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The Psychology of Accountability and Political Review of Agency Rules

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THE PSYCHOLOGY OF ACCOUNTABILITY AND POLITICAL REVIEW OF AGENCY RULES

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INTRODUCTION

Over the past three decades, mechanisms for reviewing agency rulemaking have multiplied. The traditional mechanism of oversight by congressional committees[1] has been supplemented by, inter alia, rigorous judicial review of agency reasons for adopting rules,[2] a mandate that the agency perform cost-benefit analyses of major rules—analyses which are in turn scrutinized by the Office of Management and Budget[3]—and most recently fast-track review by Congress.[4] This plethora of oversight mechanisms naturally raises several related

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1. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2257–60 (2001) (describing theories of congressional oversight of agency rulemaking).

2. The Administrative Procedure Act's arbitrary and capricious scope of review initially was understood to entail a minimal inquiry into the rationality of an agency decision, but it has come to entail a more intrusive inquiry into reasons for the decision. *See* Fred Anderson et al., *Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL L. & POL'Y F. 89, 112–13 (2000) (describing arbitrary and capricious review as a "spectrum rather than a unitary standard"); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1246 (1999) (arguing that "the broad judicial review that has resulted from the [Administrative Procedure Act] is theoretically unjustifiable and is contrary to the separation of powers principle of the United States Constitution"); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1295–1315 (1986) (describing a progression during the 1960s and 1970s from deference toward agency administrators to a more aggressive judicial review of agency decisions).

3. *See* Kagan, *supra* note 1, at 2285–90 (discussing President Clinton's program for Office of Management and Budget review of agency rules).

4. *See* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96–102 (1997) (describing legislative fast-track review of agency rules).

questions: Are all of these avenues for reviewing agency rulemaking necessary? What benefits accrue from these various review mechanisms? What mix of review mechanisms is likely to encourage agencies to adopt rules that best serve the underlying purposes of the statutes that the agencies are authorized to administer?

In a companion article to this Essay,[5] I use psychologists' understanding of accountability to analyze judicial review's potential to improve the quality of agency staff decisionmaking in formulating rules. That article concludes that the hard look version of judicial review,[6] currently applied by the courts, encourages agencies to take greater care when formulating rules, which in turn decreases the likelihood that the rulemaking process will reflect psychological decisionmaking biases.[7] Judicial review, however, also has some undesirable consequences: it imposes significant burdens on agency information gathering and analysis,[8] which increases the time and cost of rulemaking, and can even dissuade agencies from using informal rulemaking when adopting policies that significantly affect the public.[9] Hence, the conclusion that judicial review of agency rules encourages careful decisionmaking does not justify judicial review if one can derive the same benefit—decreasing psychological decisionmaking biases—from other forms of oversight that do not have the same degree of undesirable consequences. In other words, to know whether hard look review is worthwhile, one must analyze the likely impact of alternative oversight mechanisms to determine whether they provide similar benefits with fewer unintended consequences. In addition, if one concludes that alternative mechanisms cannot substitute for judicial review, then one must face the question of whether use of such alternatives is

5. Mark Seidenfeld, *Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (forthcoming 2002) (manuscript on file with the *Duke Law Journal*).

6. For a description of the operational demands of hard look review, see Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 491–92 (1997).

7. Seidenfeld, *supra* note 5 (manuscript at 59).

8. E. Donald Elliot, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493–94 (1992); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992).

9. McGarity, *supra* note 8, at 1386 (describing how agencies use less participatory means to set policy to avoid the rigidity that results from judicial review of notice and comment rulemaking); Richard J. Pierce, *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 10–11 (1991) (arguing that hard look review has discouraged the Federal Energy Regulatory Commission from using rulemaking to restructure the electric utility industry).

justified. By illuminating the impact of oversight mechanisms other than judicial review, the literature on the psychology of accountability can help one discern whether such mechanisms provide independent benefits that warrant maintaining political review, and what form such review should take.

In this Essay, I use the psychology literature on accountability to evaluate the likely impact of the various forms of political review on the quality of agency decisionmaking. I begin by briefly reviewing the basic findings of psychological research regarding the impact of accountability on decisionmaking. I then apply those findings to the three mechanisms of political review mentioned above—OMB scrutiny of cost-benefit analyses that accompany rules, congressional committee oversight of rulemaking, and congressional fast-track review. Finally, I discuss the implications of those findings, addressing in particular the contention of some scholars that judicial review is unnecessary in light of political review, and opining on the desirability of each mechanism for political review. I conclude that, unlike judicial review, none of the mechanisms for political oversight that I analyze promises to improve the quality of agency staff formulation of most rules. These mechanisms, nonetheless, encourage agencies to develop rules that accord with the preferences of influential political actors, such as the president, congressional leaders, and chairs of committees responsible for oversight of agency programs. Whether one views such encouragement as a justification for political review depends, in large measure, on the theoretical model of the administrative state to which one subscribes.

I. THE PSYCHOLOGY OF ACCOUNTABILITY[10]

Psychologists have recognized that individuals do not make decisions by choosing the optimal outcome from available alternatives.[11] Instead, decisionmakers conserve cognitive resources by using decisionmaking shortcuts. Without such shortcuts, the burden of collecting and analyzing information would be so great that individuals might be unable to make any complex decisions at all. Individuals

10. The psychology of decisionmaking and the impact of accountability are developed more fully in my article analyzing the impact of judicial review on agency staff rulemaking decisions. Seidenfeld, *supra* note 5 (manuscript at 5–39).

11. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 99 (1955) [hereinafter Simon, *A Behavioral Model*], *reprinted in* 2 HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY 239, 239 (1982) [hereinafter SIMON, MODELS].

thus learn to use decisionmaking devices that usually lead to acceptable results without demanding that the person collect an undue amount of information or engage in paralyzing analysis of every possible alternative in light of the available information.[12] Individuals use shortcuts that are unique to them, decisionmaking rules that reflect their training and experiences;[13] they also use shortcuts that they share with most other individuals, decisionmaking heuristics that tend to lead all decisionmakers to acceptable outcomes in most situations.[14]

Psychologists also have recognized that personal decision rules and the use of generally applicable heuristics can lead to biases in decisionmaking.[15] Individuals apply decision rules outside of appropriate contexts, and they use heuristics in ways that lead to demonstrably inferior choices.[16] Such biases include the propensity of individuals to overly attribute their knowledge—"beliefs, opinions, suppositions, attitudes and related states of mind"—to others.[17] In addition, deci-

12. *See* 2 SIMON, MODELS, *supra* note 11, at 295–96 (explaining that decisionmakers satisfice rather than optimize).

13. *See* Xueguang Zhou, *Organizational Decision Making as Rule Following*, *in* ORGANIZATIONAL DECISIONMAKING 257, 258–59 (Zur Shapira ed., 1997) (contrasting decisionmaking as choice with decisionmaking as "rule following," "the process of . . . recognizing the social role one is to play and matching appropriate rules to the situation"). By decisionmaking rule, I mean the use of predetermined categories into which a person places factual circumstances to derive an outcome. *See* JAMES G. MARCH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN 58 (1994) (defining rule following as a three step process that asks the decisionmaker to evaluate the kind of situation she is in, the kind of person she is with respect to the decision, and what a person of that kind does in a situation of the kind identified).

14. *See* SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 109 (1993) (noting that heuristics reduce the time necessary for decisionmaking and "yield fairly good estimates"); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 3 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY].

15. For a general discussion of heuristics and the biases to which they might lead, see PLOUS, *supra* note 14, at 107–88; Tversky & Kahneman, *supra* note 14, at 3–20.

16. *See* MARCH, *supra* note 13, at 82–91 (explaining ways in which biases in recalling and evaluating experiences and interpreting feedback from applying decision rules can result in development of maladaptive rules); Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2084 (1996) (proposing that decisionmaking habits can reflect mindless repetition); Hillel J. Einhorn, *Learning from Experience and Suboptimal Rules in Decision Making*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 14, at 268, 273–76 (explaining how feedback from outcomes can reinforce suboptimal decisionmaking rules); Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 568–70 (1983) (suggesting that selection processes for developing rules that govern human behavior may not result in optimal behavior and may even allow dysfunctional behavior to persist).

17. Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One's Own Knowledge to Others*, 125 PSYCHOL. BULL. 737, 737 (1999); *see also*

sionmakers, especially experts like those who draft agency rules, tend to be overconfident about predictions they make based on available evidence.[18] Decisionmakers also often make technical errors, such as ignoring base rates when making predictions based on statistical evidence,[19] or considering sunk costs when evaluating investment decisions.[20] Although experts are less apt to make such errors, on occasion they do make them.[21] In evaluating the probability that an event will occur, individuals may rely inappropriately on the "availability heuristic"—the ease with which they can recall similar events.[22] Decisionmakers also may be influenced by irrelevant information,[23] tend to confirm initial hypotheses in the face of contradictory evidence,[24]

Pamela Hinds, *The Curse of Expertise: The Effects of Expertise and Debiasing Methods on Predictions of Novice Performance*, 5 J. EXPERIMENTAL PSYCHOL. 205, 218 (1999) (demonstrating that expertise in a given field can exacerbate this "egocentrism bias").

18. For unpredictable events, experts tend to rely on "rich models of the system in question," and to ignore the quality of the data, which provides experts with false confidence about the likelihood of predictions that flow from these models. Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 430 (1992); *see also* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (forthcoming 2001) (manuscript at 111, on file with the *Duke Law Journal*) (noting that experts are more likely than others to exhibit overconfidence).

19. When evaluating the probability of an event given some evidence, individuals are likely to ignore base rates when they are incidental rather than causally related to evidence and when the evidence is more specific than the base rate information. Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 14, at 153, 155–59. Even when individuals do take base rates into account, however, they frequently fail to adjust their probability evaluations sufficiently. *Id*.

20. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, *in* JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 97, 99–103 (Terry Connolly et al. eds., 2d ed. 2000).

21. For example, business administration students asked to make investment decisions failed to heed the sunk cost adage, even when they were told to evaluate the pros and cons for their decisions thoroughly. Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419, 423–24 (1992); *see also* Itamar Simonson, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 ORG. BEHAV. & HUM. DECISION PROC. 416, 432 (1992) (reporting similar results when business administration students were asked to solve problems not explicitly involving investment but raising the issue of whether to ignore sunk costs).

