Controlling the Cumulative Costs of Regulation: Exploring Potential Solutions

Reeve T. Bull – Research Chief, Administrative Conference of the United States[1]

Over three decades ago, the United States was at the forefront of developed nations in creating a centralized system for regulatory review and rationalizing regulatory policymaking through the use of benefit-cost analysis.[2] As catalogued elsewhere on this site, the idea of centralized executive review of agency rules first began to take shape during the Johnson Administration, and it fully matured in its present form in the early days of the Reagan Administration.[3] Presidents George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama have all fundamentally reaffirmed the basic framework President Reagan created, which involves benefit-cost analysis of pending rules and centralized review of significant regulations by the Office of Information and Regulatory Affairs (OIRA). Though the system that has emerged still provokes controversy,[4] most have accepted the inevitability and desirability of some form of executive review.[5]

In the ensuing thirty years, the United States' system for executive review has changed very little, notwithstanding some minor readjustments.[6] In that same time period, other developed nations have enacted significant regulatory reforms, some of which involve copying the American framework but many of which represent new innovations that go well beyond what the United States has adopted.[7] Though the United States' approach possesses many advantages vis-à-vis that of its peers, there are a number of striking interstices in the American regulatory review framework, including the following:

- Only agency-promulgated regulations (or "secondary legislation," in the parlance typically used in the comparative literature) are subject to comprehensive benefit-cost analysis; statutes ("primary legislation") generally undergo no such analysis.

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[1] The views expressed in this post are exclusively those of the author and do not necessarily reflect the position of the Administrative Conference of the United States or its members.

[2] Council on Foreign Relations, *Federal Regulations Report*, RENEWING AMERICA PROGRESS REPORT AND SCORECARD 6 (Mar. 2015), *available at* http://www.cfr.org/corporate-regulation/quality-control-federal-regulation-policy/p36110.

[3] Executive Order 12291, Federal Regulation, 46 Fed. Reg. 13193 (Feb. 17, 1981).

[4] Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENVTL. L. REP. 10297 (2004); *see also*, Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L. J. 1097 (2006); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 208 (2012).

[5] Some academics have accepted the overall system for executive review while still suggesting that the system might be reformed to correct for what they perceive as a deregulatory bias under the existing framework. *See, e.g.*, Richard Revesz & Michael Livermore, *Regulatory Review, Capture and Agency Inaction*, 101 GEO. L. J. 1337 (2013).

[6] For instance, in EO 12866, President Clinton directed agencies to consider non-economic costs and benefits (e.g., effects on the environment or on the distribution of wealth) in addition to those that can be easily quantified. Executive Order 12866, § 1(a) Regulatory Planning and Review, 58 Fed. Reg. 51735, 51735 (Oct. 4, 1993).

[7] *See supra* note 2.

- Independent regulatory agencies are not subject to the benefit-cost analysis or OIRA review provisions of EO 12,866.[8]
- OIRA only reviews "significant regulatory actions" (as defined by EO 12,866),[9] which constitute a relatively small fraction of the rules agencies issue on an annual basis.[10]
- Even for "significant regulatory actions," agencies often fail to quantify both regulatory costs and benefits and compare the net benefits of the option selected to those of potential regulatory alternatives.[11]
- OIRA reviews only *proposed* regulations. Though the Obama Administration has undertaken an ambitious retrospective review initiative in recent years,[12] OIRA does not, as a general matter, independently review the agencies' reassessment of *existing* regulations. Under such a system of self-review, agencies lack strong incentives to reassess existing rules with any degree of analytical rigor.[13]

If the United States is to succeed in controlling the cumulative regulatory burden, then it must consider fundamental reforms to the status quo. Existing regulatory impact analysis mandates and OIRA review play a critical role in combating overregulation and containing the costs of the regulatory state, but they alone are inadequate to control ever-increasing regulatory costs. In contemplating potential reforms, the United States fortunately needn't start from scratch, as many developed nations have undertaken significant regulatory overhauls in recent years. By observing what has worked well overseas, the United States can learn from and ideally build upon foreign innovations, refashioning international best practices to fit the American context.

