not see its principal role as prediction of what courts would do. This may compel even more attention to the practice of precedent at OIRA.

Moreover, one plausible story about why *stare decisis* is rational rather than arbitrary is that the first decision-maker witnessed and participated in a proper adversarial process that reinforces confidence in and reliability of the primary decision. In OIRA, it is possible that there is more adversary process – with better representation of the relevant interested parties – than there is at OLC, where a difficult “client” issue prevails for the lawyers therein:¹⁸⁹ the client is the President, the Law, the Constitution, and the People.¹⁹⁰ This confuses the work – and disables proper deliberation among and with potential stakeholders. That would be yet another reason to give *stare decisis* pride of place within OIRA: although both OLC and OIRA are “brain-trusts” of a sort, OIRA is expected to deliberatively engage persons and entities controlled by their decisions in a way OLC is not, which is a reason to think agencies actually ought to be bound by the legal decision-making at OIRA and OIRA ought to give greater respect to the accretion of its decisional resources over time.

It is also useful to think about calibrating *stare decisis* within the domain of what we have called quasi-enforcement. In this arena, there are reasons to think that the Executive Branch needs more discretion.¹⁹¹ Just as prosecutors and police have wide berths to consider individual factual contexts without a lot of worry about whether a charging decision is consistent with or establishes precedent, to the extent that what OIRA does is “enforce” in the way prosecutors and police do, perhaps OIRA ought to be given a corollary of “prosecutorial discretion.” Indeed, “prompt letters” are perhaps a domain where OIRA should not be shackled by precedent because it is clearer in that context that the ultimate decision about how to proceed rests with agency being given a prompt, which is really meant to be

¹⁸⁹ See Tushnet, *supra* note 1, at 1352.

¹⁹⁰ Cf. HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR (2009); Bruce Ackerman, *Presidential Power Grabs*, HUFF. POST (Feb. 10, 2014, 8:34 AM), http://www.huffingtonpost.com/bruce-ackerman/presidential-power-grabs-_2_b_4759352.html?view=print&comm_ref=false.

¹⁹¹ See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985). For a useful critique – highlighting how lawmaking and policymaking pervades agency prosecutorial discretion, see Ashutosh Bhagwat, *Three Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996).

a preliminary signal rather than an adjudication of the merits of agency action.

Yet it does not follow that precedential thinking is wholly irrelevant in quasi-enforcement. There is good reason for Executive Branch actors to be clear about enforcement priorities, so that primary conduct can acclimate to the enforcement environment.¹⁹² After all, repeat players – which Executive Branch agencies no doubt are – do watch patterns of enforcement and learn from them. Accordingly, when an administration wants to shuffle resources to enforce certain kinds of laws less aggressively than others (drug laws, immigration laws), it is surely better for decision costs, consistency, coordination, reliance, and legal legitimacy for actors to be on notice about how enforcement is likely to proceed. So too within OIRA: although there is a vast range of quasi-enforcement that can be indifferent to precedent, the office’s priorities can be usefully memorialized in guidance and policy documents that help agencies learn how to behave and comply. It is for this reason that OIRA sometimes enters into memoranda of understanding with agencies, to help streamline particularized regulatory review.¹⁹³

Quasi-regulations seem closer to quasi-enforcement than to quasi-adjudication. Again here – and perhaps more clearly so – the tight force of precedent as constraining the application of legal norms ought to be substituted by a more limited requirement of reason-giving and transparency. That a policy or guidance document has been settled one way is not a decisive reason to settle it the same way when the question arises again, if political or technological winds have shifted, revealing new regulatory priorities. Yet constraining the exercise of legal power that coerces other actors is still necessary to cohere with the standard values that in adjudication and quasi-adjudication command adherence to *stare decisis*. To save decision costs, promote consistency, facilitate coordination, respect and channel reliance, and promote legitimacy, transparency, reason-giving, and notice are critical.

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

Across all three modalities, however, hewing to past practice has costs as well as benefits, and departures can be justified. Here, it is possible to recognize a kind of hydraulic tradeoff among the values embodied in *stare decisis*, transparency, and reason giving. Indeed, there is both a complementarity and substitution effect to these relationships. In some instances, all of these rule-of-law values can be served simultaneously;

¹⁹² See generally Andrias, *supra* note 69.