22. For a general discussion of the availability heuristic and the biases that it can cause, see Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 14, at 163, 163–64.

23. Philip Tetlock & Richard Boettger, *Accountability: A Social Magnifier of the Dilution Effect*, 57 J. PERS. & SOC. PSYCHOL. 388, 389 (1989); Henry Zukier, *The Dilution Effect: The Role of the Correlation and the Dispersion of Predictor Variables in the Use of Nondiagnostic Information*, 43 J. PERS. & SOC. PSYCHOL. 1163, 1164–65 (1982).

24. *See* Dieter Frey, *Recent Research on Selective Exposure to Information*, *in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 41, 44 (Leonard Berkowitz ed., 1986) (discussing re-

and irrationally avoid choices that represent extremes when a decision involves a trade-off between two incommensurable values.[25] All of these biases can reduce the quality of decisionmaking by agency staff responsible for formulating rules.

When decisionmakers are held accountable for their choices, their propensity to fall prey to psychological biases changes. Accountability is a broad notion that describes any situation in which a decisionmaker believes that he must justify his decision to others and that failure to provide a satisfactory justification will cause the decisionmaker to suffer negative consequences.[26] Those consequences need not be material. Disdainful looks and feelings of disappointment in one's own performance may suffice to elicit responses mediated by accountability.[27]

Within the broad ambit of accountability falls a multitude of means by which an organization, such as an agency, or, more generally, the administrative state, oversees decisionmakers. Depending on the precise means used, accountability might induce a decisionmaker to take greater care and avoid many of the biases identified above;[28] it might cause the decisionmaker to become defensive about his initially preferred outcome and therefore to expend resources finding information and performing analyses to bolster that outcome, even when subsequent information suggests that the individual should choose an alternative.[29] Or, it might influence the decisionmaker to shade his choice toward an outcome that he believes is preferred by the audi-

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search findings that people search for information that supports rather than contradicts their prior decisions).

25. Itamar Simonson, *Choice Based on Reasons: The Case of Attraction and Compromise Effects*, 16 J. CONSUMER RES. 158, 161–62 (1989); Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 292 (1993).

26. "[A]ccountability refers to the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings and actions to others. . . . Accountability also usually implies that people who do not provide a satisfactory justification . . . will suffer negative consequences . . . ." Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999).

27. *Id.* at 255; *cf.* BERNARD GUERIN, SOCIAL FACILITATION 164 (1993) (reporting that individuals may perform differently when in front of a nonevaluative audience in an attempt to "reduce any discrepancy between the internalized social norm [of performing well] and current behavior"); Kate Szymanski & Stephen G. Harkins, *Social Loafing and Self-Evaluation with a Social Standard*, 53 J. PER. & SOC. PSYCHOL. 891, 891, 894 (1987) (demonstrating that an individual's ability to evaluate his own performance—to compare his performance to a social standard—was a sufficient motivation to alleviate social loafing).

28. Lerner & Tetlock, *supra* note 26, at 257.

29. *Id.*

ence to which he is accountable.[30] In assessing which of these responses is likely, one must look at: (1) whether the decisionmaker is aware that he will be held accountable when he makes his decision, (2) whether he perceives the audience to which he is accountable as legitimate, (3) whether the audience demands a justification of the outcome of the decision rather than the processes by which the decisionmaker reached that outcome, and (4) whether he knows the outcome preferences of his audience, or even the identity of the audience well enough to surmise what its outcome preferences might be.[31]

If an individual commits to a course of action before he is aware that he will have to explain that action, the individual is apt to expend great effort to justify any decision already made.[32] Individuals experience cognitive dissonance if they perceive their behavior as inconsistent with values that they hold.[33] A value that is shared by most professionals is the desire to perform their jobs well. Agency staff members, who are generally professionals, assigned a task of making recommendations or preparing analyses based on externally specified factors—factors that might be stated in a statute or regulation, or dictated by their superiors—thus would suffer dissonance if they could not persuasively explain their recommendations and analyses based on these factors. The potential for such dissonance could induce agency staff members to become defensive and bolster decisions made before they were aware that they would be accountable for those decisions, even if subsequent evidence indicated that those decisions were suboptimal.

An individual accountable to an audience that he does not consider legitimate often will not take the same care in making a decision as one who is accountable to a legitimate audience.[34] Decisionmakers consider an audience illegitimate when the audience has no reason to review the decision, or when the decisionmaker perceives that review is intended to modify his beliefs.[35] When the audience has no reason to be concerned with the decision, such as when the decisionmaker is asked to report to strangers with neither responsibility for the matter

30. *Id.* at 256–57.

31. *Id.* at 256–59.

32. *Id.* at 257.

33. *See* PLOUS, *supra* note 14, at 28–29 (noting that cognitive dissonance can affect behavior after a person commits to a decision).

34. Lerner & Tetlock, *supra* note 26, at 258.

35. George Cvetkovich, *Cognitive Accommodation, Language, and Social Responsibility*, 2 SOC. PSYCHOL. 149, 150 (1978); Lerner & Tetlock, *supra* note 26, at 258–59.

nor personal interests in the decision, the decisionmaker simply may not work hard to make a good decision.[36] When the decisionmaker perceives that the audience is trying to alter his beliefs, he is apt to defend decisions that depend on those beliefs more vigorously than if there were no review.[37] As can occur when the decisionmaker becomes aware of review after committing to a decision, this perception can lead to a counterproductive bolstering of initial commitments.

Accountability tends to enhance the quality of decisionmaking only if the decisionmaker is not aware of the preferences of the audience to whom he must report. When individuals are accountable to an audience whose preferences are known, these individuals do not engage in more complex thought about their decision tasks. Instead they alter the outcome of their decisions to come closer to an outcome that would satisfy their audience.[38] In some situations, decisionmakers modify their choices in a manner that is obviously inefficient to avoid an outcome that they might find unpleasant to explain to their audience.[39] Individuals who are accountable to an audience with unknown views are significantly more self-critical while making their decisions.[40] They are more open to qualifying decisions about which they are uncertain.[41] Even when a decisionmaker does not know his audience's preferences, if he knows its identity then he may attempt to surmise what that audience would prefer, and will modify his chosen outcome toward his best guess of what the audience desires.[42] One can avoid the propensity of decisionmakers to choose outcomes that they

36. Lerner & Tetlock, *supra* note 26, at 258–59.

37. *Id.*

38. Richard Klimoski & Lawrence Inks, *Accountability Forces in Performance Appraisal*, 45 ORG. BEHAV. & HUM. DECISION PROC. 194, 202–03 (1990); Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERS. & SOC. PSYCHOL. 74, 80–81 (1983); Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERS. & SOC. PSYCHOL. 632, 638 (1989).

39. For example, individuals who were told they were responsible for awarding financial aid to students who would have to drop out of school if they did not receive sufficient aid, and whose budget was not sufficient to provide aid to all applicants, tended to award insufficient funds to all the applicants when they were accountable to those applicants. Even when individuals were accountable to the provider of funds rather than the recipients, they were more apt to award insufficient funds to some of the applicants. Sheldon Adelberg & C. Daniel Batson, *Accountability and Helping: When Needs Exceed Resources*, 36 J. PERS. & SOC. PSYCHOL. 343, 347–48 (1978).

40. Tetlock, *supra* note 38, at 80–81.

41. *See* Philip E. Tetlock & Richard Boettger, *Accountability Amplifies the Status Quo Effect When Change Creates Victims*, 7 J. BEHAV. DECISION MAKING 1, 18 (1994) (identifying strategies decisionmakers use when asked to make a difficult decision).

42. Tetlock, *supra* note 38, at 80.

think will please their audience by shielding the identity of the audience from the decisionmaker.

Finally, the impact of accountability also depends on whether the audience evaluates the outcome of the decision rather than the process by which the individual reached it.[43] Outcome-based review hinges on whether the audience agrees with the decision, independent of the reasons for it. Process-based review focuses on the search for information, processing of information, and reasoning that led to the decision, and does not depend on whether the audience agrees with the outcome. When review is process based, decisionmakers tend to use proper decision strategies and evaluate available alternatives more critically than when they are subject to no review.[44] In contrast, when review is outcome based, decisionmakers tend to engage in greater post hoc justification and therefore to increase their commitment to prior courses of action.[45] Outcome-based review also encourages individuals to decrease the effort that they devote to making decisions.[46]

In reality, pure process- and outcome-based review may be unattainable archetypes.[47] A decision that is persuasively reasoned would be likely to convince at least some reviewers that the outcome chosen is best. But the flip side of this is also probable; an audience that agrees with an outcome is more likely to approve of the process used to reach an outcome with which it agrees than one with which it disagrees. Although psychologists try to keep process and outcome accountability entirely distinct, the literature implicitly recognizes that in the real world the two archetypes interact. That is why, even if re-

43. Lerner & Tetlock, *supra* note 26, at 258.

44. *Id.*; Karen Siegal-Jacobs & J. Frank Yates, *Effects of Procedural and Outcome Accountability on Judgment Quality*, 65 ORG. BEHAV. & HUM. DECISION PROC. 1, 14 (1996).

45. *See* Simonson & Staw, *supra* note 21, at 423–24 (finding that business students who were told that they would be evaluated based on their decisionmaking strategy were less apt to succumb to the sunk cost fallacy than those who were told that they would be evaluated based on the outcome of their decisions).

46. *See* Patricia M. Doney & Gary M. Armstrong, *Effects of Accountability on Symbolic Information Search and Information Analysis by Organizational Buyers*, 24 J. ACAD. MARKETING SCI. 57, 62 (1996) (reporting that buyers who were held accountable for the process by which they reached their decisions analyzed information more extensively than they did when not accountable or accountable only for decision outcomes).