The remainder of this post explores potential approaches to containing regulatory costs, drawing heavily upon the pioneering work of several foreign governments. As a general matter, such reform efforts fall into two-broad categories: (a) top-down reform, wherein some centralized entity coordinates among agencies and assumes primary responsibility for controlling regulatory costs and (b) bottom-up reform, wherein the system is redesigned to provide

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[8] In EO 13579, President Obama encouraged independent regulatory agencies to undertake the same analysis as their executive branch peers, but he did not direct them to do so. Executive Order 13579, Regulation and Independent Regulatory Agencies, § 2, 76 Fed. Reg. 41587, 41587 (July 11, 2011).
[9] Executive Order 12866 – Regulatory Planning and Review, 58 Fed. Reg. at 51739.
[10] In 2014, 3,554 final rules were published in the Federal Register. During the same year, OIRA conducted only 452 reviews of significant rules, or around 13 percent of total rules issued. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 6, 10 (2015).
[11] Richard Williams & James Broughel, *Government Report on Benefits and Costs of Federal Regulations Fails to Capture Full Impact of Rules*, MERCATUS CENTER, GEORGE MASON UNIVERSITY (Dec. 2, 2013), *available at*: http://mercatus.org/publication/government-report-benefits-and-costs-federal-regulations-fails-capture-full-impact-rules; *see also* Sarah M. Harris, *Reviewing Regulatory Review*, 15 NAT'L AFF. 18 (Spring 2013).
[12] *See* Executive Order 13610, Identifying and Reducing Regulatory Burdens, §§ 1, 3-4, 77 Fed. Reg. 28469, 28469–70 (May 14, 2012); Executive Order 13579, § 2, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41587, 41587 (July 14, 2011); Executive Order 13563, Improving Regulation and Regulatory Review, § 6, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011). .
[13] Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265 (2015).

incentives for lower-level entities (including state and local governments, regulated entities, agency employees, and members of the public) to police against excessive regulatory burdens.

Top-Down Regulatory Reform Efforts

Traditionally, most past efforts at regulatory reform in the United States qualify as top-down initiatives, since the President (acting through OIRA) has typically served the central coordinating function. This section considers foreign practices to explore two top-down reforms efforts that might, if adopted domestically, help to control regulatory costs.

<u>One-In-One-Out</u>

Regulatory scholars have occasionally discussed the concept of a regulatory budget, which would set a ceiling on the regulatory costs an agency can impose in a given period of time.[14] One intuitively appealing approach to regulatory budgeting would involve creating a "one-for-one" initiative (or two or more for one), wherein an agency that wishes to adopt a new regulation that will impose costs on industry must rescind a separate regulation that imposes equal or greater costs. In recent years, the United Kingdom, Canada, and Australia have all adopted variants of this approach.

The UK's current program requires that for every £1 of costs imposed by new regulation, £2 of regulatory costs must be eliminated.[15] Similarly, Canada's Red Tape Reduction Act requires that for each new paperwork-imposing regulation, at least one existing regulation be repealed, and that the reduced "administrative" or paperwork burden equal the burden imposed by the new regulation.[16] Australia's Office of Best Practice Regulation requires all new regulations to be run through an online algorithm that calculates the costs of proposed regulation. New regulatory costs, thus determined, must be negated by a concurrent reduction in costs.[17]

In certain contexts, a "one-in-one-out" style regulatory budget may prove to be an attractive mechanism for containing regulatory costs. Its primary virtue is its simplicity: agencies will have an incentive not only to reassess existing regulations but also to more critically examine proposed regulations if the cumulative regulatory burden they may impose is

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[14] *See* Susan E. Dudley, *Improving Regulatory Accountability: Lessons From the Past and Prospects for the Future*, 65 CASE W. RES. L. REV. 1027, 1039, 1049 (2015); Eric. A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473, 1473–75 & n.7 (2002) (discussing "Net Benefit Accounts" as nuanced version of regulatory budgeting); Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. R. 835, 839 (2014).
[15]United Kingdom Department for Business Innovation and Skills, *Better Regulation Framework Manual*, at 41 (2015), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421078/bis-13-1038-Better-regulation-framework-manual.pdf.
[16] Red Tape Reduction Act, S.C. 2015, c. 12 (2015) (Can.).
[17]Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Australian Government Guide to Regulation*, at i (2014), *available at* http://cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf.

capped. At the same time, this approach suffers from a number of drawbacks, including the following:

