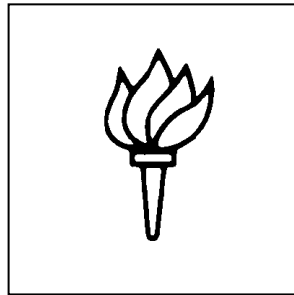


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State Farm 'with Teeth':
Heightened Judicial Review in the
Absence of Executive Oversight

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STATE FARM “WITH TEETH”: HEIGHTENED JUDICIAL REVIEW IN THE ABSENCE OF EXECUTIVE OVERSIGHT

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While courts and commentators have considered the information-forcing role of executive oversight and judicial review of agency action, the dynamic relationship between the two has yet to be considered. This Article presents a novel justification for heightened judicial scrutiny in the absence of meaningful executive oversight, premised on a reasoned decision-making basis. Judicial review of certain types of agency determinations should be more stringent because those determinations have not been vetted by executive oversight and are thus less likely to be premised on reasons backed by empirical support. Agency cost-benefit analyses and agency conflict preemption determinations—two realms rarely if ever considered together—are compared in terms of their reliance on underlying factual predicates and contrasted in terms of the existing framework for executive oversight and judicial review of agency determinations.

A heightened judicial review standard—what I term “State Farm with teeth”—should guide courts’ evaluations of the cost-benefit analyses performed by independent agencies not subject to executive oversight. This Article is the first to draw the distinction between independent and executive agencies in the State Farm hard-look context. It is also the first to explore the recent Business Roundtable decision by the D.C. Circuit through this analytical lens.

The stringent “State Farm with teeth” standard should likewise be applied to judicial review of agency determinations of conflict preemption made in the absence of executive oversight. As this Article discusses, recent developments involving the Office of the Comptroller of the Currency’s preemption assertions regarding state banking laws provide a compelling illustration of why this should be so. This Article also points to a potential new information-forcing role for Congress. Using the Dodd-Frank Act as an illustration, this Article shows how Congress can set parameters for judicial review of administrative agencies’ fact-based conflict preemption determinations.

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INTRODUCTION

The executive branch, not the courts, enforces executive orders directed at federal agencies. But this simple, true statement obscures the more complicated relationship between executive oversight and judicial review of agency decision-making. To explore this relationship, I analyze two significant realms of agency decision-making: cost-benefit analyses and conflict preemption determinations. Both contexts reveal what is lost when executive oversight is absent and show how courts can—and should—fill that gap.

In these two specific agency decision-making realms, executive oversight and judicial review play central information-forcing roles vis-à-vis agencies (independent or executive) and can serve as functional substitutes.¹ This insight grounds my argument for heightened judicial review in the absence of executive oversight.²

I argue that judicial review of certain types of determinations by independent agencies should be more stringent because those determinations are not subject to executive oversight and are thus less likely to be premised on reasons backed by empirical support. This Article’s distinction between independent and executive agencies in the *State Farm* hard-look context is unprecedented in the relevant literature.

In Part I, I make the counterintuitive choice to place agency cost-benefit analyses and agency conflict preemption determinations in the

¹ I fully recognize that executive oversight and judicial review also serve quite different purposes. Executive oversight promotes coordination between different parts of the executive branch, *see, e.g.*, Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1367–69 (2013) (discussing OIRA’s coordination function), whereas judicial review embodies a vision of separation of powers, *see, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440 (“Rationalist review acknowledges the unique constitutional position of agencies outside of the tripartite system of government envisioned by the Framers, and compensates through heightened scrutiny of agency decisions in the form of the requirement that agencies give adequate reasons.”).

² Here, it is worth clarifying the scope of my argument. I am not making a general argument across the board that judicial review of *all* agency actions, including, for example, statutory interpretation, should vary inversely with executive oversight. Instead, this Article provides a justification for more stringent hard-look judicial review absent executive oversight in specific contexts where agency decision-making is distinctly fact-based, such as agency cost-benefit analyses and conflict preemption determinations. These fact-based inquiries present prime targets for the information-forcing role provided by executive oversight or judicial review.

same analytical box. This Article is the first to recognize and analyze the striking parallel between cost-benefit analyses and conflict preemption determinations with respect to the requisite underlying factual predicate. Each determination relies, to a significant extent, on facts developed as part of the agency's regulatory record, either at the agency's own behest or in response to evidence put before it during the notice-and-comment rulemaking period. The agency's policy judgment—that a rule is justified by its anticipated net benefits, or that the rule should preempt a state law because it interferes with or imposes prohibitive costs on the federal regulatory scheme—is (or should be) informed by the underlying factual predicate developed as part of the regulatory record.

Part II explores the underpinnings of my central argument that courts should apply a more stringent standard to scrutinize the empirical or factual bases of agency determinations that are *not* subject to executive oversight. Heightened judicial review can serve an information-forcing function, prodding agencies to develop and reveal to courts more robust regulatory records—either by buttressing their internal expertise and capacity or by voluntarily submitting to executive oversight.

Part III illustrates my main thesis in the realm of agency cost-benefit analysis. The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB), is the chief enforcer of the executive order on cost-benefit analysis.³ Executive branch agencies, in anticipation of OIRA review, have an incentive to develop a robust body of information on the likely potential costs and benefits of proposed regulations. Courts, when reviewing regulations challenged as “arbitrary and capricious” under the Administrative Procedure Act (APA),⁴ may take a fairly lax approach to interrogating cost-benefit analyses that have been given OIRA's imprimatur. In the context of rigorous executive oversight, such leniency centered on the reasonableness of the agency's actions, manifested in a relatively deferential *State Farm* judicial review standard,⁵ is appropriate.

But in the absence or failure of executive oversight, heightened judicial scrutiny should apply. Courts should probe the underlying cost-benefit analyses of independent regulatory agencies (not subject

³ Exec. Order No. 12,866, § 2(b), 3 C.F.R. 638, 640 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–03 (2012).

⁴ 5 U.S.C. § 706 (2012).

⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). For more discussion on the stringency with which courts apply the *State Farm* hard-look standard, see *infra* Part II.B.

to OIRA review) with more vigor, using a standard of *State Farm* “with teeth”—with an attendant close examination of the record amassed in the course of the regulatory rulemaking process.⁶

A recent controversial D.C. Circuit Court of Appeals decision, *Business Roundtable v. SEC*,⁷ is illustrative of the heightened scrutiny demanded by a “*State Farm* with teeth” standard. The D.C. Circuit struck down the “proxy access” rule promulgated by the Securities and Exchange Commission (SEC), an independent regulatory agency, as “arbitrary and capricious” under section 706 of the APA, as interpreted by *State Farm*. Writing for a unanimous panel, Judge Douglas Ginsburg excoriated the SEC for its lax approach to analyzing the economic effects of the rule.⁸ As an independent regulatory agency, the SEC is not subject to OIRA oversight of its cost-benefit analyses. Did this absence of executive oversight justify the D.C. Circuit’s application of a “*State Farm* with teeth” standard of scrutiny of the SEC’s underlying analysis?⁹ Could *Business Roundtable* be a harbinger of a new administrative law model that embraces this distinction and allows judges to calibrate the stringency of their review of an agency’s cost-benefit analysis by taking into account OIRA’s prior scrutiny? Moreover, might the SEC (and other independent regulatory agencies) respond by voluntarily submitting to OIRA cost-benefit review, thus avoiding more stringent judicial review in the future? There is striking emerging evidence that the specter of stepped-up judicial review, of the sort applied in *Business Roundtable*, has had an information-forcing effect upon the independent federal banking agencies, which have instituted measures to buttress their ability to produce robust cost-benefit analyses for proposed regulations.¹⁰

This dynamic interplay between executive oversight and judicial

⁶ By “*State Farm* with teeth,” I mean a more exacting standard than the ordinary, deferential one by which the agency is required only to provide reasonable assertions to support its action. Catherine M. Sharkey, *Preemption As a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1, 10 n.37 (2012) (citing Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 449 n.60 (2009)).