47. *Cf.* Seidenfeld, *supra* note 5 (manuscript at 30–35) (concluding that the evidence on whether judicial review is driven by judges' ideology rather than law indicates that such review is in part process- and in part outcome-based).

view is process based, a decisionmaker who knows his audience's preferences will shade the outcome toward those preferences.[48]

II. OMB REVIEW OF AGENCY RULEMAKING

In addition to the Administrative Procedure Act's simple requirement of notice and comment, when an agency promulgates a rule, various statutes and executive orders require it to prepare numerous analyses, many of which the agency must submit to the Office of Management and Budget (OMB) for review.[49] Of all the required analyses that OMB oversees, the mandate that an agency prepare a cost-benefit analysis for any rule that is a significant regulatory action has had the greatest effect on rulemaking.[50] OMB review plays an especially influential role with respect to cost-benefit analyses because, when OMB finds the agency analysis wanting, that office can prevent the agency from proceeding with the rulemaking unless the agency obtains permission to proceed from the president.[51] In this Part, I focus exclusively on OMB review of cost-benefit analyses of rules with significant economic impact.

Before an agency publishes a proposed rule that will have a significant regulatory impact, and again before it adopts the rule in its final version, the agency must prepare a cost-benefit analysis and provide this analysis to the Office of Information and Regulatory Af-

48. Lerner & Tetlock, *supra* note 26, at 256–57; *see* Neal P. Mero & Stephan J. Motowidlo, *Effects of Rater Accountability on the Accuracy and Favorability of Performance Ratings*, 80 J. APPLIED PSYCHOL. 517, 522 (1995) (reporting that, although accountability improved the accuracy of performance appraisers who were under no pressure to achieve a certain rating outcome, accountability magnified the tendency of appraisers who learned, prior to making their ratings, that their boss thought historical ratings were too low, to inflate their ratings). *But cf.* Serena Chen et al., *Getting at the Truth or Getting Along: Accuracy- Versus Impression-Motivated Heuristic and Systematic Processing*, 71 J. PERSONALITY & SOC. PSYCHOL. 262, 272 (1996) (finding that knowledge of audience-outcome preferences affected most those who were motivated to have a pleasant interaction with the audience, and least those who were motivated to think and act objectively).

49. *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV 533, 536–37 (2000) (charting the statutes and executive orders that an agency must consider in meeting requirements for analysis of regulatory impact).

50. Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. 638, 646 (1994), *reprinted in* 5 U.S.C. § 601 (1994). This executive order defines a "significant regulatory action" as including "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." *Id.* § 3(f).

51. Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 45–46 (1995) (discussing Executive Order 12,866's authorization of OMB to veto agency regulatory actions).

fairs (OIRA), within OMB.[52] The analysis is reviewed by an OIRA desk officer, who usually is learned in economic analysis, but who generally has little knowledge about the problem that necessitated the rule or of the regulatory environment within which the agency works.[53] Moreover, although desk officers are political appointees under the direct control of the White House, they are sufficiently low level that one cannot guarantee that a particular desk officer shares the views of the president with respect to the particular rule he is reviewing.[54] What OIRA desk officers share, however, is a focus on the costs of regulation, which makes it likely that they will object to a rule if there is uncertainty about whether the regulatory benefits are sufficient to justify the costs of the rule.[55] If a desk officer takes issue with the analysis provided by the agency, then he can stymie regulation unless the agency is willing to escalate the disagreement to the level where it will be addressed by the Administrator of OIRA and the agency head.[56] Pragmatically speaking, a desk officer has considerable ability to make agency staff think hard about issues on which the two disagree.

A. Perceived Legitimacy of OMB Review

The impact of OMB review on agency staff depends first on whether agency staff consider such review legitimate. When President Reagan first imposed the substantive cost-benefit requirement on agency rules, many questioned its legitimacy.[57] Even though the man-

52. Exec. Order No. 12,866 § 6(a)(3)(B)-(C), 3 C.F.R. 638, 645–646 (1994), *reprinted in* 5 U.S.C. § 601 (1994).

53. Desk officers, however, work closely with other staff members at OIRA who have expertise with respect to the subject matter of particular regulations. *Strategic Plan FY 2001–2005*, Office of Management and Budget, at 7, *at* http://www.whitehouse.gov/omb/mgmt-gpra/strategicplan-fy2001-2005.pdf (Oct. 2, 2000) [hereinafter OMB Strategic Plan] (on file with the *Duke Law Journal*).

54. Robert V. Percival, *Checks Without Balance: Executive Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 182 (Autumn 1991).

55. *See id.* at 181 (reporting that "in performing its review function, OIRA has focused almost exclusively on the cost of regulation and its economic impact"); OMB Strategic Plan, *supra* note 53, at 7 (explaining that "OIRA staff tend to focus more on the economic and societal consequences of the regulation"); *see also* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1065 (1986) ("OMB review . . . places the elimination of cost to industry above all other considerations.").

56. *See* Seidenfeld, *supra* note 51, at 45 (asserting that low-level OIRA officers gain power from their ability to stop agency action).

57. *See* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456–57 (1987) ("When the President or his staff can secretly intervene

date applied only to the extent consistent with law, there is a question whether that mandate nonetheless altered the factors that Congress, by statute, prescribed for agency rules, and therefore whether the president exceeded his authority in issuing it.[58] The furor over the imposition of a cost-benefit standard seems to have died down since President Clinton issued his cost-benefit executive order. The relaxation of the concern about the standard may reflect the fact that Clinton's standard is fuzzier, in that it does not require that all costs and benefits be reduced to dollar values.[59] More likely, however, the decrease in concern stems from perceptions about the president's reasons for promulgating the standard. Clinton maintained an image as a proponent of more efficient but not necessarily more lax regulation.[60] Reagan, however, was seen as driven to curtail social regulation, such as regulation of workplace safety and the environment, and cost-benefit review provided a convenient mechanism to stop such regulation, or at least to soften the impact of regulation on affected indus-

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into any stage of the regulatory process, accountability suffers."); *see also* Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 310 (1993) ("Presidential value selection impoverishes rather than enriches the process for governmental value selection."); Morrison, *supra* note 55, at 1064 (stating that the OMB system "imposes costly delays," relies on staff "who are neither competent in the substantive areas of regulation, nor accountable to Congress or the electorate," and "operates in an atmosphere of secrecy and insulation from public debate").

58. *See* Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 527–28 (1987) (noting the potential for cost-benefit analysis to allow the White House to induce agencies to rely on impermissible factors, but arguing that judicial review provides a check against this abuse of executive oversight); Morton Rosenberg, *Presidential Control Of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1200 (1981) (contending that Reagan's cost-benefit requirement exceeds the president's authority because it displaces agency discretion to weigh relevant factors). *But see* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520–24 (1985) (arguing generally for increased presidential influence over agency decisionmaking as a means of increasing political accountability).

59. *Compare* Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 639 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (mandating that "[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"), *with* Exec. Order 12,291 § 2(b), 3 C.F.R. 127, 128 (1982) (requiring that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society").

60. Unlike previous presidents, Clinton often personally associated himself with particular reform efforts that were sympathetic to increased regulation. Kagan, *supra* note 1, at 2248; *see also* Dennis D. Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 U. ILL. L. REV. 129, 140 n.54 (identifying President Clinton and Vice President Gore as the proponents of the Environmental Protection Agency's reform project XL).

tries.[61] Thus, Clinton's agenda was fundamentally consonant with the interests of the entrenched bureaucracy in the agencies, while Reagan's program of cost-benefit review intended to change the institutional role and ethic of the agencies.[62]

If that perception was shared by agency staff, then under Reagan, staff members would have been apt to respond to OMB review by "rigging" their analyses to show that regulations they initially formulated were cost effective. It is difficult to determine whether this in fact occurred. There is some evidence that cost-benefit analyses submitted by agencies tended to show that even more stringent regulations than those proposed would maximize net benefits.[63] This might reflect the agency bolstering support for its proposal, but it also might reflect that even without OMB oversight, agencies are constrained from adopting regulations that the public would perceive as too stringent, even when the costs imposed by such regulations are justified.

Even when agency staff members do not perceive OMB as ideologically driven, they may perceive OIRA desk officers as unknowledgeable about the regulations at issue.[64] Moreover, in many instances an agency's statutory mandate seems to dictate some standard other than economic efficiency to determine the stringency of regulations.[65] Both the perceived ignorance of desk officers and irrelevance of cost-benefit analysis could translate into staff questioning whether the desk officers really had any legitimate reason to monitor the economic impacts of regulations. According to the psychology of ac-

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61. *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 21–22 (1991) (noting that, in response to Reagan's Executive Order 12,291, OMB "operat[ed] on the presumption that the unimpeded market should be the preferred norm" and rejected regulations at an alarming pace); Percival, *supra* note 54, at 184 (identifying deregulation as an unstated goal of Reagan's regulatory review policies).

62. *See* Kagan, *supra* note 1, at 2249 (explaining that, although Reagan "worked to dilute or delay regulatory initiatives, [presidential supervision] served in the Clinton years as part of a distinctly activist and pro-regulatory governing agenda").

63. *See* MCGARITY, *supra* note 61, at 44 (noting that some regulatory analyses accompanying the reductions of the use of lead in gasoline supported a more stringent standard); *see also id.* at 131 (noting that retrospective studies reveal that before-the-fact cost-benefit analyses consistently overestimate compliance costs).

64. *See* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 558 (1989) ("OIRA's principal officers do not expect expertise or research from the desk officers.").

65. *See* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 512 (1981) (construing the Occupational Safety and Health Administration's provisions governing health-based standards for worker exposure to toxic substances as calling for prevention of material health impairment to the extent feasible, not simply according to a cost-benefit analysis).

countability, such perceptions would tend to induce the agency to do a shoddy job on its cost-benefit analyses and simply wait for feedback from OIRA. Again, the extent to which staff reacted to OMB oversight in this fashion is unclear. There is evidence that in some cases the agency took great pains to consider carefully all costs and benefits of proposed regulations.[66] There are also documented incidents, however, when the agency simply threw together a rough estimate of a proposed rule's economic impact, and the ultimate fate of the rule did not depend on the lack of care that the agency used in preparing the analysis.[67]

B. Knowledge that OMB Will Review the Rule Before the Agency Commits to It

An agency generally will know at an early stage in the formulation of a rule whether the rule will have a significant economic impact. Hence, the agency usually knows from the proposed rule's inception whether a cost-benefit analysis is required and whether the rule's economic impact will be subject to OMB review. There are instances, of course, when the significance of a rule's economic impact will not be known with certainty early in the rulemaking process. But because the ultimate determination of significance rests with OMB, agencies are likely to treat such rules as if their impact will be significant to avoid rejection on the ground that no regulatory impact analysis was prepared. If perchance the agency erroneously concludes early in the rulemaking process that a rule will not have a significant impact, then the agency staff will commit to the originally proposed rule before preparing the cost-benefit analysis. In that case, psychology predicts that agency staff will engage in a defensive bolstering of the originally proposed rule beyond what an accurate assessment of economic impacts would warrant.