- **Failure to account for regulatory benefits**: If any given regulation's social benefits exceed the costs it creates, then rescinding it will impose net economic harm on society. To the extent it focuses solely on regulatory costs rather than the net economic impact of a regulation, the "one-in-one-out" approach runs the risk of eliminating socially beneficial rules.
- **Disincentivizing retrospective review**: If agencies cannot enact new regulations until they have eliminated old ones, they will have an incentive to "save up" outmoded regulations in order to swap them for new regulations in the future. This may have the effect of disincentivizing any independent agency-driven deregulatory efforts.[18]
- **Manipulability of cost figures**: A "one-in-one-out" system creates incentives for agencies to understate the costs of new regulations and overstate the costs of existing regulations. Absent independent oversight, agencies might be able to manipulate the figures in order to achieve their desired results.
- **Regulatory inflexibility**: A strictly enforced "one-in-one-out" system would prove problematic in the face of a major unforeseen market failure that calls for new regulations. Those nations that have adopted such programs have generally accounted for this contingency by creating an "emergency" exception, yet it is difficult to set reasonably restrictive standards for what constitutes an "emergency" (such that the exception does not swallow the rule).

In this light, a "one-in-one-out" system for regulatory budgeting is unlikely to prove a panacea for controlling regulatory costs. At best, this approach would likely promote regulatory inertia, achieving little in the way of rolling back existing burdens but checking or at least decelerating the imposition of additional burdens. Nevertheless, in certain areas characterized by "mission creep," wherein the regulatory burden has gradually expanded over time, this approach may hold some promise.

Enhanced Centralized Review

As noted previously, there are major gaps in the existing system for executive review of agency rulemaking. In a forthcoming article in the Administrative Law Review, I draw insights from the regulatory framework erected by the European Commission, which, in many respects, is more comprehensive than its American counterpart in attempting to control regulatory burdens. Specifically, I propose a new "track" for agency rulemaking, dubbed "market corrective rulemaking" (MCR), which would closely resemble traditional informal rulemaking but would impose certain additional procedural requirements on the agencies. Congress would possess plenary discretion in deciding whether to mandate MCR procedures. As the name implies, Congress would invoke MCR procedures in order to correct some perceived market failure,

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[18] Canada has corrected for this problem by awarding credits to agencies that repeal existing rules that can later be swapped out for new regulations

intervening in order to promote net social benefits. Thus, MCR procedures would not be applied to government interventions designed to protect civil rights, ensure justice, promote morality, guarantee equal opportunity, or advance any other governmental goal other than promoting net social utility, such that application of a strict benefit-cost balancing test is inappropriate.

MCR procedures would include the following requirements, inspired by the regulatory policymaking approach used in the European Union:

- **Early Stakeholder Input**: The European Commission solicits input from the regulated public at a very early point in the policymaking process, immediately after it has decided to act. MCR would require a rulemaking agency to issue an advance notice of proposed rulemaking, obtaining stakeholders' views on the proposed course of action before the agency has preliminarily settled upon a preferred approach, in addition to the traditional comment solicitation following issuance of a draft rule.[19]
- **Comprehensive Benefit-Cost Analysis**: Short of a constitutional amendment, there can be no mandate requiring Congress to base its legislation on benefit-cost analysis. This differs from the EU Commission, which generally conducts a regulatory impact analysis for proposed regulations and directives (the equivalent of U.S. statutes).[20] Given agencies' greater institutional capacity for conducting such analysis, it is preferable for Congress simply to delegate broadly to the agencies but statutorily mandate that they consider regulatory costs and benefits and strive to maximize the latter and minimize the former. Under MCR procedures, the benefit-cost analysis requirement would apply to all agencies, including the independent regulatory agencies that have traditionally been exempt from Presidential review.[21]
- **Proportionality**: The treaties establishing the lawmaking apparatus of the European Union enshrine the "proportionality principle," which holds that the EU institutions should regulate no more stringently than is required to achieve any given goal.[22] MCR would require agencies to undertake such a proportionality analysis, striving to minimize the regulatory burden. Of course, this may conflict with the goal of maximization of net benefits: the most economically beneficial approach is not always the least costly to regulated entities. Thus, agencies would be afforded considerable leeway in balancing these two goals, merely being required to conduct both types of analysis and explain the final decision.[23]

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[19] Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, __ ADMIN. L. REV. __, 31 (forthcoming 2015)

[20] *Impact Assessment*, EUROPEAN COMMISSION (Aug. 11, 2015), http://ec.europa.eu/smart-regulation/impact/index_en.htm.