⁷ 647 F.3d 1144 (D.C. Cir. 2011).

⁸ *Id.* at 1149–51.

⁹ The *Business Roundtable* decision is susceptible to multiple interpretations. A more narrow view would limit its applicability to regulations promulgated by the SEC, given the SEC’s congressional mandate in the Securities Exchange Act to consider the economic implications of its rulemakings. An alternative political interpretation connects the outcome in *Business Roundtable* to an ideologically driven distaste for regulation. For further exploration of these alternatives, see *infra* notes 157–58, 265–66 and accompanying text.

¹⁰ For more on this information-forcing effect, see *infra* Part III.B.2.

review of agency cost-benefit analyses, noteworthy in its own right, also unearths more generalizable insights. Indeed, it reframes judicial review of agency conflict preemption determinations, taken up in Part IV. Preemptive rulemaking by executive branch agencies is subject to an executive order on federalism and a presidential memorandum on preemption.¹¹ But—in contrast to its role in the realm of executive agency cost-benefit analyses—OIRA actively polices neither executive branch nor independent agency compliance with these executive mandates. Thus, heightened judicial review is warranted.

Part IV then takes up the illustration of enhanced judicial scrutiny for conflict preemption determinations by independent agencies. In a mostly unnoticed provision of the Dodd-Frank Act, Congress fundamentally transformed the Office of the Comptroller of the Currency (OCC) from an executive branch agency to an independent regulatory agency¹² and simultaneously subjected the OCC's conflict preemption determinations to more stringent judicial review.¹³

Part V confronts potential obstacles to the proposed “*State Farm* with teeth” framework. It then extends the framework's reach by considering the role of Congress in providing courts with an incentive (or mandate) to apply heightened judicial scrutiny in the absence of executive oversight. The Dodd-Frank–OCC example highlights a potential novel role for Congress to play: setting the parameters in legislation for court-agency interaction on questions of conflict preemption.

I

AGENCY DECISIONS: COST-BENEFIT ANALYSIS AND CONFLICT PREEMPTION

Agencies' cost-benefit analyses and determinations of state-federal conflicts are conventionally seen as very different types of agency decisions. Cost-benefit analysis is seen (albeit, controversially to some) as implicating empirically verifiable information regarding the monetary costs and benefits of regulatory interventions. In sharp

¹¹ Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted as amended in* 3 U.S.C. § 601 app. at 807–10 (2012); Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009).

¹² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 315, 124 Stat. 1376, 1524 (2010).

¹³ *See id.* § 1044 (codified as amended at 12 U.S.C. § 25b(b)(5)(A) (2012)) (laying out amended standards of judicial review, by which courts scrutinize the OCC's conflict preemption findings for “substantial evidence” and apply the less deferential *Skidmore* review standards).

contrast, conflict preemption determinations are typically viewed as primarily legal and political decisions, implicating largely nonquantitative values embodied in federalism debates and pitting abstract notions of state sovereignty and regulatory experimentation against equally abstract notions of federal uniformity.

I resist this conventional categorization and focus instead on overlooked parallels. Agency conflict preemption determinations are admittedly multidimensional and premised, in part, on normative judgments not susceptible to empirical validation.¹⁴ But that should not obscure the fact that, at its core, a (if not the) significant factor governing an agency’s determination that state law interferes with the federal regulatory scheme is the net burden or cost imposed by the state regulation on the federal scheme. In other words, in the seemingly disparate realms of cost-benefit analysis and conflict preemption determinations, agency action is (or, I argue, should be) premised on an empirical or factual substrate of information.

Moreover, the information amassed by an agency in compiling its regulatory record is critical to its decision-making, and yet, left to its own devices, empirical data indicates that the agency is likely to underproduce such information. Agency cost-benefit analyses and conflict preemption determinations are, in other words, seemingly disparate decision-making realms plagued by a similar informational deficit.¹⁵ Indeed, given the lack of recognition of the fact-based nature of agency conflict preemption determinations, the deficit in that realm is especially dire.

A. *Underlying Factual Predicates*

Agency cost-benefit analysis has received a great deal of scholarly attention.¹⁶ And while controversies abound—particularly

¹⁴ While I certainly agree that there are additional dimensions to the preemption determination—such as federalism concerns—that are absent from cost-benefit analysis, I disagree that the two realms are wholly divorced. *Cf., e.g.*, Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 779–80 (2008) (arguing that while agencies are better than courts when it comes to “pragmatic” variables such as cost-benefit analysis, courts are the “least worst” institution to decide preemption questions due to their expertise in preserving constitutional division of powers, preserving stability, and balancing state and federal authority).

¹⁵ By informational deficit, I am referring primarily to situations in which the evidence is obtainable, but the agency is not adequately incentivized to gather and consider it. There is room, nonetheless, within my framework to accommodate situations involving evidentiary uncertainty. *See infra* note 258 (discussing the debate regarding the feasibility of agency cost-benefit analysis for financial regulations).

¹⁶ *E.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008); CASS R. SUNSTEIN, *THE COST-BENEFIT*

with respect to whether cost-benefit analysis should be the sine qua non of regulatory review,¹⁷ as well as the extent to which qualitative factors are systematically discounted by a quantitative assessment¹⁸—no one would dispute that cost-benefit analysis is grounded in, indeed determined by, empirical facts and information.¹⁹

In sharp contrast, agency production of empirical or factual information relating to federal-state law conflicts is largely unexplored terrain. The conventional take on preemption holds that it is a legal determination, centered primarily (if not exclusively) on statutory interpretation, which may or may not be the appropriate domain for agency action.²⁰

But this misses a significant dimension—particularly of implied conflict preemption—where the question is whether, notwithstanding the absence of any express legislative mandate, federal law trumps state law on the ground that the state law upends or significantly interferes with the federal scheme.²¹ This dimension of conflict preemption should be fact-based and focused on demonstrating the

STATE: THE FUTURE OF REGULATORY PROTECTION (2002); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008); Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998).

¹⁷ Compare Cass R. Sunstein, *The Stunning Triumph of Cost-Benefit Analysis*, BLOOMBERG VIEW (Sept. 12, 2012, 6:30 PM), <http://www.bloomberglaw.com/articles/2012-09-12/the-stunning-triumph-of-cost-benefit-analysis> (describing cost-benefit analysis as part of the informal constitution of the U.S. regulatory state), with Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1331 (1987) (“The considerable limitations of cost-benefit analysis can be avoided by recognizing that cost-benefit analysis alone cannot dictate regulatory results in most regulatory contexts.”).

¹⁸ See, e.g., McGarity, *supra* note 16, at 10–12 (expressing concern that even if a “soft” cost-benefit analysis could be carefully crafted to incorporate qualitative factors, it could still be used by powerful interest groups to undermine regulatory goals in such areas as health and environmental protection where, in the author’s view, qualitative considerations should often dominate).