C. OMB Review as Grounded in Process Rather than Outcome

All of the executive orders that have required executive office oversight of agency rulemaking have specified that the agency is to

66. *See* MCGARITY, *supra* note 61, at 47–56 (outlining the Environmental Protection Agency's heroic efforts in preparing a cost-benefit analysis for its particulate national ambient air quality standard).

67. *See id.* at 68–70 (describing the National Highway Transportation Safety Administration's decision to revoke a rule limiting obstructions in automobile drivers' views, and concluding that the decision was made without much discussion or analysis).

submit its own analysis of the costs and benefits of the rule, which in turn is reviewed by the White House or OMB.[68] Similarly, the current executive order governing OMB review of agency rules does not mandate that OIRA perform an independent cost-benefit analysis.[69] In fact, OIRA does not have the resources in general to prepare such analyses. Because OIRA desk officers review the analysis submitted by the agency, on its face, this review is process based.

Review that is process based in appearance still might be outcome based if the reviewer uses the acceptability of the agency rule as a *sub rosa* test for signing off on the agency's analysis.[70] Because industry often has greater access and influence on OMB and the White House than more diffuse public interest groups,[71] de facto outcome-based review is most likely when industry has taken a definite stance on a proposed regulation. In that situation, agency staff might perceive the reviewer as supportive of the industry stance and might fear that the desk officer at OIRA can obtain independent data, provided by industry, with which he potentially can impugn the agency's numbers. In such a situation, psychology predicts that the agency is likely to be less critical in preparing its own cost-benefit analysis but spend more effort to bolster the analysis once prepared. In the alternative, the agency might change its proposed rule to a rule more in line with that favored by industry, which is more likely to comport with what the agency staff's perception of what the OIRA desk officer would prefer.

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68. *See* Percival, *supra* note 54, at 133, 139, 143, 148 (describing the mandates that Presidents Nixon, Ford, Carter, and Reagan imposed on agencies under their respective programs of executive review of rulemaking).

69. *See* Exec. Order No. 12,866 § 6(b), 3 C.F.R. 638, 646–48 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (authorizing OIRA to review significant regulatory actions, but not providing for OIRA preparation of its own analyses of agency rules).

70. *See generally* Seidenfeld, *supra* note 5 (discussing the psychological effect that the prospect of judicial review has on agency decisionmakers).

71. *See* Bruff, *supra* note 64, at 580–81 (noting that "[t]he frequency of [the Reagan OMB's] contacts with industry groups opened OMB to a portrayal as special pleader for industry"); Oliver A. Houk, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 542 (1987) ("OMB has acted as a conduit for communications from industry opponents of agency actions."); *see also* Percival, *supra* note 54, at 168–70 (noting how the "Nixon administration had created an extraordinary mechanism for facilitating secret industry lobbying [of the Environmental Protection Agency] by establishing the National Industrial Pollution Control Council").

D. Knowledge of the Preferences or Identity of OIRA Reviewers

An agency is unlikely to know the identity of the particular OIRA desk officer who will be assigned to review the regulatory impact analysis for a proposed rule. Therefore, agency staff members would not be aware of the particular preferences of the reviewer when adopting the rule. One might hypothesize that the agency will equate a desk officer's preferences with those of the president, and that therefore OIRA review will influence the rule's bottom line. After all, the staff members of OIRA are political appointees, and a president is free to choose officers who share his view of regulatory programs.[72] Pragmatically, however, it would be impossible for the White House to envision the substance of every rule that might come before a desk officer,[73] let alone monitor desk officers' preferences perfectly to ensure that they align with those of the president regarding every major rule.[74] Hence, for many rules an agency cannot reliably predict the preferences of the OIRA officer who will review the rule.

Nonetheless, when the president has taken a public stance on the issues addressed in a rule, agency staff members reasonably could predict that OIRA will favor that stance. First, those who disagree with the president's ideology are unlikely to apply for OIRA desk officer positions. In addition to this self selection, the political nature of the selection of such officers will weed out some applicants whose approach to regulation generally is in tension with that of the president. Finally, the work of desk officers will be monitored by the director of OIRA, and that monitoring will induce them to review analyses ac-

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72. *See* Diver, *supra* note 58, at 531 (noting that during the Reagan administration OIRA staff members were "as close to the President in perspective and preferences as any group of appointed officials is likely to be").

73. *Cf.* GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 103 (1991) (discussing the "tenuousness of presidential control" over administrative policy decisions); Bruff, *supra* note 64, at 557 (describing the limited resources OIRA brings to its oversight of agency rules due to the large volume of rules that must be reviewed).

74. *See* ROBINSON, *supra* note 73, at 102 ("In fact, these executive intervenors [such as OMB] are themselves part of the administrative bureaucracy and, as such, present the same type of monitoring and control problems . . . as the agencies they seek to influence."); Percival, *supra* note 54, at 182 ("[R]egulatory review inevitably involves delegation of responsibility to lower level staff who may not have a clear sense of the priorities of the president whom they purportedly represent."); Seidenfeld, *supra* note 51, at 14 ("The President and his close personal aides cannot directly review all or even any significant portion of agency rulemaking decisions.").

cording to the White House's preferences for a particular rule when those preferences can be discerned.

When the president has not taken a public stance, the agency still might make some reasonable guesses about the preferences of an OIRA reviewer. Although each reviewer might have a different take on the merits of individual rules, they all are trained to conduct cost-benefit analyses with an eye toward preventing the adoption of unnecessarily costly rules.[75] Hence, agency staff might reasonably presume that, on balance, OIRA desk officers will favor cheaper alternatives with potentially fewer regulatory benefits over rules that impose greater costs for the mere possibility of increased benefits. In other words, OMB review is likely to encourage the agency to propose a rule that may be less effective but also less costly than the rule the agency otherwise would consider best.

III. TRADITIONAL CONGRESSIONAL OVERSIGHT OF AGENCY RULEMAKING

Although theoretically the legislature's role is to make law that the executive implements, in the modern administrative state the Congress by necessity authorizes administrative agencies to make many rules that regulate private conduct, often with only the broadest of guidelines about what those rules should be.[76] Pragmatically, the delegation to agencies of broad discretion to formulate rules leaves Congress primarily the role of overseeing administrative behavior to prevent agencies from adopting rules or of statutorily overriding rules with which the legislative body disagrees.[77] The process for promul-

75. *See* Morrison, *supra* note 55, at 1065 (contending that Reagan used executive oversight of rulemaking to place "the elimination of cost to industry above all other considerations"); Percival, *supra* note 54, at 181 (arguing that OMB review focused inordinately on the cost of rules).

76. *See* Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 345 (1987) (noting that the legitimacy of Congress's power to delegate broad authority to administrative agencies recently has faced heavier questioning from critics); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 429 (1987) (explaining the functional critique of the nondelegation principle, which argues that only broad delegations can provide the flexibility needed in a complex modern society); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 329 (1987) (arguing that increased reliance on delegating power to administrative agencies has been brought about by a sweeping expansion of centralized federal command).

77. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 509–10 (describing the devices Congress may use to constrain agencies other than formal legislative action); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 394 (1989) (contending that modern legisla-

gating a statute that removes the agency authority to adopt a rule, or that overrules a rule once adopted, is extremely cumbersome.[78] There are a multitude of individuals and subgroups of Congress—committees with substantive jurisdiction over a regulatory program, which must vote out bills overriding rules; their chairs who control committee agendas; and the leadership of each house, which controls what bills come to the floor of their respective chambers—who singlehandedly can stop such legislation even if virtually the entire Congress might prefer it.[79] The president must be willing to sign the legislation unless the Congress can amass a two-thirds majority in each house to override a veto. Not surprisingly, explicit statutory overrides of proposed or adopted rules are rare.[80]

Congress, however, has mechanisms by which it can use the threat of legislation to influence agency rulemaking.[81] Members of Congress usually are assigned to the committees of their choice, and the incentive to be reelected induces many of them to choose commit-

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tion acts by authorizing other institutions to implement Congress's goals, and that delegation subject to ongoing political control by Congress may be a preferable alternative to detailed standards).

78. *See* Farina, *supra* note 77, at 508 (noting that the time-consuming legislative process that now prevents Congress from stopping administrative action initially was implemented by the Framers to prevent Congress from changing public policy too quickly).

79. *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 81–86 (1984) (discussing the powers of committees and committee chairs); CHARLES TEIFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE 57–58 (1989) (noting that committees can bury legislation and put spins on bills that alter their likelihood of adoption); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 386–87 (1988) (arguing that policy determinations are made by congressional committees and therefore are not representative of the congressional majority); *see also* Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740, 741–44 (1983) (describing how committees can act as gatekeepers to influence legislation that is finally adopted); Tim Groseclose & David C. King, *Committee Theories Reconsidered*, *in* CONGRESS RECONSIDERED 191, 208–12 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (examining the extent to which subcommittees, committees, and their chairs have gatekeeping power over legislation).

80. *Cf.* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 252 (1987) (discussing the political costs Congress faces in passing legislation to override an agency decision).

81. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–96 (1984) (describing the role of each branch of government in overseeing administrative action); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768 (1983) ("[C]ongressmen—or, more specifically, particular congressmen on the relevant committees—possess sufficient rewards and sanctions to create an incentive system for agencies.").

tees that oversee regulatory programs in which their constituents have a direct interest.[82] Hence, committee members are likely to place greater importance on influencing the rules that come from the agency programs that their committee oversees than do other members of Congress. Mechanisms such as logrolling allow the committee to make credible threats of overrides of agency action with which the committee strongly disagrees.[83] In addition, agency programs must be funded every year, and Congress uses the power of the purse to constrain agency policy.[84] Because there is strong competition for dollars spent on regulatory programs, programs that do not enjoy the support of the oversight committee are apt to face cuts in appropriations.[85]

There are two other mechanisms by which Congress asserts its influence on agencies. The first involves active monitoring by congressional committees both on a formal and informal level.[86] By conducting hearings and investigations into actions that the agency is considering, a congressional oversight committee both finds out about the agency's planned actions and communicates to the agency com-

82. *See* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 207 (1996) (discussing reelection as one of the goals influencing the committee assignments that House members seek); KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE 231–34, 236 (1978); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 145–46 (1988) (describing assignment of legislators to committees as a bidding system in which "legislators seek assignment to those committees that have the greatest marginal impact over their electoral fortunes"). House members' requests for committee assignments, however, to some extent reflect the probability of their obtaining those assignments, which may mean that statistics overstate the extent to which assignments accord with representatives' underlying committee preferences. SHEPSLE, *supra*, at 37–38.