[21] Bull, *supra* note 19 at 31.

[22] *See*, Consolidated Version of the Treaty on the Functioning of the European Union, Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality art. 1, May 9, 2008, 2012 O.J. (C 326) 206 (defining proportionality principle).

[23] Bull, *supra* note 19 at 33.

- **Institutionalized Retrospective Review**: The European Commission has recently implemented an overarching program of retrospective review ("evaluation" in the EU lexicon) whereby regulators must adopt plans for periodically reassessing new regulations and directives. MCR would impose a similar requirement upon U.S. agencies: for each new rule adopted, the agency must set metrics for assessing whether the rule is achieving its intended goals and establish a timeline by which the rule will be reevaluated.[24]

Like the current system for Presidential review of proposed regulations, MCR represents a top-down reform initiative: Congress sets the overarching procedural framework governing agency policymaking, and agencies must comply with these procedural strictures. Unlike the current system, in which agencies' regulatory impact analyses are exempt from judicial review,[25] MCR would enable private citizens to sue agencies for failure to adhere to the procedural requirements or to conduct the required benefit-cost or proportionality analyses. In this way, it also includes a "bottom-up" enforcement mechanism, which should provide strong incentives for agency officials to comply closely with MCR procedures.

To the extent that Congress elected to invoke MCR, this innovation would represent significant progress in efforts to combat cumulative regulatory costs. For regulations designed to correct market failures, agencies would be required not only to defend new regulations as benefit-cost justified and proportionate to the underlying problem but also to reassess existing rules under that standard. Nevertheless, the proposal still affords a high degree of discretion to agencies, especially as courts would be expected to show a very high degree of deference to an agency's determination on judicial review.[26]

Bottom-Up Regulatory Reform Efforts

A fundamental flaw of top-down regulatory reform initiatives, including both the existing system of Presidential regulatory review and the alternative approaches discussed in the preceding section, is the disconnect between high-level overseers of the process and lower-level regulators. At the top, the President, OIRA, Congress, and even political appointees at individual agencies may have a strong incentive to contain regulatory costs and implement efficiency-minded reforms, but they lack a comprehensive understanding of the often complex regulatory systems they seek to revamp. Ground-level regulators, in turn, have a much more nuanced understanding of existing programs, but they lack any incentive for reforming the status quo.[27] Thus, the two sides are often at loggerheads, which diminishes the likelihood of successful reform.

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[24] *Id.* at 25, 43–44
[25] Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. at 51745.
[26] Bull, *supra* note 19 at 30–32.
[27] Bull, *supra* note 13, at 280–81.

An alternative set of approaches would realign the incentives of the key actors or introduce additional players in order to resolve the gridlock prevailing in the existing system. This subsection explores three potential "bottom-up" reforms that hold some potential for controlling cumulative regulatory costs.

Collaborative Alternatives to "Command-and-Control" Regulation

Regulatory scholars have described the traditional approach to policymaking as a system of "command-and-control," whereby agencies erect a series of rules that direct regulated entities to undertake certain actions and penalize them for failure to comply.[28] In the last several decades, agencies have increasingly taken a more flexible approach, pursuing less burdensome alternatives such as setting "performance goals" (which allow regulated entities to determine precisely how they will meet a regulatory mandate), using "cap and trade" systems to limit (but not prohibit) certain activities, taxing disfavored conduct (or subsidizing desirable conduct), and disseminating information without prohibiting or mandating any course of conduct.[29] Another potential approach to minimizing the burden on businesses while ensuring strong regulatory protections involves promoting active coordination between public and private sector entities in crafting and enforcing regulations.