¹⁹ Indeed, even as disputes rage with respect to whether financial regulations should be subject to cost-benefit analysis, see *infra* note 258 (citing sources on both sides of the debate), there is consensus that a prerequisite for such analysis is reliable facts and information.

²⁰ See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (“[T]he task for the Court [for preemption analysis] is to discern what Congress has legislated and whether such legislation displaces concurrent state law—in short, the task of statutory construction.”); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 7 (2013) (“[I]n an era in which textualist statutory interpretation has grown enormously in significance, a purposive approach to statutory interpretation remains powerful, even dominant, in preemption cases.”).

²¹ See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 588–89 (2009) (describing two kinds of implied conflict preemption: “where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce” and where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

net costs imposed by state regulation.

What might such fact-based information look like?²² Consider, for example, the regulatory record underlying the FDA’s 2008 proposed drug-labeling rule. The FDA claimed that its regulation, which pertained to the circumstances in which a drug manufacturer can unilaterally revise its warning on account of “newly acquired information,” should preempt conflicting state law requirements, so as to mitigate or prevent overwarning by drug manufacturers.²³ But nowhere in the regulatory record did the agency provide evidence to support this fear of overwarning. To the contrary, during the notice-and-comment period, some members of Congress opposed to the preemption rule requested data on the number of times the FDA had rejected a drug manufacturer’s proposed heightened warning.²⁴ The FDA responded by noting that, of more than three thousand such requests by drug manufacturers, the FDA had rejected the proposed warnings in only four instances and none on the basis of threatened harm to the public.²⁵

Or consider a potential claim by the OCC that a state predatory lending law significantly impairs the federal banking scheme and is thus preempted under the National Banking Act. In the early 2000s, the OCC took the position that, in promulgating its federal fair-lending regulations, it sought to achieve a carefully calibrated balance between promoting consumer protection and ensuring the availability of subprime credit.²⁶ Several states, including Georgia, enacted more

²² To be sure, unlike the case of agency cost-benefit analysis, most of the examples here point to the dearth, rather than the collection, of such fact-based evidence. But that is at least in part because, in this realm of conflict preemption, such information has not (to date) been insisted upon by executive oversight, judicial review, or congressional mandate.

²³ See Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices, 73 Fed. Reg. 49,603, 49,605–06 (Aug. 22, 2008) (“This amendment is intended to clarify FDA’s existing policies and is intended to ensure that scientifically valid and appropriately worded warnings will be provided in the approved labeling for medical products, and to prevent overwarning, which may deter appropriate use of medical products, or overshadow more important warnings.”).

²⁴ Letter from Henry A. Waxman, Chairman, House Comm. on Oversight & Gov’t Reform, et al., to Andrew C. von Eschenbach, Comm’r, FDA 4 (Jan. 23, 2008), available at <http://oversight-archive.waxman.house.gov/documents/20080123120931.pdf>.

²⁵ Letter from Stephen R. Mason, Acting Assistant Comm’r for Legislation, FDA to Hon. Edward M. Kennedy, Chairman, Comm. on Health, Educ., Labor, & Pensions, U.S. Senate 2–3 (Mar. 7, 2008), available at <http://www.regulations.gov/#!documentDetail;D=FDA-2008-N-0032-0023> (view attachment titled “FDA Response [Office of Legislation] to The Honorable Edward M. Kennedy”). For elaboration on this example, see Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2188–89 (2009) [hereinafter Sharkey, *Federalism Accountability*].

²⁶ See, e.g., News Release, Comptroller of the Currency Adm’r of Nat’l Banks, Comptroller Hawke Urges New Approach to Combating Predatory Lending (July 24,

stringent laws to combat predatory lending.²⁷ In response, in 2003, the OCC issued an administrative order preempting the Georgia law, positing that the state statute posed “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁸ I would argue that this conclusory justification is not sufficient and that the OCC should have to provide factual evidence sufficient to meet the legal standard that the state law “prevents or significantly interferes with” the national bank’s exercise of its regulatory powers.²⁹ To meet this standard, the OCC would have to demonstrate that the state law was in fact likely to restrict the availability of subprime credit.³⁰ The agency would also have to confront competing evidence that the more stringent state law would lead to lower foreclosure rates and less risky mortgage loans.³¹

As these examples demonstrate, it is often the case that agencies do not amass sufficient factual support for their conflict preemption determinations. Perhaps if the information were insisted upon by executive oversight or judicial review, the outcomes would have been

2003), available at <http://www.occ.gov/static/news-issuances/news-releases/2003/nr-occ-2003-57.pdf>.

²⁷ *Id.* at 2.

²⁸ Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,269 (Aug. 5, 2003). This preemption order was a precursor to the OCC’s strategy to effectuate blanket preemption of all state predatory lending laws via preemptive rulemaking. *See infra* note 229 (tracing the history of federal preemption of state predatory lending laws).

²⁹ Indeed, the Dodd-Frank Act now instantiates such a requirement: The OCC must demonstrate with “substantial evidence” that state law “significantly interferes” with the national banking regime in order to promulgate a preemptive regulation. Dodd-Frank Act § 1044(a), 12 U.S.C. § 25b(b)(1)(B), (c) (2012); *see also infra* Part IV.B.2 (discussing the Dodd-Frank Act’s modification of the OCC into an independent agency and its imposition of heightened judicial review for preemption determinations).

³⁰ In a single footnote of its order, the OCC did cite “a growing body of evidence” that state anti-predatory lending laws had this effect. 68 Fed. Reg. at 46,271 n.26. But the OCC made no attempt to show, for example, that the original version of the state law involved ambiguities that prevented bond-rating agencies such as Standard & Poor’s from being able to rate a significant number of Georgia home loans, which in turn caused some lenders to stop financing home loans within the state altogether. *Cf.* Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 374–75 (2005) (describing the problems with the Georgia law, which ultimately resulted in the law’s amendment). Moreover, the OCC should have to address contrary empirical evidence in the regulatory record. In the aforementioned footnote, the OCC acknowledged that various empirical studies had reached a contrary conclusion, but addressed only one, pointing to its inherent methodological limitations. 68 Fed. Reg. at 46,271 n.26.

³¹ *See, e.g.,* LEI DING ET AL., UNIV. OF N.C. CTR. FOR CMTY. CAPITAL, THE IMPACT OF FEDERAL PREEMPTION OF STATE ANTI-PREDATORY LENDING LAWS ON THE FORECLOSURE CRISIS 37–39 (2010), available at <http://ccc.unc.edu/contentitems/the-impact-of-federal-preemption-of-state-anti-predatory-lending-laws-on-the-foreclosure-crisis/> (presenting findings that preemption led to higher risk of a default for mortgages originated by OCC lenders in states with strong anti-predatory lending laws).

different, and the state regulation could persist, at least unless and until it was shown to impose significant costs on the federal regulatory scheme. *Cline v. Bank of America, N.A.* is a case in point.³² In that case, the court refused to find federal preemption of a state law restricting debt collection methods. In holding that the state law did not pose an obstacle to the federal banking regime, the court stated that there was “*no indication*” that the state law restrictions on debt collection methods “interfere in any way, much less a significant way, with the purposes and objectives of federal law.”³³ By implication, the court stood ready to be convinced on the basis of empirical evidence—for example, data indicating that banks in states imposing restrictions on debt collection methods have difficulties collecting debts.