¹⁹³ For examples, see *supra* note 85.

however, as the NLRB example – and similar practice across a range of traditional administrative law realms – illustrated,¹⁹⁴ departures from past practice place a particular burden of explanation on agencies.

The general argument for such reason-giving by OIRA in its capacity as legal actor echoes the same imperative in other legal contexts.¹⁹⁵ Reason-giving, of course, enables meaningful reliance on the decision made, helping both to have it make sense to bind agencies in the future—and to have an organized way to depart from precedent when that is salutary. Public reason-giving, moreover, by exposing legal decision-making to question and contestation, stands to improve that decision-making; there is also arguably a dignitary interest at play as well for those affected by a legal process. This is not to make a strictly instrumental argument for a kind of efficiency of rights approach to OIRA’s legal function, to echo David Super.¹⁹⁶ Normative legitimation can derive from the iterative nature of reason-giving and response.¹⁹⁷

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

This value of transparency applies as well to OIRA’s quasi-enforcement work. Enforcement has effects on people’s organization of their primary

¹⁹⁴ See *supra* text accompanying notes 46-50.

¹⁹⁵ See generally Mathilde Cohen, *Sincerity and Reason Giving: When May Legal Decision-Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010); Mathilde Cohen, *The Rule of Law as the Rule of Reasons*, 96 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 1 (2010); Mathilde Cohen, *Reason Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257 (2008).

¹⁹⁶ See David Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051 (2005).

¹⁹⁷ Jeremy Waldron has argued that agency – in the individual sense – is critical to Rule of Law (as he capitalizes it), and the same argument can apply to those institutional actors subject to oversight within the internal bounds of the administrative state:

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

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

conduct enough that actors are entitled to feel that enforcement agencies are constrained by some rule-of-law priorities. Transparency about how enforcement resources will be focused within an administration can thus substitute for the constraining role of precedent if the exercise of discretion requires more flexibility.

Finally, in quasi-regulation, because the initial position of the office is publicly articulated in the first instance, that transparency raises the importance of articulating reasons for departure from past practice. This reflects a broader insight within realms more traditionally subject to judicial review that agencies engaging in rulemaking or other final agency action binding on the general public may depart from past agency practice but cannot do so without a reasoned explanation.¹⁹⁸ In this way, reason-giving and *stare decisis* operate as counterweights in constraining agency action: to the extent that an Executive Branch actor chooses to reject precedent, it must, at a minimum, explain that it is doing so and why it is doing so.¹⁹⁹

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

2. OIRA Reform in Regleprudential Terms

¹⁹⁸ See *FCC v. Fox*, 556 U.S. 502, 515 (2009) (noting that “the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”). In *Fox*, the majority rejected the proposition that there was any *heightened* burden on agencies to explain an agency change of position, but reiterated the longstanding proposition that norms of reason giving in judicial review of agency action require addressing the fact of change. See also Kozel & Pojanowski, *supra* note 48 (arguing that agencies should have a higher burden of justification when engaging in “expository” reasoning – interpreting sources of law – as opposed to “prescriptive” reasoning, which involves evidence, expertise, and policy choices).

In some ways, our interests here align with those who wish to understand what is known as “the *Accardi* principle,” the principle that agencies need to follow their own rules. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (deciding when agencies need to follow their own rules); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006) (exploring the contours of the under-theorized decision in *Accardi* and its progeny). Some refer to this idea as “the *Arizona Grocery* principle.” See, e.g., STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 438-479 (6th ed., 2012) (referencing and discussing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932)). Ultimately, although clarifying the justifications for these principles would be productive for regleprudence, since the principle is really about devising rules for the *judicial review* of when agencies depart from their previous practices, *Accardi* and *Arizona Grocery* are mainline administrative law rather than what we are calling regleprudence.

¹⁹⁹ Moreover, quasi-rulemaking raises the additional rule-of-law concern that there is no mechanism for challenging any abrogation of authority, raising the value of transparency all the more.