83. *See* Groseclose & King, *supra* note 79, at 193 (describing how the committee system, in theory, can facilitate logrolling to the benefit of committee members' interests).

84. *See* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 55–56 (1989) (noting that the main point of the appropriations process is to establish significant control over agency action).

85. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1552 (1992) ("[Evidence] suggests that agency policies do respond to changes in the make-up and prevailing ideology of the agencies' appropriations committees.").

86. *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 14–15, 130–44 (1990) (noting that Congress has increased the amount and the intensity of its oversight since the early 1970s, and describing various methods Congress uses to exercise oversight); OLESZEK, *supra* note 79, at 226–28 (stressing the importance of hearings and investigations as oversight techniques); Kagan, *supra* note 1, at 2257–58 (discussing both sides of the debate over whether Congress effectively influences agency decisionmaking).

mittee members' preferences regarding such actions.[87] Given the threat of cuts in appropriations or statutory limitations on agency authority, agencies have a strong incentive to conform their actions to be at least acceptable to the committee chair and a majority of committee members. The second mechanism is more passive: it involves committee members waiting until the interest groups that are affected by proposed agency actions come to them to complain about such actions. Such complaints act like a fire alarm, which, when rung, stimulates the committee to begin hearings and investigations.[88] One suspects that agency staff also maintains contacts with representatives from affected interest groups and tries to keep such groups sufficiently placated to dissuade them from sounding the alarm to the oversight committee.[89]

A. Perceived Legitimacy of Traditional Congressional Review

Our constitutional democracy seems wedded, at least in theory, to legislative supremacy. Despite the Constitution's vesting of all the executive power in one president, Congress has been allowed to delegate to agencies the authority to make ultimate decisions about how the coercive power of the United States is to be exercised; for most matters, the president cannot directly countermand an agency adjudicatory order, rule, or decision to enforce a rule or statute if Congress has called for the agency to make that decision.[90] Congress even can

87. *See* MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY 155 (1976) (analyzing the role of hearings as a form of legislative oversight).

88. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 171 (1984) (arguing that a decentralized oversight system, in which Congress responds to specific complaints, is "more effective" than direct centralized surveillance over administrative agencies).

89. *See* James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, *in* INTEREST GROUP POLITICS 319, 325–26 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991) (describing the role of participants in "policy subsystems," including interest groups, agencies, policy specialists, and the media, among others); *see also id.* at 332 (noting that, even when policy subsystems are competitive, they often involve repeat players who "try to keep final decisions out of the view of the public").

90. *See* Kagan, *supra* note 1, at 2250 ("Congress possesses broad, although not unlimited, power to structure the relationship between the President and the administration, even to the extent of creating independent agencies."); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) ("It therefore seems plausible to conclude, as the conventional view does, that while the President may discharge, he may not otherwise force decisions, at least if Congress has allocated decisional authority to a particular agency."); Strauss, *supra* note 81, at 649–50 ("Presidential participation, like agency decision, seems possible only within the area of discretion that a particular law establishes."); *see also* EDWARD S.

prohibit the president from removing the head of an agency who takes an action with which the president disagrees, so long as that prohibition does not unduly undermine the president's ability to perform his constitutional functions.[91] Congress, to the contrary, has the power to stop all such action so long as it does so by passing a statute using constitutionally prescribed procedures.[92] Hence, there is no question about the legitimacy of Congress's power to reverse agency rules by legislation or to cut off funds to programs that the agency has implemented that the legislature does not condone.

B. Knowledge that Congress Will Review the Rule Before the Agency Commits to It

Staff members of a congressional oversight committee are in close contact with staff members of the agencies that their committee oversees.[93] Hence, the agency staff is likely to assume that they will have to answer to some audience, if only congressional staffers, early in the formulation of the rule. Similarly, representatives of interest groups directly affected by an agency program are likely to be repeat players who maintain stable channels of communications with agency staff members.[94] Staff members reasonably could assume that these representatives too will learn of planned rules early in the formulation process. The psychology of accountability predicts that agency

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CORWIN, THE PRESIDENT: OFFICE AND POWERS 80–81 (4th ed. 1957) (arguing that Congress must be able to vest ultimate decisionmaking power in agencies for some, but not all, matters).

91. *See* Morrison v. Olson, 487 U.S. 654, 696–97 (1988) (upholding the constitutionality of an independent counsel removable only by the attorney general and only with good cause).

92. The government may have to pay compensation if, in reversing an agency action, Congress deprives a person of property that derives from that administrative action or a contractual entitlement that Congress had authorized the agency to make. *See* United States v. Winstar Corp., 518 U.S. 839, 895–96 (1996) ("[A]llowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'"). But this just means that individuals' property rights are protected against government deprivation by a liability rule, rather than an injunctive remedy. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972) (discussing the distinction between and the appropriate use of property versus liability rules).

93. *See* WILLIAM F. WEST, CONTROLLING THE BUREAUCRACY 132 (1995) ("Committee members and their staff frequently spend years interacting with the same agency officials, developing well-defined working relationships in the process."); *see also* OLESZEK, *supra* note 79, at 232 (describing the importance of personal relationships and informal oversight).

94. *See* Thurber, *supra* note 89, at 327 (describing the structure and role of "dominant policy subsystems").

staff members will attempt to placate these monitors by formulating rules that are more palatable to them than the rules that otherwise would be sent to the agency head. Knowledge that oversight by congressional staff or interest-group representatives will trigger actions signaling a threat to the agency's authority or budget to implement a planned action is much less certain. If the agency incorrectly predicts that a rule will not be targeted by congressional staff or industry representatives—if the agency is surprised by the convocation of committee hearings and investigations—then the psychology of accountability predicts that agency staff will become more committed to its initial formulation of the rule and engage in counterproductive bolstering of that formulation.

C. Congressional Review as Grounded in Outcome Rather than Process

By traditional accounts, members of Congress are not concerned with the care that an agency takes in adopting a rule, or the reasons that lead the agency to promulgate the rule. Rather, they have an overriding interest in whether the final agency rule accords with their particular preferences. As one of the early students of congressional oversight phrased it:

> For the committee member there was no abstract meaning in the term "proper" when used to describe the relationship between the independent commission and the committee. Anything was proper that served to bring the agency . . . into accord with the members' view of how the agency should act.[95]

That early view of Congress members' attitudes toward oversight is supported by more recent literature that models this congressional function. Models invariably assume that Congress, or some influential subset thereof, reacts when the predicted agency outcome deviates from the legislative body's preferences.[96] The view is supported as

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95. Seymour Scher, *Congressional Committee Members as Independent Agency Overseers: A Case Study*, 54 AM. POL. SCI. REV. 911, 919 (1960); *see also* DAVIDSON & OLESZEK, *supra* note 82, at 334 (quoting Clinton White House officials as complaining that members of Congress use oversight hearings not to improve government performance but rather to gum up the works and intimidate those who are carrying out the laws passed by Congress).

96. *See, e.g.*, Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91, 97–99 (Winter 1994) (discussing a model that sought to explain how legislators' policy goals affect their roles in overseeing administrative agencies); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 244–45 (Spring 1994)

well by descriptions of particular instances in which Congress engages in oversight. Even when Congress focuses on agency decisionmaking processes, it seems to do so as a means either of protecting its own power to counteract presidential influence over agency policy,[97] or as a means of achieving specific policy preferences.[98] Thus, although one cannot conclude that Congress is indifferent to agency processes for promulgating rules, Congress's procedural concerns are not the kind that the psychology literature demonstrates hold the potential to improve the quality of agency rulemaking.

D. Knowledge of the Preferences or Identity of Congressional Committee Members

As previously noted, even when review is nominally process based, a decisionmaker will react as if it is outcome based when the decisionmaker has information about the preferences of his audience or from which he can infer those preferences.[99] When, as for congressional review, accountability is not even nominally designed to be process based, the impact of knowing the preferences of the reviewers is likely to influence the outcome of agency decisions to an even greater extent.

Agency staff often works closely with the staff of its oversight committees and is well aware of the identities of the members of those committees.[100] Legislators are assigned to an oversight commit-

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(analyzing the interaction between the branches of government in the process of crafting legislation); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) (describing Congress as a "watchdog" that monitors agency performance).

97. *See* Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 25 (1994) (attributing the increasing tendency of Congress to impose deadlines and other procedures that reflect micromanagement of agency decisionmaking to competition with the White House for control over the bureaucracy); *see also* OGUL, *supra* note 87, at 16–18 (discussing the effect of executive-legislative relations on congressional oversight behavior).

98. *Cf.* CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 8–9 (1988) (arguing that the uncertainties surrounding policy "ends" encourages congressional overseers to "focus more shortsightedly on immediately placating constituencies and policing agency procedures—a preoccupation with means related only imperfectly to policy [ends]"); McGarity, *supra* note 8, at 1405 (contending that analytic requirements are important vehicles for congressional control of administrative discretion).

99. *See supra* notes 43–46 and accompanying text.