A rich vein of legal scholarship describing this phenomenon of so-called "collaborative governance" has emerged in recent years.[30] Unfortunately, as Professor Jody Freeman has noted, agencies have been hesitant to embrace such novel approaches to regulation.[31] In a recently published article in the *Administrative Law Review*, I offer a potential solution to this problem, suggesting that regulated entities might file petitions for rulemaking proposing collaborative alternatives to existing "command-and-control" regulatory regimes.[32] The petitioning party would bear the burden of demonstrating that the proposed alternative would preserve the prevailing level of regulatory protection while imposing a smaller compliance burden.[33] On judicial review, the agency's decision to grant or deny the petition would receive the traditionally high level of deference associated with dispositions of rulemaking petitions, but the agency would be required to provide some justification for its decision.[34]

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[28] *See generally* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448 (2003).
[29] Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, HARV. L.J. 549 (1979).
[30] *See generally,* Jody Freeman, *Collaborative Governance in the Administrative State,* 45 UCLA L. REV. 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,* 89 MINN. L. REV. 342 (2004); *see also,* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance,* 2010 WIS. L. REV. 297; Daniel J. Fiorino, Reply, *Rethinking Environmental Regulation: Perspectives on Law and Governance,* 23 HARV. ENVTL. L. REV. 441 (1999); Bradley C. Karkkainen, *''New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping,* 89 MINN. L. Rev. 471 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction,* 28 FORDHAM URB. L.J. 1611 (2001); Richard B. Stewart, *Administrative Law in the Twenty-First Century,* 78 N.Y.U. L. REV. 437 (2003).
[31] Freeman, *supra* note 30, at 95.
[32] *See generally* Bull, *supra* note 13.
[33] *Id.* a 288.
[34] *Id.* at 305.

This approach holds significant promise for reducing the cumulative regulatory burden while still maintaining the strong regulatory protections associated with the modern administrative state. As F.A. Hayek recognized, it is impossible for a centralized planning body to obtain a complete picture of a complex regulatory problem, given the fact that information is dispersed broadly throughout society.[35] Collaborative governance mechanisms allow agencies to leverage the expertise residing in the private sector to design regulations that are both less costly and more likely to achieve their intended aims. Nevertheless, collaborative approaches to regulatory policymaking may not be appropriate in all circumstances, particularly in areas wherein the agency is especially susceptible to capture. The European Commission traditionally worked closely with major businesses (as well as unions) when devising new laws, which has led to charges of institutionalized rent-seeking and favoritism exhibited toward large EU businesses.[36] Thus, to the extent that U.S. agencies move towards a more collaborative approach to policymaking, they should implement appropriate protections designed to ensure that objectivity of policymakers and to guarantee that all voices are heard (including small businesses, consumers, and civil society organizations).

Subsidiarity

In recent years, administrative law scholars have extolled the virtues of regulatory experimentation.[37] For all of the advances in the predictive capabilities of policymakers in the last several decades, regulators still face a high degree of uncertainty when adopting new rules. Thus, the most effective approach is often basic "trial and error," simply testing a range of approaches and observing the results (ideally simultaneously, to enable direct comparison of the different options). Unfortunately, this can be very challenging to achieve in the regulatory context, as implementing any new policy will create winners and losers, and the former will be vehemently opposed to testing a different approach or reverting to the status quo.[38] Thus, regulatory policymaking is characterized by a high degree of path dependency: once an agency has acted, it is exceedingly difficult to change course.

One possible means of overcoming this challenge is by delegating certain aspects of the policymaking function to lower level entities, such as state and local governments. The European Union has designed a policymaking instrument, the so-called "directive," to achieve

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[35] F.A. HAYEK, THE ROAD TO SERFDOM 95 (Bruce Caldwell ed., 2007).

[36] Shannon Donnan, *US Pushes for Greater Transparency in EU Business Regulation*, FINANCIAL TIMES, Feb. 23, 2014, http://www.ft.com/intl/cms/s/0/6e9b7190-9a65-11e3- 8e06-00144feab7de.html#axzz38mJgpnx2 ("US companies also complain that they are often shut out of the regulatory process in Europe because the EU system can depend on closed consultation with local industry groups that make it difficult for outsiders to register their concerns").

[37] Joseph Aldy, Learning for Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy (Nov. 17, 2014), *available at* https://www.acus.gov/report/retrospective-review-report; Zachary Gubler, *Making Experimental Rules Work*, 65 ADMIN. L. REV. __ (forthcoming 2015); J.B. Ruhl & James Salzman, *Regulatory Exit*, (Vanderbilt University Law School Public Law and Legal Theory, Working Paper No. 14-31, 2014).);

[38] This dynamic poses an especially grave challenge insofar as the "winners" are often relatively small in number and derive concentrated benefits from the status quo, whereas the "losers" are often diffuse and may incur relatively small direct harm, such that they have weaker incentives to lobby for a policy change. WILLIAM N. ESKRIDGE, JR. CASES & MATERIALS ON STATUTORY INTERPRETATION 56–60 (2012)

precisely this purpose.[39] Unlike regulations, which apply directly to all Member States, directives simply set forth overarching goals but defer to the Member States in determining precisely how to achieve those ends.[40]