The conceptual apparatus we have sketched thus far suggests a regleprudential reform agenda that can better reflect core rule-of-law values of consistency and transparency.²⁰⁰ As we have discussed, OIRA has been the subject of sustained criticism not only for its anti-regulatory bias, but also for the overly politicized nature of its regulatory review, as well as the office's opacity, both to the public and to the agencies it oversees.²⁰¹ Two related strands of reform could form the core of a strategy that would respond to these critiques: a commitment by the office to public reason-giving for its legal functions and a related recognition that transparency carries with it a need to justify variations from precedent.²⁰²

As a first step in implementing a commitment to reason-giving, OIRA could return to – and build on – the simple promise of transparency embodied in the original text of Executive Order 12,866.²⁰³ Recall that the Executive Order is drafted to mandate, at a minimum, written notification to agencies of the result (or waiver) of OIRA review as well as a “written explanation” for any regulatory action that is returned to an agency and specifying the pertinent Executive Order provision being invoked.²⁰⁴ As we have discussed, there was at least a small period during which OIRA complied with this mandate for at least some of its rules, although that window has largely closed.²⁰⁵

There is a related, although rarely discussed, mandate in Executive Order 12,866 that, unlike review and return letters, has been entirely ignored to our knowledge.²⁰⁶ In section 6(b)(4)(D), the Executive Order mandates that:

After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged

²⁰⁰ While we can defend the valence of these particular rule-of-law values, we acknowledge the generality of the concept of rule of law might lead others to a different set of prescriptions for constraining Executive Branch legal functions. Cf. Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491 (2008). Indeed, some think the rule of law is essentially about accountability mechanisms that are largely meant to be effectuated through judicial review. See, e.g., William C. Whitford, *Rule of Law*, 2000 WIS. L. REV. 723. We hope our lens into the rule of law here exposes how regleprudence is rooted in rule-of-law values but does not rely principally on judicial review.

²⁰¹ See *supra* Part II.A.2.

²⁰² To be clear, much of what we are advocating in this section has been raised in past efforts – by academics, advocates, the General Accountability Office, the Administrative Conference of the United States, and others – to bring transparency and consistency to OIRA. What is novel about our prescriptions is their grounding in an explicit recognition of OIRA's critical role as a legal institution and in a category of analysis we are calling regleprudence.

²⁰³ Lisa Heinzerling has made a similar observation about the failed promise of the Executive Order's commitment to transparency. See Heinzerling, *supra* note 5.

²⁰⁴ See *supra* text accompanying notes 79–80.

²⁰⁵ See *supra* Part II.C.

²⁰⁶ This provision is rarely mentioned in the literature on OIRA, perhaps because it has been so roundly ignored by the office itself in practice.

between OIRA and the agency during the review by OIRA under this section.²⁰⁷

Compliance with this important requirement would fundamentally transform OIRA's work, both for the agencies it oversees and also for the public that is eventually subject to the legal interpretation that OIRA imbeds in the rules it reviews.²⁰⁸

Although there exists a repository of review and return letters, the value of those letters is quite limited given how few there are and how uniformly cursory their explanations. Indeed, once one removes the introductory and hortatory concluding language from the letters, each contains a bare few paragraphs, at best, of substance. Accordingly, a second step in embracing the value of public reason-giving would involve actually giving real *detail* about the nature of the review, the substance of OIRA's concerns, the "precedent" on which OIRA relied, and the lessons – in a common law way – that the individual quasi-adjudication might hold for subsequent regulatory actions. Scholars have raised significant concerns in recent years about the increasingly summary nature of the dispositions courts are undertaking, undermining their value in undergirding the rule of law,²⁰⁹ and the same concerns recommend that OIRA provide reasoned substance as it puzzles through the challenging oversight it undertakes. Flexibility is one thing and arbitrariness another; one is a virtue, the other implicates the legitimacy of a government.

We acknowledge, of course, that OIRA is not a judicial institution and we are not advocating the equivalent of judicial decisions for each instance

²⁰⁷ Exec. Order No. 12,866, § 6(b)(4)(D). As noted, some redline/strikeout versions of rules that reflect OIRA review are available, but give little context for the substantive content of those line edits.

²⁰⁸ In recent years, OIRA has created an on-line interface that gives the illusion of transparency by providing real-time data on all rules undergoing regulatory review under Executive Order No. 12,866. For a link to OIRA's regulatory review "dashboard," see *Regulatory Review Dashboard*, OFFICE OF INFO. & REGULATORY AFFAIRS <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last visited Feb. 10, 2014). In truth, this on-line record says essentially nothing substantive, neither providing access to any communications with agencies or, more importantly, even the cursory substance that was for a short period of time available through review and return letters.