I am hardly the sole advocate for the necessity of an empirical foundation for agencies’ conflict preemption determinations. This view has also been embraced by the American Bar Association, which adopted a resolution recommending that federal agencies provide “*factual support in the record* for any assertions that state tort law has in the past interfered with or is currently interfering with the operation of federal laws or regulations.”³⁴ The Administrative Conference of the United States (albeit, in a recommendation based on a report for which I served as academic consultant) has also endorsed a (fairly diluted) standard whereby “[t]he agency should provide a reasoned basis, with such *evidence* as may be appropriate, that supports its preemption conclusion.”³⁵ Finally, Congress, as part of the Dodd-Frank Act, has required that the OCC make “*specific finding[s]* regarding . . . preemption” that must be backed by “*substantial evidence*, made on the record of the [agency] proceeding.”³⁶

B. Incentives to Amass Regulatory Records

At present, both executive branch and independent regulatory agencies have insufficient incentives to amass comprehensive regulatory records in either the cost-benefit analysis or conflict

³² 823 F. Supp. 2d 387 (S.D. W. Va. 2011).

³³ *Id.* at 399 (emphasis added).

³⁴ Am. Bar Ass’n, Res. 117, § 3 (2010) (emphasis added).

³⁵ Adoption of Recommendation 2010-1, Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81, 83 (Jan. 3, 2011) (emphasis added).

³⁶ Dodd-Frank Act § 1044(a), 12 U.S.C. § 25b(c) (2012) (emphasis added). This provision, discussed further in Part IV.B.2, likewise casts doubt on the reasoning of the California Supreme Court in *Parks v. MBNA Am. Bank, N.A.*, 278 P.3d 1193 (Cal. 2012), discussed *infra* notes 254–56.

preemption determination realms.³⁷

Cost-benefit analysis is an inherently expensive process.³⁸ Due to the cost, agencies will often not invest enough in analysis to ensure that the rules they promulgate are optimally effective and value maximizing.³⁹ In 2007, Robert Hahn and Patrick Dudley concluded that the economic analyses prepared for environmental regulations typically do not provide enough information to maximize the effectiveness of a rule.⁴⁰ Based on a study of seventy-four regulations spanning three administrations, Hahn and Dudley found that a “significant percentage” of rules are lacking in some of the basic data necessary to undertake a proper economic analysis.⁴¹ Somewhat alarmingly, sixty-nine percent lacked quantitative information on net benefits and nearly half failed to quantify at least some of the benefits of alternative regulatory options.⁴² Their results were particularly

³⁷ The underlying reason(s) for this incentive-based problem—including reasons relating to public choice or capture theories—are elusive. Here, I rely instead on documented evidence that such a problem exists, without probing the underlying reasons. I do explore, however, an alternative possibility that the problem stems not from inadequate incentives, but lack of resources. *Infra* Part V.A.6.

³⁸ The Congressional Budget Office analyzed eighty-five Regulatory Impact Analyses (RIAs) and concluded that the average cost per RIA was \$570,000, but ranged from \$14,000 to \$6 million. CONG. BUDGET OFFICE, REGULATORY IMPACT ANALYSIS: COSTS AT SELECTED AGENCIES AND IMPLICATIONS FOR THE LEGISLATIVE PROCESS, at viii (1997). Hahn and Tetlock estimated that the cost of analyzing a major regulation is about \$720,000, and that total regulatory impact analyses cost about \$72 million annually. Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?*, 22 J. ECON. PERSP. 67, 80 (2008); see also Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1146 (2001) (“Cost-benefit analysis is expensive because surveys must be conducted and experts retained . . .”).

³⁹ See, e.g., Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL’Y 859, 861–62 (2000) (proposing a number of recommendations to improve agency compliance with Executive Order 12,866).

⁴⁰ Robert W. Hahn & Patrick M. Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?*, 1 REV. ENVTL. ECON. & POL’Y 192, 209 (2007); see also Hahn et al., *supra* note 39, at 861 (“The RIAs typically do not provide enough information to enable regulatory agencies to make decisions that will maximize the efficiency or effectiveness of a rule.”). Hahn et al. propose “scorecards” to attempt to summarize the impact of different regulations based on a number of indicators, including costs, benefits, cost savings, lives or life-years saved, cost effectiveness, and net benefits. *Id.* at 864, 877.

A number of scholars have criticized scorecards and related work for discounting benefits, antiregulatory bias, the use of ex ante estimates, qualitative benefits, the robustness of results, and the benefits and costs to subgroups. For a summary of the major critiques, see Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1024–31 (2004).

⁴¹ Hahn & Dudley, *supra* note 40, at 194.

⁴² *Id.* at 201, 203. Of the sixty regulatory impact analyses that monetized at least some costs and considered at least one alternative, eleven failed to monetize at least some costs of alternatives. *Id.* at 206; see also Hahn et al., *supra* note 39, at 861 (finding that, out of

alarming because the economic analyses they examined were submitted by executive branch agencies subject to OIRA/OMB review.

But the incentives facing independent regulatory agencies—not subject to OIRA/OMB review—are even more elusive. In a 2012 study of cost-benefit analyses contained in 192 proposed and final rules, orders, and notices issued under Dodd-Frank Act, promulgated by the SEC, the Commodity Futures Trading Commission (CFTC), the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), the Financial Stability Oversight Council, the Consumer Financial Protection Bureau (CFPB), the OCC, and the Office of Thrift Supervision (OTS), the Committee on Capital Markets Regulation found that more than one-quarter of the rules had no cost-benefit analysis at all.⁴³ More than one-third had entirely nonquantitative cost-benefit analysis.⁴⁴ And the majority of the rules that did contain quantitative analysis limited it to administrative and similar costs, ignoring the rule’s expected broader economic impact.⁴⁵

Comparing the cost-benefit analyses undertaken by executive and independent agencies, Kirti Datla and Richard Revesz highlight that “rules promulgated by independent agencies under the Dodd-Frank Act do not meet the standards set out in OMB Circular A-4, which ‘serves as best practices for conducting regulatory analysis.’”⁴⁶ A 2013 GAO report likewise found that independent financial agencies failed to fully quantify the costs associated with all but a dozen of the fifty-nine substantive Dodd-Frank rules that went into effect between July 2011 and July 2012, including major regulations

forty-eight RIAs conducted for major environmental, health, and safety regulations, agencies only quantified net benefits for twenty-nine percent of the rules).