Though U.S. agencies occasionally work closely with states through schemes of "cooperative federalism,"[41] there is no clear analog for the EU directive in the American system. This is unfortunate, since this style of policymaking holds great potential for achieving improved regulatory efficiency without eroding prevailing high levels of regulatory protection. Any proposal for enhanced delegation to states often produces knee-jerk opposition from pro-regulatory groups, which contend that such decentralized schemes inevitably result in a "race to the bottom" of progressively eroded regulatory protections. To the extent that the entire policymaking exercise devolves to the states, this is a legitimate concern: even if a state wishes to erect stronger regulatory protections, it may elect not to do so for fear of placing itself at a competitive disadvantage. This concern is greatly mitigated, however, when overarching performance goals are set at the federal level, leaving states with the discretion to devise novel approaches for accomplishing those aims.

An approach to regulatory policymaking characterized by greater delegation to the states enjoys three distinct advantages vis-à-vis a more centralized framework. First, allowing a diversity of distinct approaches facilitates regulatory experimentation, as state and federal policymakers can observe what works well and build on each other's innovations.[42] Second, regulators can tailor their approaches to implementation to take account of diverse local conditions. For instance, the optimal approach to conserving water resources may vary significantly between the humid states of the east and the arid states of the west. Third, splitting the policymaking function among a number of distinct regulatory authorities may combat rent-seeking. For instance, consider a regulatory mandate requiring states to reduce carbon emissions from motor vehicles by 20% (but affording them complete discretion in determining how to do so). In a state with a large number of hybrid car manufacturers, industry might lobby for stricter fuel economy standards, as this will place their product at a competitive advantage vis-à-vis that of traditional auto producers. In a state without a major automobile sector, a more attractive option might entail reducing the speed limit. Allowing these disparate approaches greatly

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[39] Treaty on European Union and the Treaty on the Functioning of the European Union art. 288, May 9, 2008, 2008 O.J. (C 115) 169-70. The directive represents one of the many protections erected by the European treaties for the so-called "subsidiarity" principle, which holds that higher-level authorities should act only when lower-level authorities are incapable of doing so. *Id*. at 17 (defining "subsidiarity").

[40] *Id*. at 169 (describing directives in conjunction with regulations, recommendations, etc.).

[41] *See e.g*., Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 187–88 (2005); Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 ENVTL. L. REP. 10426 (2014); Phillip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. STATE U. - DCL L. REV. 727, 728–29; *see also*, 16 U.S.C. §§ 3181–3183; 29 U.S.C. § 651; 33 U.S.C. §§ 1251-1887; 42 U.S.C. § 6901.

[42] This reaffirms the wisdom of Justice Brandeis's insight that states might serve as laboratories for testing a variety of policies. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

reduces the risk that industry groups will capture the entire national market. Of course, it also increases the risk that those groups will capture specific markets, but dissatisfied producers or consumers can always "vote with their feet" and move to states offering a more attractive regulatory package.

Ultimately, a regulatory regime that delegates greater authority to state and local governments should, over time, impose a smaller regulatory burden than a more centralized system as lower-level regulators identify innovative, comparatively less burdensome ways of accomplishing regulatory goals. Nevertheless, this approach also suffers certain limitations. For instance, in certain cases, regulated entities may actually prefer a uniform national standard to a series of differing state standards, given the costs associated with learning and complying with disparate rules.[43] In other cases, a "race to the bottom" may prove a legitimate risk even where the overarching policy goals are set at the national level. For instance, states might be tempted to adopt implementing regulations that are relatively easy for regulated parties to circumvent, creating an incentive for existing firms to relocate to those states perceived as lax enforcers of regulatory mandates. Thus, each program must be assessed on a case-by-case basis, with some proving strong candidates for a more decentralized approach and others not.