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

²⁰⁹ There is a significant body of literature debating the merits of the rise of both non-precedential unpublished decision-making at the appellate level and a host of related summary dispositional practices that undermine the public-reasoning nature of the judicial enterprise. See, e.g., Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

of regulatory review. There are certainly other practical ways for OIRA to provide notice and a reasoned body of practice to the agencies it oversees. OIRA conducts a significant number of reviews and even at the height of the era in which OIRA was providing return and review letters, those letters covered only a tiny fraction of relevant regulatory actions.²¹⁰

Rather, OIRA could accomplish this reform through some kind of periodic or topical cumulative restatement of its “common law,” referencing and digesting some universe of particular prior reviews (its quasi-adjudications). OIRA could then draw from what is most rule-of-law like in the promulgation of its quasi-regulations, providing a period for agencies to comment on this restatement, giving OIRA input that could refine the office’s future work on a given statutory regime or regulatory domain. We imagine this to be an iterative process, perhaps short of the ideal of full transparency, but a marked improvement over the reality of the black-box approach that OIRA currently maintains. Since OIRA is already reporting annually to Congress on the benefits and costs of federal regulatory activity,²¹¹ these reports could contain some self-reflective sections on developing “common law” within the office, disclosing to agencies and the public what the law of the office looks like.

Indeed, several recent “regleprudential moments” recommend themselves as models for reform at OIRA more generally. First, when President Obama undertook to craft his own Executive Orders that were to control the work of OIRA, he did not simply promulgate them after consulting only with personal advisors, White House Counsel, or OLC. Rather, Obama “directed the Director of OMB, in consultation with regulatory agencies, to produce a set of recommendations for a new executive order on federal regulatory review within 100 days, followed by an unusual request for public comments on the same subject. Almost 200 public comments were received.”²¹² Although there are some meaningful ways that the Bush Administration’s OIRA under John Graham was more transparent than what became of Obama’s OIRA in his first term – the repository is a much better window into Graham’s OIRA than it is into Sunstein’s OIRA – Obama understood that importing a public comment process into trans-substantive regulatory review itself could be salutary and promote rule-of-law values.

But Bush’s OMB also understood the benefit of notice and comment for the details of trans-substantive regulatory review. To wit, when OMB issued its “Peer Review Bulletin” on December 16, 2004, it responded to

²¹⁰ See *supra* note 75.

²¹¹ See http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress. These reports, issued pursuant to the Regulatory Right-to-Know Act, Section 624 of the Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554, 31 U.S.C. § 1105 note, focus on the benefits and costs of federal regulation. They supply both aggregate benefit and cost information, as well as analyses of individual rules. These reports, however, are not focused at all on the substance of the rules at issue, and shed little light on the questions pertinent to regleprudence.

²¹² See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 28-29 (5th ed., 2012).

243 comments that were received after proposing prior versions of the Bulletin over two comment periods.²¹³ And when OMB issued its “Final Bulletin for Agency Good Guidance Practices” on January 18, 2007, it responded to 31 comments from diverse public and private stakeholders and was refined through the comment process and interagency deliberations after originally being proposed on November 23, 2005.²¹⁴ Or perhaps even more importantly, when OMB issued Circular A-4 on September 17, 2003, guidance that defines good regulatory analysis for the entire administrative state, it had subjected drafts to public comment, interagency review, and peer review.²¹⁵

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

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

Were OIRA to commit to public reason-giving and a greater respect for consistency in regulatory review, it is certainly likely that such reforms would render more costly and time consuming a process that is already a symbol of the ossification of the administrative state.²¹⁶ By all appearances, OIRA is currently incapable of meeting the deadlines set by Executive Order 12,866,²¹⁷ even a relatively periodic accounting for the basis for its decisions might burden regulatory review to the breaking point.²¹⁸

The kind of commitment to rule-of-law values we advocate, however, need not radically change the nature of OIRA’s case-by-case oversight, even if we envision fairly significant structural changes to how those reviews are memorialized and communicated.²¹⁹ The substance of what is communicated to agencies need not have the formality and depth of a judicial opinion in order to apprise agencies of the reasoned basis of

²¹³ See LUBBERS, *supra* note 136, at 35-36.

²¹⁴ See Memorandum from Rob Portman, Dir., Office of Mgmt. & Budget, to Heads of Exec. Dep’ts and Agencies (Jan. 18, 2007), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf>.