⁴³ Media Advisory, Comm. on Capital Mkts. Regulation, CCMR Warns That Inadequate Cost-Benefit Analysis Opens Dodd-Frank Rulemaking to Challenge and Delay 1 (Mar. 7, 2012), http://capmksreg.org/pdfs/2012.03.07_CBA_letter.pdf.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 840 & n.395 (2013) (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-151, DODD-FRANK REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 15, 37–39 (2011)) (noting that independent agencies perform scant analysis of costs and alternatives as they are not subject to the full executive regulatory review process); see also OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 31 (2011) (noting that not a single one of seventeen “major” regulations promulgated or proposed by independent agencies between 2009 and 2010 contained full or complete information regarding the rule’s quantified costs and benefits).

expected to have a substantial economic impact.⁴⁷

Fraas and Lutter conclude that independent regulatory agencies “appear to be issuing major regulations without reporting any quantitative information on benefits and costs . . . that would routinely be expected from executive branch agencies covered by Executive Order 12866.”⁴⁸ Indeed, the GAO and OMB themselves have expressly recognized that independent financial regulatory agencies’ cost-benefit analyses fall significantly short of the standards set forth by the OMB.⁴⁹

Turning to the realm of agency conflict preemption determinations, the incentives for agencies to amass, develop, and rely on factual predicates for these agency conclusions are not only suboptimal (as in the case of cost-benefit analysis), but also often nonexistent, given the lack of executive oversight and, at least until recently, highly deferential judicial review. For a time, courts regularly gave mandatory *Chevron* deference to the preamble of an FDA drug-labeling regulation that asserted preemption of state law,

⁴⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 14-67, DODD-FRANK REGULATIONS: AGENCIES CONDUCTED REGULATORY ANALYSES AND COORDINATED BUT COULD BENEFIT FROM ADDITIONAL GUIDANCE ON MAJOR RULES 14-15, 77-84 (2013); *see also* OFFICE OF MGMT. & BUDGET, 2014 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 33 (2014) (noting that independent agencies “still continue to struggle in providing monetized estimates of benefits and costs of regulation”). The GAO has also observed that these independent regulatory agencies typically fail to identify and analyze the uncertainties that prevent them from conducting more thorough analyses. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 13-101, DODD-FRANK ACT: AGENCIES’ EFFORTS TO ANALYZE AND COORDINATE THEIR RULES 19 (2012).

⁴⁸ *See* Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions: Would Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions?* 2 (Resources for the Future Discussion Paper, RFF DP 11-16, 2011); *see also* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 110 (2011) (pointing to independent agencies’ tendency to conduct inferior cost-benefit analysis as a reason why these agencies’ regulations should be subject to more demanding cost-benefit requirements and OIRA review); Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons From the SEC’s Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1, 17 (2006) (“Though [the SEC] does conduct CBA on several levels, none of its practices demonstrate the analytical rigor contemplated by Executive Order 12,866 or the policy guidelines regarding its implementation.”).

⁴⁹ *See* U.S. GOV’T ACCOUNTABILITY OFFICE, HIGHLIGHTS OF GAO-13-101, A REPORT TO CONGRESSIONAL ADDRESSEES (2012), *available at* <http://www.gao.gov/assets/660/650948.pdf> (“GAO’s review of selected rules found that regulators did not consistently follow key elements of the OMB guidance in their regulatory analyses. . . . By not more closely following OMB’s guidance, [many] financial regulators continue to miss an opportunity to improve their analyses.”); OFFICE OF MGMT. & BUDGET, *supra* note 47, at 33 (stating that the absence of high-quality information on the costs and benefits of independent agencies’ rules “is a continued obstacle to transparency” that “might also have adverse effects on public policy”).

notwithstanding the dearth of empirical backing to support its claims about the risks of overwarning and the fact that the preamble was not subject to the notice-and-comment process.⁵⁰ In similar fashion, in the banking preemption context, for years the OCC received *Chevron* deference from courts regarding its largely unsupported assertions of conflict between state financial protection laws and the national banking scheme.⁵¹

A revised regime of information-forcing executive oversight and judicial review, proposed here, will fill the incentives gap that currently allows agencies to evade the dictates of executive orders and “reasoned decisionmaking” requirements under the APA. Independent agencies typically lack established internal standards for conducting cost-benefit analysis.⁵² The absence of internal standards suggests that they are unlikely to voluntarily adopt the practices that OMB has identified as conducive to higher-quality regulation.⁵³ Likewise, most agencies (executive and independent) lack internal guidelines for implementing the preemption provisions of the federalism executive order or for evaluating evidence in support of preemption.⁵⁴ Thus, some form of external accountability may be necessary to improve the quality of these agencies’ decisions.

⁵⁰ See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL’Y 1013, 1040–46 (2007) (noting, among other cases, *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 525 (E.D. Pa. 2006), and *In re Bextra & Celebrex Mktg. Sales Practices & Prods. Liab. Litig.*, No. M:05-1699 CRB, 2006 WL 2374742, at *8 (N.D. Cal. Aug. 16, 2006), as examples of courts giving *Chevron* deference to agency interpretive positions).

⁵¹ For discussion, see *infra* Part IV.B.2.

⁵² See Fraas & Lutter, *supra* note 48, at 10 (reporting that they were unable to identify any independent agency with established standards for economic analysis).

⁵³ See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis* 37 (Univ. Chicago Law Sch. John M. Olin Law & Econ. Working Paper No. 150, 2002) (“[M]any . . . [independent] agencies do not routinely quantify the benefits and costs of their proposed regulations, in part because they are not required to do so.”); see also Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,355 (July 10, 2013) (recommending that independent agencies engage in and document more rigorous cost-benefit analysis). A former FCC commissioner’s testimony before a House subcommittee in 2011 lends additional support: “[F]or not a single one of [dozens of rules] can we say with any certainty that the benefits exceed the costs because they are never documented. I can tell you from the perspective of an agency that has never been under [E.O. 12,866], there is a lot that is lost.” *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong 34 (2011) (statement of Harold Furchtgott-Roth, Former Comm’r, Fed. Commc’ns Comm’n).

⁵⁴ See Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 570–82 (2012) [hereinafter Sharkey, *Inside Agency Preemption*] (discussing the absence of internal agency standards or guidelines for preemptive rulemaking).

II

JUDICIAL REVIEW OF AGENCY DECISIONS

This Article starts from the premises that (1) agency cost-benefit analyses and agency conflict preemption determinations should be data driven, namely justified by factual or empirical information; and (2) executive oversight and judicial review of these agency determinations can be information forcing, leading to the development of more robust agency records subject to oversight, all in the pursuit of better (i.e., more rational and coherent) agency decision-making.⁵⁵ While it is difficult to posit an “optimal” amount of information production, the idea is to force agencies to present information sufficient for meaningful oversight.⁵⁶

This Part begins with an elaboration of the widely accepted premise that judicial review of agency action will be information forcing.⁵⁷ What is highly contested is the optimal stringency of such judicial review as a normative matter, the actual stringency applied as a descriptive matter, and whether varying degrees of scrutiny matter in practice.

I then propose a stepped-up “*State Farm* with teeth” standard to be applied when fact-based agency decisions are not subject to executive oversight. Under a more aggressive *State Farm* regime, an

⁵⁵ It is worth emphasizing at this point that the overall social welfare goal of the “*State Farm* with teeth” standard posited by this Article is improvement in regulatory outcomes, not merely the production of more (or optimal) information, as discussed in Part V.A.1.

⁵⁶ It may well be the case that the “optimal” amount of information might be different for the agency and its overseer. An agency, for example, may routinely gather information but then not provide such data to the relevant overseer. The information-forcing rationale, then, aims to spur the agency to reveal information to its overseer (whether the executive or courts) sufficient for that overseer to conduct meaningful oversight. *See, e.g.*, SUNSTEIN, *supra* note 16, at 127 (“If the EPA cannot explain in concrete terms, why it chose the particular levels it chose, how can courts know that the agency’s decision was not arbitrary?”). Moreover, as Sunstein and Vermeule aptly point out, “the standard of proof under which the agency must demonstrate its conclusions (to its own satisfaction)” and “the standard of review under which judges examine the adequacy of the agency’s conclusions” are distinct administrative law questions. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, U. CHI. L. REV. (forthcoming 2015) (manuscript at 38–39), available at <http://ssrn.com/abstract=2460822>. And it stands to reason that the informational demands of the first inquiry are larger than those of the latter.