Realigning Regulator Incentives

The primary contribution of public choice theory to the administrative law scholarship has been its insight that one cannot understand a complex governmental system without some comprehension of the motivating forces driving the individual actors in that system. This maxim alone helps elucidate the significant shortcomings of all top-down approaches to regulatory reform: if individual regulators lack any personal incentive to vigorously pursue such reform efforts, their failure to do so should come as no surprise. Furthermore, there is every reason to believe that regulators would openly oppose any efforts to modify or overhaul the programs they administer. Even ignoring the potential adverse employment consequences associated with agency restructuring, basic principles of behavioral economics suggest that an individual is likely to oppose changes in a system that it has taken him or her a significant amount of time to master (a product of the so-called "Ikea effect").[44] Given the fact that lower-level regulators possess a significant informational advantage vis-à-vis would-be regulatory reformers, the bureaucracy very frequently emerges victorious from these battles.

Thus, any efforts to curtail cumulative regulatory costs are likely to founder if they are actively opposed by those agency officials most responsible for operating the relevant programs. One can envision any number of approaches to realigning the incentives of frontline agency

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[43] This concern animates Dormant Commerce Clause jurisprudence, which provides that federal courts can strike down state laws that impose an undue burden on interstate commerce (even where those laws do not necessarily discriminate between in-state and out-of-state producers). *See, e.g.*, *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007) ("[T]he existence of substantial regulatory conflicts between states may itself disproportionately burden interstate commerce."); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959).

[44] *See* Dan Ariely, THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME 89–95 (2010); *see also* Reeve T. Bull, *Building A Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 281 (2015)

officials to provide stronger motivations for controlling regulatory costs. Unfortunately, each of these approaches also poses significant drawbacks, as explored in the following chart.

Potential Reform	**Advantages**	**Disadvantages**
Promoting greater mobility between the public and private sectors (the so-called "revolving door")	Introduces fresh perspectives from individuals who are not yet steeped in the agency culture and provides a platform for importing private sector innovations	May encourage regulatory capture insofar as regulators avoid taking any action that might alienate past or future employers May reduce operational efficiency insofar as recent hires from the private sector clash with long-term officials
Offering performance incentives to agency officials for identifying efficiency-minded reforms	Realigns regulator incentives by rewarding innovative thinking	May undermine esprit de corps and divert agency officials from carrying out their assigned duties per traditional protocol
Training agency policymakers on benefit-cost analysis and other economic principles	Increases the likelihood that regulators will consider the downstream economic effects of their actions when devising new rules	Unlikely to effect a culture shift in agencies, especially if one's performance evaluation is not tied to applying the principles learned
Imposing micro-level regulatory budgeting (e.g., applying a "one-in-one-out" rule to particular subdivisions of the agency)	Provides a very strong incentive for policing regulatory costs and identifying outmoded rules	Could prove even more problematic than high-level regulatory budgeting, since the demand for new regulations is likely to vary significantly across individual subdivisions over time

Again, agencies must remain very mindful of the totality of circumstances when deciding whether to deploy one or more of the aforementioned reforms. For instance, in some contexts, regulatory capture may be a relatively minimal risk (e.g., private sector salaries in a particular area are not substantially greater than public sector salaries), and encouraging greater mobility between the private sector and government may prove especially attractive. Though attempting to fine-tune regulator incentives may ultimately produce more harm than good in certain areas, regulatory reformers should closely consider these options in attempting to create a system that more effectively controls regulatory costs.

Conclusion

As the preceding discussion should make clear, there is no "silver bullet" for redesigning regulatory programs to control cumulative costs. The traditional top-down approach to regulatory review, which includes benefit-cost analysis and OIRA review, has proven very effective in avoiding the imposition of regulatory costs far in excess of associated benefits, but there are significant gaps in the existing system. Though supplementing the top-down system to include some form of regulatory budgeting or a more comprehensive regime of regulatory review could help overcome some of these limitations, the enterprise is unlikely to succeed absent some additional bottom-up reforms designed to leverage the expertise of lower level governments and regulated entities and realign regulator incentives to promote greater openness to innovation. In contemplating such reforms, one must remain attentive to potential adverse effects of regulatory redesign, which may ultimately increase the likelihood of regulatory capture, inappropriately weaken regulatory protections, or otherwise interfere with a soundly functioning regulatory system. Ultimately, the key to meaningful reform is likely an increased openness to trial and error, both in crafting regulations and in redesigning the regulatory system itself. If agencies are allowed to experiment with the various reforms described above, they will eventually come to a fuller understanding of what regulatory frameworks are most likely to control costs without undermining regulatory effectiveness.