²¹⁵ See CIRCULAR A-4, *supra* note 86.

²¹⁶ *Cf.* McGarity, *supra* note 17.

²¹⁷ See *supra* note 78.

²¹⁸ If OIRA was born in the Paperwork Reduction Act, see *supra* note 2, we can certainly acknowledge the further irony of advocating that OIRA produce, well, more paperwork.

²¹⁹ On one level, though, in suggesting that OIRA hew at a minimum to the ignored transparency mandates of Executive Order 12,866, we are in some ways advocating a return to norms envisioned when the current structure of regulatory review was first articulated.

decision-making and, again, there are relatively simple ways to capture the office's common-law development in specific domains over time.²²⁰

To the extent that OIRA's resistance to meeting the transparency mandates of Executive Order 12,866 derives from a too-burdensome docket, there is a simple institutional answer. OIRA could retreat from the outsized gate-keeping role it currently performs and recommit to the original scope of its jurisdiction under the Executive Order. Or it could limit full regulatory review to only the most economically significant rules. Certainly this raises the basic Weberian implausibility of a bureaucratic institution ceding power, but that should not deter us. There are good reasons – tied to OIRA's lawmaking role we have identified here – to focus OIRA's resources on the most significant of agency actions, as originally contemplated in a more modest era of regulatory review.

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

C. *Regleprudence Beyond OIRA*

Although we have focused regleprudential attention upon OIRA's lawmaking function, our themes have the potential to apply to a much broader swath of the legal infrastructure of the regulatory state. In this section, we outline a variety of other contexts ripe for regleprudential inquiry and then offer some concluding thoughts about future research that might deepen this initial foray into regleprudence.

1. *The Beyond*

Scholars have paid increasing attention in recent years to the reality of the breadth of lawmaking activity within the Executive Branch. But this work has largely focused on the most visibly legal aspects of the

²²⁰ Just as there are summary judicial dispositions, there may be contexts where non-precedential or even essentially *per-curiam*-like cursory statements simply noting the fact of review may continue to be appropriate. However, that would at least provide some accounting for the relative importance and precedential value of a given pronouncement.

phenomenon. The ground is well trod, for example, in the path exploring the President's structural role in separation of powers, the interplay between final regulatory action and judicial review, and even those aspects of the internal function of the Executive Branch that are most clearly legally oriented, such as work of the Office of Legal Counsel.²²¹ These are important grounds of inquiry, but risk obscuring a number of important institutional practices within the Executive Branch that, like OIRA's regulatory review, are amenable to renewed examination for their more law-like aspects.²²²

To take one example, the practice of Presidents issuing statements when signing legislation has erupted into a source of much controversy in recent years.²²³ Although the practice has deep roots,²²⁴ presidential signing statements have in recent Administrations become a significant vehicle not only to register publicly the Executive's interpretation of newly enacted legislation – and voice reservations – but also to direct officials how to act in interpreting and enforcing such legislation.²²⁵ Signing statements are subject to a similar kind of Administration-wide inter-agency review as regulatory actions,²²⁶ and often involve significant and controversial questions of law.²²⁷ All of the questions that we have asked of OIRA are relevant in this context: what is the force of *stare decisis* when presidents consider past signing statements (or other sources of Executive precedent) in

²²¹ Beyond Trevor Morrison's recent work on *stare decisis* in OLC, see Morrison, *supra* note 1, there is some literature developing on lawmaking within the Executive Branch. See, e.g., Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From The Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1303-04 (2000) ("The relative inattention to the executive branch as an expositor of the law is striking given the extraordinary breadth and significance of executive branch legal interpretation."); see also Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

²²² To be clear, we are not arguing that legal domains within the Executive Branch that are the subject of traditional administrative law are beyond examination through the lens of regleprudence. We are merely focusing on institutions within the domain of Executive lawmaking that have traditionally not been subject to direct and routine judicial review.

²²³ See generally Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11 (2007).

²²⁴ See TODD GARVEY, CONG. RESEARCH SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1 (2012) (noting that "Presidents have issued such statements since the Monroe Administration").

²²⁵ See Cass & Strauss, *supra* note 223, at 18 ("Signing statements can be used within an administration to help resolve disputable questions of interpretation. There are many different executive officials who might have a hand in the implementation, and therefore the interpretation, of statutory instructions. A signing statement provides the President's direction on which interpretive turn to take."); see also Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 538 n.54 (2012) (discussing signing statements as lawmaking when they bind Executive Branch actors).