⁵⁷ *See, e.g.*, Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 755–56 (2006) (arguing that both the executive and judiciary overcome their informational disadvantage by forcing information out of the agencies in the form of detail, polish, and thoroughness of their explanations); Emerson H. Tiller, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1453, 1459 (2002) (arguing that the essence of hard-look review is to attack the reasoning processes of the regulator and force it to spend more of its resources on producing information).

agency would have an enhanced incentive to amass and develop a robust regulatory record. Heightened judicial review, warranted in the absence of information-forcing executive oversight, would incentivize data-driven (and hence, better) agency decision-making.

A. *Information-Forcing Judicial Review*

In theory, judicial review ensures that the agency bases its decision on a reasoned analysis of relevant information. Even if a court is ill-equipped to evaluate the details of an agency’s scientific evidence, hard-look substantive review demands that an agency supply generalist judges with reasoned explanations backed by sufficient scientific references.⁵⁸ Judicial review thereby encourages the production of information and a more deliberative process within the agency. As Matt Stephenson has argued, the quality of the agency’s reasoning—including its explanations, consistency, and adequate consideration—creates a reviewable record.⁵⁹ Moreover, prompting agencies to develop a robust record is desirable to the extent that it is expertise forcing and thus leads to better regulatory outcomes, including forcing agencies to look for less costly ways to fulfill their statutory mandates.⁶⁰

Administrative law scholars have analyzed agencies’ conduct in the shadow of impending judicial review. Critics and proponents of heightened judicial review agree that the process has an information-forcing effect. For example, Thomas McGarity, a leading critic of such heightened review, spins a foreboding tale: “Fully aware of the consequences of a judicial remand, the agencies are constantly ‘looking over their shoulders’ at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking ‘record.’”⁶¹ There is

⁵⁸ An agency must demonstrate that it has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted).

⁵⁹ Stephenson, *supra* note 57, at 769–70. Stephenson’s main interest is in how an agency thereby signals to judges how it values the payoff of the regulation in question. Here, by contrast, my main interest is in forcing the agency to amass the requisite factual evidence as part of the reviewable regulatory record.

⁶⁰ See, e.g., Cass R. Sunstein, *From Technocrat to Democrat*, 128 HARV. L. REV. (forthcoming 2014) (manuscript at 8–9) (“[A] requirement of reason-giving can be seen as an effort to ensure that technical expertise is in fact being applied, and that agencies are not merely bowing to political winds.”).

⁶¹ Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992). The point here is that even McGarity—a leading critic of heightened judicial review, on the ground that it is likely to stymie new rulemakings,

little doubt that judicial review plays a significant information-forcing role.⁶²

B. Heightened Judicial Review

This Article proposes a novel argument for heightened judicial scrutiny in certain instances that is premised on a “reasoned decision-making” basis. The crux of the proposal is that judicial review of certain types of fact-based agency actions should be more stringent to the extent that such determinations—and the empirics, logic, and coherence underpinning them—have not been vetted by executive oversight.

Because I propose a stepped-up “*State Farm* with teeth” standard, as an initial matter, I specify how such a standard diverges from the status quo *State Farm* standard. I then present the argument for heightened judicial review in the absence of executive oversight and make the case that courts’ hard-look review of particular fact-based agency decisions falls within the appropriate sphere for administrative common law development, and, moreover, is fully consistent with existing Supreme Court precedent.⁶³ The heightened “*State Farm* with teeth” standard takes the common-law-like nature of hard-look review as its starting point and posits a distinction between independent and executive agencies in the *State Farm* hard-look context that has yet to receive attention.⁶⁴

experimentation, and revisitation of old rules—agrees that it is information forcing. McGarity’s concerns regarding the ossification of the rulemaking process are addressed in Part V.A.5.

⁶² Disagreements continue, however, with respect to whether “forcing” such information from an agency is normatively desirable. For elaboration, see *infra* Part V.

⁶³ My claim is that Supreme Court jurisprudence is not at odds with heightened judicial scrutiny for fact-based agency determinations premised on a “reasoned decision-making” basis. As discussed below, *infra* note 105 and accompanying text; *infra* note 112, there is Supreme Court majority support (the *Fox* dissenters along with Justice Kennedy in concurrence) for the “reasons-giving” requirement and for the proposition that fact-based agency determinations should receive heightened judicial scrutiny.

⁶⁴ Several commentators, however, have expressed their opinion that *Chevron* deference may be more or less appropriate depending upon whether the agency at issue is an executive or independent agency. Randolph May has argued that courts reviewing independent agencies’ statutory interpretations should accord them less *Chevron* deference than executive agencies. Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 442 (2006); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 203 n.456 (1998) (“If the courts really followed the common law logic of *Chevron*, they should have balked at extending *Chevron* to [independent] agencies, which have less democratic accountability than agencies like the EPA, whose heads serve at the pleasure of the President.”); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 164 n.31 (2002) (“Especially

I. State Farm

Today, different versions of *State Farm* hard-look review exist side by side. Aggressive judicial review of agency action peaked in the mid-twentieth century.⁶⁵ Over time, although there has been wide variation among and within jurisdictions, the general trend has been towards leniency.⁶⁶

To some judges (and commentators), *State Farm* review provides a light guiding hand, blocking only the most illegitimate or irrational agency actions.⁶⁷ Scholars justify this approach as consistent with agency expertise (as well as democratic accountability), especially in the context of technical and scientific health, safety, and environmental decisions.⁶⁸

with regard to independent agencies, under control of officials appointed much like Supreme Court Justices, [deference under the *Chevron* principle based on accountability] is more than a little difficult to support”); David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 689 n.40 (1997) (arguing that *Chevron*’s political accountability rationale “would imply that independent agencies might not deserve *Chevron* deference”).

In a similar vein, then-Professor Elena Kagan proposed that the degree of deference should vary depending on evidence concerning the extent of presidential involvement. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001) (arguing for a “more refined version” of *Chevron* guided by whether “presidential involvement rises to a certain level of substantiality, as manifested by executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes”).

⁶⁵ In the 1970s, the overall trend was toward more activist substantive judicial review. See, e.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1306 (1986) (summarizing cases that illustrate “the new mood of judicial activism that characterized the 1970s”); *id.* at 1308 (“[T]he era of judicial deference that had spanned three decades was abruptly brought to an end [in the 1970s].”).

⁶⁶ See, e.g., *id.* at 1320 (“[T]he Court briefly tolerated a restrictive ‘hard look’ doctrine that seemed tantamount to requiring agencies to find right answers . . . but . . . soon reconsidered and enunciated a more pragmatic, tolerant stance which seemed to require only a good faith effort by agencies struggling with issues of scientific uncertainty and intangible values.”).

⁶⁷ See, e.g., Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 312 (2004) (noting that the Supreme Court “has moved away from the ‘hard look’ exemplified by *State Farm*”); Sunstein & Vermeule, *supra* note 56 (manuscript at 55) (“Strengthened arbitrariness review . . . seems out of keeping with the [U.S. Supreme] Court’s instructions, and . . . with prominent decisions on the DC Circuit” (footnote omitted)); cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1119–21 (2009) (arguing that, in a series of counter-terrorism cases after 9/11, the D.C. Circuit Court of Appeals adopted a “soft look” judicial review standard for decisions of the Treasury Department’s Office of Foreign Assets Control).