100. *See* WEST, *supra* note 93, at 132 (discussing the importance of informal oversight and the everyday interactions among committee members, staff, and agency officials).

tee primarily because they have an interest in being on that committee.[101] Often, committee members have a readily identifiable constituency with an interest in the outcome of regulatory programs that members oversee,[102] and members may have taken public stands about the issues that such programs address. Chairs of such committees are especially apt to have expressed opinions publicly on issues confronting an agency, and they often have the power to stop a legislative response to agency action. Thus, those who work on formulating rules know both the identity of their audience and the outcome it desires and, according to the psychological literature, will alter the rules to better comport with those desires.[103] In other words, traditional congressional oversight of agency rulemaking may induce the agency to tailor the rule to the preferences of members of the oversight committee, especially the chairpersons of such committees. The fact that committee members rely on congressional staff members and representatives of affected interest groups to monitor agency activity and report problems to the committee complicates the picture slightly. Agency staff may have a sufficiently close relationship with such monitors that it aims to satisfy them, thereby avoiding any report to the committee. If so, then the relevant audience is not the oversight committee; it is the monitors.[104] But the psychological prediction that the agency will write the rule to satisfy its audience remains the same. Most significantly, the outcome-based nature of congressional review and the knowledge of the identity and preferences of oversight committee members will dissuade agency staff from engaging in careful self-critical reasoning about the rule.

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101. *See id.* at 161 (noting that committee assignments can help a legislator serve constituents and win favor from interests that can contribute to reelection efforts).

102. *See* DAVIDSON & OLESZEK, *supra* note 82, at 207; *see also* WEST, *supra* note 93, at 162–63 (agreeing that committee oversight can lead to encouragement of agencies to pursue narrow policy goals, but also noting that such characterizations of the influence of oversight must be tempered in important respects).

103. *See* Weingast & Moran, *supra* note 81, at 777 (discussing the theory that the Federal Trade Commission (FTC) rules that Congress eventually found to be radical and unacceptable reflected the preferences of the members of the Senate oversight subcommittee responsible for oversight of the Commission when the rules were formulated).

104. That congressional staff members act as go-betweens for their committees and the agency staff may lead the agency to placate interests that deviate from those of the oversight committee. *See* JAMES W. FESLER & DONALD F. KETTL, THE POLITICS OF THE ADMINISTRATIVE PROCESS 280–81 (1991) ("[S]taff members purport to be representing their committees but in fact may be representing only themselves."). *But see* OGUL, *supra* note 87, at 14 ("Professional staff members will usually mirror the policy and process orientations of the congressmen who hire them and direct their behavior.").

IV. FAST-TRACK CONGRESSIONAL REVIEW OF AGENCY RULES

In 1996, the legislature passed the Congressional Review Act, which provides for fast-track review of agency rules.[105] When an agency promulgates a rule covered by the Act, it must submit reports to the comptroller general and to each house of Congress.[106] Those reports must include the rule and a concise general statement in support of the rule, as well as any other analyses that the agency was obligated by statute or executive order to prepare with respect to the rule.[107] The Act provides procedures governing joint resolutions disapproving the rule, when such resolutions are introduced within sixty days of the receipt of the agency report.[108] In the Senate, if a committee with jurisdiction over the rule does not report out a joint resolution of disapproval within twenty days of receiving the agency report, the rule may be put on the calendar of the entire chamber by written petition of thirty senators.[109] Once introduced, the process for considering a disapproval resolution in the Senate is expedited: the resolution may not be amended, postponed, or subject to any point of order against it, and debate on the resolution is limited to ten hours, after which the senior chamber can simply vote the resolution up or down.[110] Although the Act includes no internal mechanism for forcing a joint resolution of disapproval out of a committee in the House or expediting a resolution that has been introduced in that chamber, if the Senate votes to approve such a resolution, the House must consider it without the matter going to a committee, and the House must vote on the resolution as passed by the Senate.[111] Thus, the entire fast-

105. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 857, 868–74 (codified at 5 U.S.C. §§ 801–808 (2000)). For more complete descriptions of the Congressional Review Act, see Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 99–102 (1997); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1053–57 (1999).

106. 5 U.S.C. § 801(a)(1)(A)–(B).

107. *Id.*

108. *Id.* § 802(a).

109. *Id.* § 802(c).

110. *Id.* § 802(d).

111. *Id.* § 802(f). The extent to which the Act expedites review may be limited by its lack of procedural limitations for disapproval resolutions in the House of Representatives. *See* Rosenberg, *supra* note 105, at 1063 (speculating that the lack of an expedited consideration procedure in the House of Representatives could deter quick review in the House, and that the House's inaction could in turn discourage expedited review in the Senate, where time is limited). There is, however, less need for procedures to expedite consideration in the House than in the Senate, because the House rules provide mechanisms by which a majority of that chamber can bring

track process is meant to speed up consideration by limiting the opportunity for committees to block consideration of joint resolutions and by preventing a filibuster of the resolution in the Senate.

The statutory architecture of fast-track review manifests an intent that such motions be made shortly after the agency issues its rule. The Congressional Review Act applies fast-track procedures only to joint resolutions of disapproval that have been introduced within sixty days of the agency publishing a rule and submitting reports on the rule to Congress.[112] The Act also prohibits major rules—those that have the greatest regulatory impact and hence the greatest potential to induce reliance by regulated entities—from becoming effective until at least sixty days after they are adopted by the agency and published in the *Federal Register*.[113] This sixty-day stay allows the introduction of a disapproval resolution for a major rule before the rule becomes effective. The only significant exceptions to the sixty-day stay for major rules allow such a rule to go into effect if a motion for a joint resolution of disapproval of a rule is voted down by either house of Congress,[114] or if the president considers that the situation prompting the rule warrants the rule's going into effect immediately.[115] Once the resolution is defeated there is no longer any possibility that the rule will be overturned by fast-track review and therefore no justification for continuing to stay the rule.

Until recently, Congress lacked an effective mechanism for collecting the requisite information to screen rules to determine which might warrant serious review; fast-track review relied almost exclusively on agency analyses and explanations for their rules.[116] The comptroller general has fifteen days to report to Congress on every

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bills out of committee, TEIFER, *supra* note 79, at 252, and the House leadership can limit debate and amendment of bills from the floor, *see id.* at 263–74 (describing the role of the House Rules Committee in structuring floor debate on bills).

112. 5 U.S.C. § 802(a).

113. *Id.* § 801(a)(3).

114. *Id.* § 801(a)(5).

115. *Id.* § 801(c). The president can make such a determination in the case of an imminent threat to health or safety, as a necessary measure to ensure national security or enforce the criminal laws, or in other emergency situations. *Id.* One exception to the sixty-day stay that does not involve an emergency is for major rules "issued pursuant to any statute implementing an international trade agreement." *Id.* § 801(c)(2)(D). This exception reflects both that Congress has already authorized issuance of rules to implement the particular agreement and that the president plays a unique role in the area of international affairs.

116. *See* Rosenberg, *supra* note 105, at 1061 (suggesting that this lack of screening made it difficult for committees to prioritize adequately and give proper consideration to the rules before them).

agency rule,[117] but he has interpreted this obligation only to mandate that the report verify that the agency has performed and submitted to Congress all of the analyses that the Congressional Review Act required to accompany the rule.[118] The full Senate or the House leadership always can demand that an oversight committee report a joint resolution of disapproval for a rule out to the full chamber, but the short time frame envisioned by fast-track review ensures that any committee report accompanying the resolution will be cursory compared to the detailed analyses provided by the agencies, unless perhaps the committee had been able to anticipate, before an agency actually adopted a rule, that a resolution seeking disapproval of the rule would be introduced. Moreover, the expedited nature of the fast-track process makes it difficult for Congress to meaningfully assess the agency data and explanations.[119]

Last year, Congress passed the Truth in Regulating Act,[120] which allows a chair or ranking minority member of a committee with oversight jurisdiction for a major rule to request from the comptroller general a report that includes an independent evaluation of the rule.[121] Such an independent evaluation must include a substantive evaluation of the agency's data, methodology, and assumptions used in developing the rule as well as an explanation of how that evaluation supports or detracts from the agency's conclusions regarding the rule.[122] The independent evaluation must assess the agency's cost-benefit analysis, including its evaluation of alternatives to the rule, federalism concerns, and any other analysis that statutes or executive orders require the agency to prepare.[123] The comptroller general's report might provide a mechanism by which legislators can identify rules whose accompanying analyses are flawed and, ultimately, ammunition that opponents of a rule can use to seek a joint resolution of disapproval.

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117. 5 U.S.C. § 801(a)(2)(A).

118. *See* Rosenberg, *supra* note 105, at 1054–55 (explaining that such a narrow interpretation limits the comptroller general's inquiry to whether certain procedural steps were taken).

119. *Cf. id.* at 1063 (noting some of the practical difficulties that the expedited time frame for a joint resolution of disapproval poses for meaningful independent analysis of agency rules, and calling for a meshing of the mechanism for screening significant rules with expedited review).

120. Truth in Regulating Act of 2000, Pub. L. No. 106-312, 114 Stat. 1248 (codified at 5 U.SC. § 801 (2000)).

121. *Id.* § 4(a)(1)–(2).

122. *Id.* § 3(3).

123. *Id.* § 4(a)(3).

A. Perceived Legitimacy of Fast-Track Review

There is little question of the legitimacy of fast-track review. As noted earlier with respect to traditional congressional oversight of administrative agency action, despite the fact that the Constitution vests all executive power in the president, the nation has come to accept Congress's authority to monitor and oversee agency activity.[124] The Supreme Court consistently has held that Congress has broad leeway to structure administrative agencies.[125] Although no court has ruled expressly on Congress's right to obtain information from the executive branch, Congress has criminalized refusals by executive officials to comply with congressional subpoenas, and the courts have declined to grant executive officials blanket exemption from such laws.[126] Because fast-track review ultimately depends on passage of a joint resolution—a legislative act that requires a vote of the majority of both houses and presentment to the president—its constitutional status is solid and its legitimacy unquestionable.[127] Thus, there is no

124. *See supra* notes 90–92 and accompanying text.

125. In particular, Congress can vest administrative officials with authority to act that cannot be overridden by presidential edict. *See* Kagan, *supra* note 1, at 2250 (explaining the conventional view that Congress can insulate the discretionary decisions of removable administrative officials from presidential control); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 809 (noting that Congress may delegate rulemaking authority to an agency as long as the authority has been delegated within clearly defined limits that a court could review to judge compliance). Congress also can insulate officials from being fired based merely on the grounds that the president disagrees with their decisions. *See* Morrison v. Olson, 487 U.S. 654, 695–96 (1988) (allowing Congress to create an independent counsel who could not be removed by the president, because establishing this office did not impermissibly undermine the power of the executive branch); Humphrey's Executor v. United States, 295 U.S. 602, 618–19, 631–32 (1935) (permitting Congress to restrict the president's removal power over officials who perform nonexecutive functions such as adjudication and rulemaking, and striking down the removal without cause of an FTC commissioner).