²²⁶ See Cass & Strauss, *supra* note 223, at 14 (noting the "wide consultation within the executive branch" that precedes the promulgation of signing statements).

²²⁷ See generally GARVEY, *supra* note 224 (providing an overview of the substance of signing statements since the Reagan Administration).

the course of promulgating succeeding statements? How should the President balance the value of minimizing decision costs, promoting consistency, focusing coordination, and respecting reliance, with the democratic mandate reflected in the political reality of changing Administrations? What process might improve the legitimacy of such signing statements?

A perhaps even more significant arena of independent executive lawmaking can be found in foreign affairs. As Harold Koh has argued from personal experience serving as Legal Adviser at the State Department, the President has the authority not only “to enter a binding international agreement based on his own independent, Article II authorities, without action from Congress,”²²⁸ but also to undertake international agreements that have significant legal consequences in the interstices of existing statutory authority.²²⁹ Indeed, when the State Department is overseeing any process of treaty-making, it engages in an Administration-wide review process with significant legal dimensions.²³⁰ As Koh has described the process, it is “exhaustive and designed to ensure that all proposed U.S. international agreements – even if concluded by a different agency – are subject to a rigorous legal and policy review by the State Department before being negotiated and concluded. Through this process, the State Department plays the same kind of clearinghouse role with respect to international agreements that the Office of Management and Budget (OMB) plays with regard to federal regulations.”²³¹ In all of this, as with OIRA’s work, it is legitimate to ask about the potentially variable force of precedent along dimensions such as the formality of the international agreement, as well as how norms of transparency, accountability, and reason-giving might operate when the President unilaterally makes foreign affairs law.

Likewise, much of what the Executive Branch is nominally charged with under the President’s Article II “Take Care” mandate classically involves *enforcement* of statutory law.²³² Even in this task, new law is often

²²⁸ Harold Hongju Koh, *Remarks: Twenty-First Century International Lawmaking*, 101 GEO. L.J. 725, 733 (2013). This brand of executive lawmaking, Koh argues, is of a species with a broader practice he describes as “quasi-constitutional custom,” which is “a widespread and consistent practice of Executive Branch activity that Congress, by its conduct, has essentially accepted.” *Id.* at 733. For a somewhat contrary view, see Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1789 (2009) (“[T]he President may not, through his foreign affairs executive power, make new domestic law. He can make a treaty. He can negotiate an executive agreement implemented by legislation within Congress’s power. But he can no more make law on his own, through the exercise of the foreign affairs aspect of ‘the executive Power,’ than he can legislate on his own.”).

²²⁹ *Id.* at 733-34 (giving the recent example the Anti-Counterfeiting Trade Agreement, a multilateral intellectual property pact); *see also id.* at 738 (noting that the Executive Branch engages in lawmaking through the development of customary international law).

²³⁰ *Id.* at 734 (noting that the State Department’s “lawmaking practice is not limited to *joining* treaties and other agreements; we spend just as much time ensuring the U.S. is in a position to *comply* with its international obligations”).

²³¹ *Id.* at 735.

²³² *See generally* Andrias, *supra* note 69.

made (in effect) both through the exercise of executive discretion and through the acts and interpretation that actually occur in the process of enforcement.²³³ This exercise of executive discretion is just as often shielded from meaningful judicial review.²³⁴ Enforcement, no less than the quasi-statutory realm of the regulatory process, can be evaluated for how precedent is deployed; how executive institutions approach horizontal and vertical coordination; and how rule-of-law values beyond *stare decisis* might improve executive action. All regleprudential questions.²³⁵

And these questions are equally pertinent to executive action through deal-making, a mode of governance that has become increasingly important, particularly in the wake of the recent economic crisis.²³⁶ Notably, Congress authorized a \$700 billion program that allowed the Treasury Department (and, through separate authority, the Federal Reserve) to intervene with a vast swath of private firms.²³⁷ As Steven M. Davidoff and David Zaring have argued, this signature set of policies was shaped significantly by legal constraints while at the same time pressed the outer limits of authority at two institutions arguably “least constrained by the law.”²³⁸ A regleprudential approach to this increasingly significant aspect of executive activity could offer ways to respond to the concerns the practices raise, limning appropriate institutional constraints grounded in rule-of-law values even in the absence of meaningful judicial oversight.