⁶⁸ See, e.g., Stephen Breyer, *Vermont Yankee and the Courts’ Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1845 (1978) (arguing that “courts . . . should play a limited role, affecting as little as possible the outcome” given that “[j]udges, after all, are neither elected representatives nor experts in energy technology”); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 425–27 (2009) (supporting a soft hard-look doctrine when agencies act in their area of technical expertise in order to avoid judicial policymaking); Sunstein & Vermeule, *supra* note 56

While *State Farm* is now synonymous with the general administrative law standard of either reasonableness or hard-look review, another aspect of the case has received less attention. *State Farm* also gave specific guidance regarding an agency's consideration of data and conflicting empirical studies in the conduct of cost-benefit analysis. I explore in turn each of these dimensions of *State Farm*.

a. "Reasonableness" Standard

The standard of "reasonableness" appears nowhere in the APA. The APA provides that informal rules may be set aside if they are "arbitrary and capricious," represent an "abuse of discretion," or are "otherwise not in accordance with law."⁶⁹ The intended stringency of this review is the subject of much controversy. In *Overton Park*, the progenitor of the *State Farm* review standard, the Court explained that "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."⁷⁰

At a minimum, the APA "sets a lower boundary for analysis that even presidents cannot ignore."⁷¹ In this vein, Donald Arbuckle (an OIRA career official who served in four presidential administrations) recounts a colorful anecdote:

Disagreement between OMB and the [FDA] regarding a rule establishing nutrition labeling standards for food products led to a meeting between President [George H.W.] Bush, Secretary of the Department of Health and Human Services[] Louis Sullivan, and FDA Commissioner David Kessler. Sullivan argued that an option supported by OMB, favored by the meat industry, and to which the president was initially sympathetic could not be adopted because it was not supported by the rule-making record, a fundamental rule-making process requirement derived from the APA. A nonplussed President Bush is reported to have stated: "I'm a little puzzled. I'm being told that I can't just make a decision and have it promptly executed, that the Department can't just salute smartly and go execute whatever decision I make. Why is that?"⁷²

(manuscript at 39–40) (characterizing the Supreme Court as "emphatic that when agencies act at the frontiers of knowledge, courts should be extraordinarily reluctant to intervene"); see also Kagan, *supra* note 64, at 2380 (arguing that greater deference is appropriate based on accountability).

⁶⁹ 5 U.S.C. § 706 (2012).

⁷⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁷¹ Donald R. Arbuckle, *The Role of Analysis on the 17 Most Political Acres on the Face of the Earth*, 31 RISK ANALYSIS 884, 888 (2011).

⁷² *Id.*; accord Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 994–95 (2001) (citing DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 68 (2001)).

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The answer is that, without sufficient backing in the rulemaking record, a rule (even if endorsed by the President) does not comply with the APA’s “arbitrary and capricious” threshold standard and cannot be validly promulgated.

The APA requires agencies to attach a “concise general statement of basis and purpose” to final rules.⁷³ An agency must also provide reasoned explanations for its rules.⁷⁴ It must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.⁷⁵

Under so-called hard-look review, the reviewing court examines the administrative record and the agency’s explanation to determine whether the agency (1) relied on factors Congress did not intend it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation that runs counter to evidence before the agency, or (4) is so implausible that it could not be ascribed to the product of agency expertise.⁷⁶ Courts cannot accept a post hoc rationalization for agency action that is not articulated by the agency,⁷⁷ which encourages the agency to include all information necessary for judicial review of the rule in the agency record.

b. Cost-Benefit Analysis Guidance

State Farm is instructive for its application of hard-look review to agency cost-benefit analysis. In *State Farm*, the Court overturned the Department of Transportation’s (DOT) rescission of a rule requiring passive restraint devices (automatic seatbelts or airbags) in all new motor vehicles produced after a certain date. First, a unanimous Court faulted DOT for not even considering a proposed airbag requirement as an alternative to rescinding the passive restraint requirement entirely.⁷⁸ This was an easy call for the Court, given that

⁷³ 5 U.S.C. § 553(c) (2012).

⁷⁴ See Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 360 (2012) (“At the most basic level, to issue a regulation, administrative procedure and judicial doctrine require an agency to publish a detailed explanation of the grounds and purposes of the regulation . . .”).

⁷⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷⁶ *Id.* For the most part, these are judicially imposed requirements, but statutory language can also provide reinforcement.

⁷⁷ See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94–95 (1943) (“We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”).

⁷⁸ *State Farm*, 463 U.S. at 46 (“The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modify the standard to require that airbag technology be utilized.”). Several

“[n]ot one sentence of its rulemaking standard discusses the airbag-only option.”⁷⁹ The Court was not called upon to probe any justification given by the National Highway Traffic Safety Administration (NHTSA) given that, “[n]ot having discussed the possibility, the agency submitted *no reasons at all*.”⁸⁰

But the DOT had conducted a cost-benefit analysis as part of its decision-making process with respect to automatic seatbelts. A divided (5–4) Court held that DOT had downplayed the safety benefits of automatic seatbelts and, as a result, the agency was too quick to reach conclusions about the benefits and costs of automatic seatbelts relative to manual seatbelts.⁸¹ To be clear, the Court did not find DOT’s action arbitrary and capricious on account of the agency’s discounting the value of the contrary empirical studies.⁸² Indeed, the Court specifically remarked that it was “within the agency’s discretion to pass upon the generalizability of these field studies. This is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to review.”⁸³

The Court instead determined that DOT’s reasoning was flawed. According to the Court, even if the empirical studies were not determinative, it was nonetheless likely that automatic seatbelts would increase seatbelt usage.⁸⁴

empirical studies at the time demonstrated that airbags save lives. NHTSA, in its 1977 rule, estimated about 12,000 lives would be saved per year. *Id.* at 35 (citing 42 Fed. Reg. 34,289, 34,298 (July 5, 1977)). The Court also noted that the agency’s decision should not have been based purely on the automotive industry’s preference for installing seatbelts instead of airbags. *Id.* at 49.

⁷⁹ *Id.* at 48.

⁸⁰ *Id.* at 50 (emphasis added).

⁸¹ *Id.* at 51. Four Justices drew a sharp distinction between the agency’s lack of consideration of the airbag alternative—for which NHTSA gave “no explanation at all”—and its pessimistic analysis of the benefits of automatic seatbelts. *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part). These four Justices dissented from the portion of the majority opinion finding that NHTSA’s view of automatic seatbelts was arbitrary and capricious. According to the dissent, NHTSA’s explanation, “while by no means a model, is adequate.” *Id.*

⁸² DOT estimated that automatic seatbelts had to increase seatbelt usage by thirteen percent over manual belts to justify the increased cost to automobile manufacturers. *Id.* at 51 (majority opinion). But, according to DOT, there was “substantial uncertainty” that automatic seatbelts would increase seatbelt usage by this amount. *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part). Specifically, DOT rejected an empirical study that purported to demonstrate that automatic belts more than doubled the usage of seatbelts over manual belts. DOT dismissed the relevance of this study because the automatic seatbelts in the study were equipped with (subsequently banned) ignition interlocks. *Id.* at 29 (majority opinion).