126. *See* United States v. House of Representatives, 556 F. Supp. 150, 151–52 (D.D.C. 1983) (declining to exercise the court's discretion under the Declaratory Judgment Act to consider whether executive privilege protected Environmental Protection Agency (EPA) documents subject to a congressional subpoena, and ruling that the matter should be decided in the context of a prosecution of the EPA administrator for contempt).

127. Prior to 1986, Congress tended to rely on legislative vetoes as the major means for threatening a reversal of an agency rule. Between 1932 and 1975, Congress passed 196 statutes that authorized 295 veto-type procedures, often giving either house, or even the oversight committee of either house, the power to reject an agency rule. James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977). After the Supreme Court held that such vetoes were unconstitutional because legislative action could be effective only if agreed to by both houses and presented to the president for his signature, INS v. Chadha, 462 U.S. 919, 955–59 (1983), some scholars expressed concern that, in light of pragmatic needs for Congress to make broad delegations of policymak-

reason to believe that agency staff would consider congressional override, even if by fast-track review, to be a matter not properly within the purview of Congress. In addition, because fast-track review occurs at the end of the rulemaking process, it would not be perceived as an attempt by Congress to force agency staff to modify their regulatory values.

B. Knowledge that Congress Will Engage in Fast-Track Review of a Rule Before the Agency Commits to It

Technically, all rules are subject to congressional fast-track review. Agencies, however, promulgate several thousand rules a year, and Congress cannot review anywhere near that number.[128] Furthermore, the expedited nature of fast-track review makes it almost impossible for Congress to obtain sufficient information to review the substance of the agency rulemaking decision on any basis other than pure politics. Although the Truth in Regulating Act promises General Accounting Office (GAO) review of agency data and analyses that would increase the propensity of Congress to use fast-track review, it remains to be seen whether that office will provide sufficient information for Congress to evaluate the merits of agency rules on a meaningful basis. First, it is not clear whether GAO has sufficient resources to provide the kind of information Congress will need to evaluate agency rules.[129] Even assuming that the GAO has the resources to perform such evaluations, the Truth in Regulating Act mandates that the comptroller general submit the report to the requesting committee within 180 days, well after the time frame for fast-track review.[130] In addition, the Act refrained from requiring GAO to provide Con-

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ing authority to agencies, the legislative veto was justified to ensure that regulatory decisionmaking remained politically accountable. *See, e.g.*, Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 787–88 (1984) (discussing the "classic conflict in the administrative state between political accountability and the necessary complexity of regulatory decisionmaking"). Fast-track review was meant, at least in part, to provide such a threat that did not run afoul of the Constitution's provisions governing the passage of legislation.

128. *See* Cohen & Strauss, *supra* note 105, at 103 (arguing that review of each regulatory action would require enormous staff effort and consume precious legislative resources).

129. The General Accounting Office requested a total of $7.8 million to implement the Truth In Regulating Act of 2000 for fiscal years 2001 and 2002, *see* U.S. General Accounting Office, Fiscal Year 2002 Budget Request, GAO-01-809T, at 9 (June 26, 2001), *available at* http://frwebgate.access.gpo.gov/cgibin/useftp.cgi?IPaddress=162.140.64.21&filename=d01809t.txt&directory=/diskb/wais/data/gao (on file with the *Duke Law Journal*), but the Act provides only an additional $5.2 million for fiscal years 2000 through 2002. Truth in Regulating Act of 2000, Pub. L. No. 106-312, § 5, 114 Stat. 1248, 1249 (codified at 5 U.S.C. § 801 (2000)).

130. Truth in Regulating Act § 4(a)(2), 114 Stat. at 1249.

gress with its own data and analyses that legislators could use to decide whether an agency rulemaking process and justification warrant more detailed inquiry. Although Congress appears to have given some consideration to imposing such a mandate on the comptroller general,[131] that mandate would be extremely costly to implement.[132] Thus, at best it seems as though GAO will be able to provide the kind of information necessary for Congress to meaningfully evaluate agency rulemaking only for the highest profile regulations.[133] In practice, it is likely that fast-track review will continue to focus only on rules that are so notoriously controversial when promulgated that they attract congressional debate during the rulemaking process.

In addition, because joint resolutions must be presented to the president for his signature, agencies know that if the president supports the rule at issue, then sponsors of a resolution of disapproval must muster a vote of two-thirds of members in each house or at least find the rule sufficiently important to trade votes on other legislation in return for the president's signature on the resolution. Hence, it should come as no surprise that in the three years following authorization of fast-track review, agencies issued over 15,000 rules, but only eight motions for disapproval covering six rules had been introduced in Congress,[134] and one of these was introduced only so it could be voted down, allowing the rule to go into effect prior to the sixty-day waiting period usually applicable to major rules.[135] Congress has adopted only one resolution under fast-track review,[136] although a second attempted resolution led the agency to agree to suspend the

131. *See* Rosenberg, *supra* note 105, at 1061 (discussing proposed legislation to create a Congressional Office of Regulatory Affairs and to have that office prepare its own cost-benefit analyses of agency rules).

132. *See id.* at 1063 (asserting that a review committee that performed cost-benefit analysis from scratch rather than using agency data would be extraordinarily expensive).

133. The Truth in Regulating Act implicitly concedes that the GAO will not have the resources to fulfill all committee requests for evaluations by allowing the comptroller general discretion to determine "the priority and number of requests . . . for which a report will be submitted." Truth in Regulating Act § 4(a)(4), 114 Stat. at 1249.

134. *See* Rosenberg, *supra* note 105, at 1058 (summarizing utilization of the review mechanism since 1996).

135. *See id.* at 1060 (describing the procedural gymnastics surrounding the enactment of a rule that dealt with annual revision of rates for reimbursement of Medicare providers).

136. Statement of President George W. Bush upon Signing S.J. Res. 6, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

rule, and a third led to limiting legislation in a subsequent appropriation bill.[137]

The paucity of motions for disapproval resolutions indicates that agencies are not apt to focus on fast-track review as a check on their rulemaking discretion at least until late in the rulemaking process. Agencies might be likely to focus on such review when they adopt rules that they know will be unpopular in Congress, but even then they need not fear the ramifications of fast-track review unless they also believe that the president opposes the rule or is willing to compromise it to win other political battles. Fast-track review may have greater significance for midnight rules that are subject to review when a different president—one who might not support the rule—is in office.[138] But controversial rules usually take years to promulgate,[139] and an agency is unlikely to know that a rule will be issued in the waning moments of a president's term until very late in the process—too late to cause the agency to take more care in its rule formulation.

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137. *See* Rosenberg, *supra* note 105, at 1058–59 (describing the procedural and political manipulation with regard to an Occupational Safety and Health Administration (OSHA) rule and a Health Care Financing Administration rule).

138. Thus, it is not surprising that OSHA's ergonomics rule—the one rule that Congress has overridden by fast-track review—was such a midnight rule. *See, e.g.*, Mike Allen, *Bush Signs Repeal of Ergonomics Rules; Administration Promises Business-Friendly Workplace Safety Regulations*, WASH. POST, Mar. 21, 2001, at A6 (highlighting the swift repeal of workplace safety regulations as one of the most far-reaching actions of the early days of the George W. Bush presidency); Lizette Alvarez, *Senate G.O.P. Moving to Nullify Clinton Rules on Worker Injuries*, N.Y. TIMES, Mar. 3, 2001, at A1 (remarking on the extensive mobilization among politicians and business leaders to repeal ergonomics rules that were ten years in the making); Jay Cochran III, *Clinton's "Cinderellas" Face Regulatory Midnight*, USA TODAY, Dec. 13, 2000, at 17A (reviewing the last-minute attempts by Clinton agency heads to pass regulations).

139. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1283–84 (1997) (finding that, on average, EPA legislative rules take about three years to promulgate, regardless of whether negotiated rulemaking is used); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 134 (1992) (finding that negotiated rulemaking shaves about eleven months from the EPA's rulemaking process); U.S. General Accounting Office, Federal Rulemaking: Procedural and Analytical Requirements at OSHA and Other Agencies, GAO-01-852T, at 1 (June 14, 2001), *available at* http://frwebgate.access.gpo.gov/cgibin/useftp.cgi?IPaddress=162.140.64.21&filename=d01852t.pdf&directory=/diskb/wais/data/gao (on file with the *Duke Law Journal*) (citing the National Advisory Committee on Occupational Safety and Health, Report and Recommendations Related to OSHA's Standards Development Process, June 6, 2000, for the proposition that it takes OSHA an average of ten years to promulgate a health or safety standard).

C. Fast-Track Review as Grounded in Outcome Rather than Process

As with most decisions by Congress, what matters most for fast-track review is the bottom line, not how the agency got there. The significance of the bottom line is further enhanced because of the lack of time for any real deliberation about the merits of the rule. The Truth in Regulating Act might introduce some process-based components into the fast-track oversight process. Under that Act, recall, GAO is to evaluate the agency analyses of costs and benefits, impacts on small businesses, and federalism effects, as well as alternative approaches set forth in the rulemaking record.[140] The extent to which GAO will be able to prepare reports that provide meaningful information regarding agency analyses for a significant number of rules, and whether the availability of GAO's information will alter the tendency of Congress to focus on outcome without concern for process, remain to be seen.

D. Knowledge of the Preferences or Identity of the Reviewers

The audience for fast-track review is known; it is Congress as a whole. Hence, when an agency from the outset envisions a high probability that a rule will be subjected to fast-track review, one might hypothesize that the agency is likely to modify the rule to come closer to the outcome that the agency believes a majority of Congress supports. There are, however, many factors that complicate the influence of review under the fast-track process. As noted, the agency may not fear the wrath of the entire Congress so long as it believes that the president will support its rule.[141] Or, put another way, the president too becomes an audience who must be appeased under fast-track review. In addition, the agency rulemaking process has become drawn out. Even if the current Congress dislikes a planned rule, there is a chance that when an agency first formulates the rule, it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road. Finally, although oversight and appropriation committees and their chairs cannot shield an agency from a fast-track resolution of disapproval, they can protect the agency from other sanctions, such as a loss of funding and substantive limitations on agency

140. *See* Truth in Regulating Act § 4(a)(3), 114 Stat. at 1249; *see supra* notes 120–23, 129–33 and accompanying text.