In all of these institutional domains, and many others within the Executive Branch,²³⁹ regleprudence has tremendous potential to raise – and hopefully answer – questions about lawmaking functions that have received far too little attention. Those insights, in turn, can draw on the rich tradition of jurisprudence to understand the administrative state, just as legisprudence has sought to for the legislative domain of lawmaking. There is a path to appreciating limits within this arena of law that is not borne just of politics or conventions.

²³³ See Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 *FORDHAM L. REV.* 619 (2012).

²³⁴ *Id.* at 629-42 (offering examples of executive discretion in practice).

²³⁵ Indeed, Kate Andrias has advocated for a coordinating mechanism within the White House bureaucracy that would function for enforcement in ways that are not dissimilar to how OIRA oversees regulatory review. See Andrias, *supra* note 69. Were such a coordination mechanism to be adopted, it would no doubt pose the same kinds of legal-interpretive oversight challenges that OIRA raises and our regleprudential inquiry into OIRA would be directly relevant.

²³⁶ See Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 *ADMIN. L. REV.* 463, 468 (2009) (noting that “while administrative law scholars spend much of their time thinking about how the D.C. Circuit and Supreme Court might review government administrative decisions, it is worth noting that the response to the financial crisis has had nothing to do with the courts”).

²³⁷ *Id.*; see also Adam Levitin, *In Defense of Bailouts*, 99 *GEO. L.J.* 435, 437 (2011) (outlining the breadth of deal-like responses by a variety of federal agencies).

²³⁸ Davidoff & Zaring, *supra* note 236, at 466 (discussing the Treasury Department and the Federal Reserve).

²³⁹ See *supra* note 62 (outlining other structures performing legal interpretive work in the interstices of administrative practice).

2. *What is Law, Again?*

This exercise leads us back to what might be considered some foundational questions for a new regleprudence: What *is* law within the administrative state? What conditions determine the validity of that legal authority? What is its scope and command? Is it purely (or primarily) the product of social facts or expertise—or is there some inescapable normativity within even the most prosaic aspect of regulatory law such that calling it “technical” cannot obviate the need to subject the work to the crucible of legitimation? Questions like this have long been the animating concerns of jurisprudence and legisprudence and they are equally important for Executive Branch lawmaking – what we might call, with apologies to John Austin – the province of regleprudence.²⁴⁰

In some basic sense, arguing for a regleprudence is an invitation to engage the philosophical tradition of jurisprudence and apply its insights to inner workings of the administrative state.²⁴¹ And, although we have primarily been using the term “jurisprudence” with a distinctly American bent, focusing on accounts of and fundamental features of adjudication, the broader technical academic senses of “jurisprudence” – theoretical debates about the concept of law most generally – have deep significance for regleprudence (and likely vice-versa).

This is not the place for a full exploration of how the many debates that animate jurisprudence might play out for the kinds of Executive Branch institutions on which we have focused. Instead, it is enough to recognize the relevance of such debates to a future research agenda for regleprudence. After all, not one of the three major compendia of work on jurisprudence and philosophy of law has an entry on the administrative state (or even administrative law).²⁴²

Still, we offer a final word on some of what has passed for a jurisprudence of the administrative state. In light of the relatively recent interest in how the administrative state responds to emergencies, theorists have investigated and analyzed “black holes” and “gray holes” that permit a

²⁴⁰ See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

²⁴¹ We have made assumptions throughout this Article about some important aspects of how those debates might play out. For example, we have made a normative argument for applying certain core rule-of-law values to OIRA; but a scholar of jurisprudence in a Hartian vein could reasonably respond with a positivist critique of this approach, questioning whether such values have any necessary role in regleprudence. Cf. H.L.A. HART, *THE CONCEPT OF LAW* (1994). We obviously feel that there is a basis for our particular normative approach, but we recognize the contingency of that judgment.