141. *See supra* notes 133–34 and accompanying text.

authority, independent of the disapproval resolution.[142] Hence, so long as an agency is assured that it can survive a vote on such a resolution, the fast-track mechanism adds nothing to the influence that particular members of Congress already wield over agency rulemaking.

CONCLUSION—POLITICAL REVIEW VIEWED THROUGH THE LENS OF THE PSYCHOLOGY OF ACCOUNTABILITY

A. The Likely Impact of Political Review

The previous analysis of OMB, congressional, and fast-track review indicates that, according to the psychology of accountability, each mechanism is likely to have some unique impact on the behavior of agency staff members who formulate agency rules. Of the three mechanisms, OMB review holds the greatest promise for improving the quality of staff decisionmaking. The agency knows that any rule with a significant economic impact will be subject to OMB review. This review is nominally process based, and when agency staff begins formulating the rule, it usually will not know the identity of the particular desk officer assigned to scrutinize the agency's cost-benefit analysis. For rules that attract significant political attention early on, however, the agency is apt to equate the preferences of the desk officer with the publicly announced views of the White House. This in turn will encourage the agency to formulate rules that are closer to the preferences of the president than the agency would if it were not subject to OMB review. An agency is also likely to presume that desk officers will be preoccupied with regulatory cost,[143] which will induce the agency to adopt economically conservative rules rather than rules that promise uncertain but potentially large benefits at a certain and significant cost.

Traditional congressional oversight is unlikely to improve the care of agency staff analyses or the propensity of the staff to use inappropriate decision rules and to succumb to heuristic biases. Congressional review is unlikely to improve the quality of agency formulation of rules primarily because Congress cares almost exclusively about particular outcomes rather than the process that the agency

142. *See* Weingast & Moran, *supra* note 81, at 768–69 (describing the various means by which "particular congressmen on the relevant committees" can influence the decisions of agency heads).

143. *See supra* notes 54–55, 75 and accompanying text.

uses to formulate rules.[144] For this same reason, traditional congressional review might influence agency staff decisionmaking in either of two ways: it might induce the agency staff to become defensive about its initial rule preference or it might cause the staff to formulate a rule more in line with the preferences of influential members of Congress —for example chairs of oversight committees. The agency is more likely to engage in defensive bolstering if the agency formulated its initial rule preference believing, incorrectly, that the rule would not generate significant oversight attention.[145] If the rule later does generate such attention, psychology predicts that agency staff members will try especially hard to find information that confirms their initial choice and to generate persuasive post hoc rationalizations for this choice.[146] If the agency knows from the inception of a proposed rule that the rule will attract oversight committee attention, and if it knows or reasonably can guess at the outcome preferences of influential committee members, then the agency staff is likely to promulgate a rule that is more in line with these preferences than the rule would be absent congressional oversight.[147]

Fast-track review is the least likely of the mechanisms canvassed in this Essay to encourage significant change in agency decisionmaking. Because in theory every rule is subject to fast-track review by the entire Congress, one might conjecture that this review mechanism will encourage agencies to gear their rules to the median voter in Congress.[148] In fact, however, few rules ever face scrutiny of the full legis-

144. *See supra* notes 95–98 and accompanying text.

145. *See* Lerner & Tetlock, *supra* note 26, at 257 (finding that people's opinions about decisions tend to polarize if there is a delay in questioning them).

146. *See* Dieter Frey, *Recent Research on Selective Exposure to Information*, *in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 41, 44 (Leonard Berkowitz ed., 1986); David Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERS. & SOC. PSYCHOL. 892, 893 (1993) (describing the tendency of people to search selectively for confirmatory evidence of their judgment and to ignore alternatives). The tendency to seek confirmation of a hypothesis, however, is complex; it can lead to a decisionmaker's searching for easily rebutted but seemingly conflicting evidence as well as confirming evidence. Frey, *supra*, at 52–53.

147. *See* Cvetkovich, *supra* note 35, at 154 (finding that people take more time and have better recall of issues when evaluating policies that imply social accountability).

148. "The median voter theorem predicts that to the extent that support will be determined by substantive compromise along a single issue dimension, the dominant position necessary to gain majority support will be at or near the median voter." Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 346 (2001). For discussions of the median voter theorem and the extent to which it accurately describes voting systems, see generally Randall G. Holcombe, *An Empirical Test of the Median Voter Model*, 18 ECON. INQUIRY 260 (1980) (finding that for educational expenditures the me-

lature, and pragmatically those that do will not be reversed unless the president as well as a majority of Congress is willing to disapprove of them.[149] One also might contend that the fast-track mechanism might focus attention on some rules, and thereby facilitate congressional retaliation by means other than disapproval against an agency that promulgates a rule that Congress disfavors. But the mechanisms for such retaliation would involve the usual legislative processes that are subject to the influence of influential committee members. Hence, the agency is unlikely to react differently to the threat of illumination via the fast-track process than it is to the threat of traditional oversight.

B. The Need for Judicial Review in Light of Political Review

In a companion article to this Essay,[150] I evaluate judicial review of agency action under the arbitrary and capricious standard using the psychology of accountability and conclude that such review helps to improve the care with which agencies formulate rules, alleviate cognitive decisionmaking biases, and counter pathologies in group decisionmaking. Based on my analysis in this Essay, viewed through the lens of the psychology of accountability, political review is unlikely to substitute for judicial review in providing such benefits. Unlike judicial review, none of the mechanisms for political review satisfy the four criteria that psychologists have found necessary for accountability to improve the quality of decisionmaking.[151] OMB review might encourage the agency to take greater care in formulating rules, but not for every rule subject to review. Moreover, because the agency is apt to presume OIRA desk officers have a preoccupation with regula-

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dian voter model provides a good explanation of reality); Harold Hotelling, *Stability in Competition*, 39 ECON. J. 43, 41–57, 54–55 (1929) (describing the tendency of political parties to make their platforms as similar as possible to appeal to the median voter); Thomas Romer & Howard Rosenthal, *The Elusive Median Voter*, 12 J. PUB. ECON. 143 (1979) (evaluating empirical studies that purport to show that government expenditures reflect the desires of the median voter); Charles K. Rowley, *The Relevance of the Median Voter Theorem*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 104 (1984) (questioning whether the spatial model accurately captures the dynamics of political markets).

149. By public choice accounts, the need for the president's signature changes the impact of the fast-track process from one which favors the median voter to one which gives the agency discretion to adopt a rule anywhere in a policy region where any change in the rule will be disfavored by the House, the Senate, or the president. *See* McCubbins et al., *supra* note 96, at 438–39 (arguing that agency drift from policy choice will go uncorrected as long as it remains within the boundaries of approved outcomes by the House, Senate, and president).

150. Seidenfeld, *supra* note 5.

151. *See supra* notes 27–46 and accompanying text.

tory costs, OMB review generally will bias the outcome of agency rulemaking toward economically conservative rules.

C. Should These Forms of Political Review Be Retained?

One conception of agencies and rulemaking—the formalistic conception—views the administrative state as a means of implementing the will of the legislature.[152] Granting discretion in the rulemaking process to agencies allows the regulatory system flexibility to respond to changes in circumstances and political preferences.[153] Such a grant of authority spares proponents of regulatory change from having to overcome congressional inertia. If checks on rulemaking are sufficient to make the agency accountable to the political branches, those branches should prefer this mechanism as long as the value to them of allowing accountable flexibility exceeds the value of cementing their current policies in place. Given this understanding of the role of rulemaking, the mechanisms of political oversight serve the purpose of keeping the agency in line with values of the polity as represented by their elected legislators and officials.[154] Even under this understanding, however, some of the mechanisms pose problems because there is no guarantee that the agency's perceived audience or reviewer (e.g., the chairs of oversight committees, or even the president) holds the values of the polity.

An alternative conception of agencies and rulemaking—the public interest conception—views the administrative apparatus as geared to balance the values that the authorizing statute means to serve and thereby to further the interests of the citizenry.[155] Under this concep-

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152. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 28 (1988) (asserting that one role of an administrator is to engage in statutory interpretation to carry out the goals of the legislature); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1672–73 (1975) (stating that the legislature must promulgate rules, standards, and goals to guide the exercise of administrative power).

153. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96–98 (1985) (noting that the delegation of rulemaking authority allows executive responsiveness to shifts in voter preferences); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404–05 (1987) (arguing that there is a need to permit agencies the discretion to allow policies to evolve gradually over time).

154. *See* Steven Shimburg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54 LAW & CONTEMP. PROBS. 241, 245 (Autumn 1991) (arguing that one cannot legitimately criticize oversight for skewing the EPA's priorities toward those of Congress).

155. *See* SHAPIRO, *supra* note 152, at 28 (suggesting that administrative deliberation may involve philosophic discourse about basic values to guide policy choices); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 65–76

tion, in essence, the agency is to use its expertise to adopt the rule that best serves these values, given technological and economic constraints. Political review then may interfere with the agency's role by pushing the agency away from the best solution in terms of underlying prescribed values toward the particular solution that is preferred by the political actors to whom the agency answers. Under this conception, there still may be a role for political review to protect against the agency implementing a balance that is clearly unacceptable to the current polity.[156] But it would seem that in those rare circumstances, Congress and the president likely would agree to legislation overruling the agency regulation. OMB or fast-track review may be necessary for political review to overcome the influence of congressional committees with idiosyncratic regulatory preferences.[157] Generally, however, from this perspective, judicial review to ensure the legality and wisdom of agency decisions would seem a better choice to ensure that the agency takes care in implementing its statutory responsibilities.

(1998) (giving an overview of the main principles and critiques of public interest theory); *see also* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 174–75 (1990) (arguing that, at least in part, regulators pursue public interests that are distinguishable from their private interests).

156. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 481–82 (1999) (discussing Congress's role in forcing the president to replace the EPA administrator when he attempted to undermine the enforcement of environmental protection laws).

157. *See* Weingast & Moran, *supra* note 81, at 778–80 (describing the preferences of influential senators that deviated from those of the chamber generally, and noting how the agency that those senators monitored acted in accordance with their preferences).