²⁴² See *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* (Andrei Marmor ed., 2012); *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* (Jules Coleman & Scott Shapiro eds., 2002); *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* (Dennis Patterson ed., 1999).

form of action by the executive seemingly outside the legal order.²⁴³ “Black holes” are areas where the law is theorized to have a gap that essentially permits unbridled discretion for the executive to act without judicial oversight; “grey holes” are areas where the legal order uses such flexible constraints over the executive that there is effectively unbridled discretion, even though judges maintain the façade of judicial oversight.²⁴⁴

What philosophers of law (“jurisprudes,” in the parlance) seem to be arguing about mostly, however, is not the way in which these holes reveal different pockets of legal ordering that we haven’t completely focused on before, ones that have their own commitments to legal regularity and validity: what regleprudence would demand. They are not, to be clear, proposing a legal order without judicial enforcement as its centerpiece, as regleprudence would recognize. Rather, the jurisprudential debates are largely about how disputes about executive discretion may or may not be controlled by judges and/or legislatures.²⁴⁵ These debates skirt the core project of what we would hope to see in a field of regleprudence: not to focus on the ways the judiciary can be brought to bear on executive action and decide whether the executive has lived up to judicially enforceable administrative law, but on the ways the executive can grow to appreciate the kind of law it is making, developing, and adhering to over time, even without the shadow of judicial enforcement.

Perhaps what we are offering, then, is just another Fullerian project of discovering an “internal morality of law,” delineating features of legality – like *stare decisis*, consistency, reason-giving, transparency²⁴⁶ – but one calibrated for the modern administrative state. We are pushing back against an old instinct that is routinely attributed to A.V. Dicey, who saw all of administrative law as conceptually inconsistent with the rule of law, who resisted any jurisprudence of the administrative state.²⁴⁷ This old instinct even reveals itself in Fuller. Consider Ed Rubin on Fuller:

On reflection, the problem is that Fuller has not stated principles that apply to law in general, and reflect its internal morality, but rather principles that apply to the way the state controls the conduct of its citizens through transitive statutes – in other words,

²⁴³ See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

²⁴⁴ See Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. COLLOQUY 309, 309 (2010).

²⁴⁵ See generally *id.*

²⁴⁶ See LON FULLER, *THE MORALITY OF LAW* (1964).

²⁴⁷ See A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 329 (10th ed., 1959) (1885); A.V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 256 (1905). For a more nuanced account of Dicey’s views about administrative law, see John A. Rohr, *Dicey’s Ghost and Administrative Law*, 34 ADMIN. & SOC’Y 8 (2002).

to the same traditional, pre-administrative category of enactments that positivists regard as law.²⁴⁸

Thus Fuller, although framing his inquiry by investigating a king lawgiver Rex – an executive *par excellence* – still “embodies the basic idea that when the state imposes burdens on a specific person, it must do so through some sort of adjudication.”²⁴⁹

In the generations since Fuller, the field of jurisprudence continues mostly to theorize about law as that which is implemented in courts, not as binding principles that work themselves out over time within the Executive Branch itself. Rex may be King – but he has morphed into Hercules the Judge within mainstream jurisprudence.²⁵⁰ This is not to say that all jurisprudence is adjudication-focused – there is no doubt work on legislation, international law, and law outside courts – but it remains true that the philosophy of law has not focused much energy on accounting for the ways regulations, ordinances, administrative practice, Executive Orders, and regulatory review must be accommodated by the concept of law. We hope our introduction to regleprudence here inspires more work along these lines.

CONCLUSION

This Article calls for a new approach to analyzing the legal function at the heart of the administrative state through what we have called regleprudence: the “systematic analysis of regulation within jurisprudential accounts of the role and nature of law.”²⁵¹ We have focused on OIRA as a quintessential example of the kind of lawmaking institution internal to the Executive Branch that is rarely conceived of in terms of legality. But a commitment to regleprudence can illustrate that concerns about the sources and legitimacy of the law, the force of precedent, and myriad other aspects of legality may apply to the entire superstructure (and substructure) of administration. Administrative law has certainly long grappled with how the judiciary should respond to the regulatory state. But law is intrinsic to so much more of the functioning of the Executive Branch than traditional accounts have allowed and a research agenda in regleprudence can provide a frame for a deeper conceptual and practical engagement with that reality.

²⁴⁸ RUBIN, *supra* note 27, at 218.

²⁴⁹ *Id.*

²⁵⁰ One might attribute to Dworkin’s success in jurisprudence – and his focus on adjudication – the loss of the Fullerian focus on Rex as king. *See, e.g.*, Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim*, 113 U. PA. L. REV. 668 (1965); RONALD DWORIN, *LAW’S EMPIRE* (1986).

²⁵¹ *See supra* note 3.