⁸³ *Id.*

⁸⁴ The Court criticized DOT for its failure to consider the benefit provided by automatic seatbelts over manual belts in light of “inertia”—namely, that an automatic belt

Some generalizable criteria for evaluation of empirical studies as part of cost-benefit analyses emerge from the Court’s reasoning in *State Farm*. To begin, the Court made the pragmatic observation that “not infrequent[ly]” available data will not resolve a regulatory issue.⁸⁵ An agency is therefore called upon to “exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.”⁸⁶ But there are nonetheless discernible limits to the agency’s discretion. Chief among these is that the agency must point to adequate support in the record for material empirical conclusions.⁸⁷

2. State Farm “With Teeth”

As discussed above, *State Farm* sent conflicting signals about the stringency of the judicial review standard. The opinion rings with deference to agency expertise,⁸⁸ but the five-Justice majority enthusiastically mines the agency record on its own and is thus hardly deferential at all.⁸⁹ Does *State Farm* itself support a more demanding “*State Farm* with teeth” standard? The Court’s language would seem to say “no”;⁹⁰ whereas the Court’s actions—at least with respect to finding NHTSA’s view of automatic seatbelts arbitrary and capricious in light of the Court’s probe of the underlying empirical evidence—suggest “yes.”⁹¹

The APA sets a minimum standard for agency analysis. How far courts can raise the bar remains to be seen. While lower courts

connects each time unless and until it is physically disconnected. *Id.* at 54.

⁸⁵ *Id.* at 52.

⁸⁶ *Id.*

⁸⁷ *Id.* (“[W]e do appreciate the limitations of this record in supporting the agency’s decision.”).

⁸⁸ *Id.* at 33 (“This task called for considerable expertise and Congress responded by enacting the National Traffic and Motor Vehicle Safety Act of 1966”); *id.* at 48 (“Expert discretion is the lifeblood of the administrative process . . . , the strength of modern government” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962))).

⁸⁹ Recall that a unanimous Court faulted NHTSA for not supplying any explanation at all with respect to its failure to consider the airbag alternative. *Id.* at 50. Under any level of scrutiny, the agency’s lack of consideration altogether would fail judicial review premised on “reasons-giving.” But the five-Justice majority then proceeded to probe the agency’s decision-making process and underlying record evidence with respect to the automatic seatbelt option. *See id.* at 51–57 (second-guessing the agency’s finding that it could not reliably predict the safety benefits of automatic seatbelts).

⁹⁰ *See id.* at 43 (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”).

⁹¹ *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1066 (1995) (drawing attention to the “conflicting messages” sent by the *State Farm* Court).

(particularly the D.C. Circuit) have raised the bar by adding substance to APA provisions, the Supreme Court has been sharply divided on the propriety of this common-law-like development of administrative law. Moreover, the Court has questioned whether the distinction between executive and independent agencies should inform the levels of judicial scrutiny agencies receive. The disagreement is most clear between Justice Scalia's majority and Justice Breyer's dissent in *FCC v. Fox Television Stations, Inc.*⁹² Below I discuss the development of hard-look review as a form of administrative common law and the ensuing divide between Justices Scalia and Breyer. This discussion sets the stage for my proposal of a heightened standard of judicial scrutiny in cases involving independent agencies.

a. Hard-Look Review as Administrative Common Law

There is no gainsaying that courts have engrafted myriad requirements onto the minimum thresholds of the APA. In the hands of the lower courts, the modest-sounding minimum APA requirements⁹³ have evolved into more stringent ones.⁹⁴

Gillian Metzger has characterized the Court's adumbration of *State Farm* arbitrary and capricious review as a quintessential example of "administrative common law," namely judicially created doctrine.⁹⁵ According to Metzger, in *Chevron*, the Supreme Court justified such a framework "on general assumptions about congressional intent, constitutional considerations and the appropriate bounds of the judicial role, and the relative accountability of courts and agencies."⁹⁶

But others—on the bench and in the academy—are not so welcoming of this development. As then-Professor Antonin Scalia remarked (with noticeable chagrin):

⁹² 556 U.S. 502 (2009).

⁹³ See *supra* notes 71–75 and accompanying text (outlining the minimum rulemaking requirements that the APA requires of agencies, including a general statement of purpose and reasoned explanations for rules).

⁹⁴ See, e.g., *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) ("There are contexts, however, contexts of fact, statutory framework and nature of action, in which the minimum requirements of the Administrative Procedure Act may not be sufficient."); see also Rabin, *supra* note 65, at 1309 ("[T]he *Kennecott Copper* line of cases established an activist foundation for statutory construction of the APA informal rulemaking provision, just as *Overton Park* declared an interventionist principle for judicial review of informal adjudication.").

⁹⁵ Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1303 (2012). Metzger describes the trajectory as a "pattern of judicial common law development punctuated by periodic resistance." *Id.* at 1305.

⁹⁶ *Id.* at 1302.

The courts have attached many procedural requirements not explicit in the APA. These include the requirements that the agency publish and permit the public to comment on all data and studies on which it intends significantly to rely, and that the agency justify the rule in detail and respond to all substantial objections raised by the public comments.⁹⁷

Justice Breyer, by contrast, embraces an evolutionary view of the arbitrary and capricious standard: “[I]t is a *process*, a process of learning through reasoned argument, that is the antithesis of the ‘arbitrary.’”⁹⁸

To be sure, the development of administrative common law has some clear outer limits. In *Vermont Yankee Nuclear Power Corp. v. NRDC*,⁹⁹ for example, the Court forbade lower courts from subjecting agencies to additional, judicially fashioned procedural requirements.¹⁰⁰ *Vermont Yankee* (at least as it has been applied to date) is, however, a relatively soft outer limit.¹⁰¹ Moreover, while *Vermont Yankee* technically bars judicially imposed procedural requirements, hard-look review is grounded in the substantive—not procedural—provisions of the APA.¹⁰² Thus, while *Vermont Yankee*

⁹⁷ Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION, July/Aug. 1981, at 26. Agencies must respond to outside comments passing a “threshold requirement of materiality.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (1973); *see also* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (1980) (laying out the basis for notice-and-comment requirements).

⁹⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 548 (2008) (Breyer, J., dissenting). Prominent administrative law scholars are likewise divided on this point. Cass Sunstein favors something akin to Justice Breyer’s evolutionary approach, whereas Adrian Vermeule echoes Justice Scalia’s formalist position. *See infra* notes 120–22 and accompanying text (describing disagreement between Sunstein and Vermeule on whether courts can require agencies to engage in quantified cost-benefit analysis as part of arbitrariness review under the APA).

⁹⁹ 435 U.S. 519 (1978).

¹⁰⁰ *Id.* at 525 (chastising the D.C. Circuit for “engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress”).

¹⁰¹ *See, e.g.*, Rabin, *supra* note 65, at 1310 (“[O]n close examination it was far from clear that the [*Vermont Yankee*] Court had in fact undercut the activist thrust of the early 1970s to any significant extent.”). Indeed, the soft nature of this outer limit has led some administrative law scholars to call for a “*Vermont Yankee II*.” *See, e.g.*, Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 419 (1981) (“If the Court is serious about preserving the outcome of *Vermont Yankee*, it must add to its procedural decision a substantive one, modifying the expansive scope of a review standard that allows reviewing courts to build a record in informal proceedings.”); *see also* Sunstein & Vermeule, *supra* note 56 (manuscript at 57) (calling for a “*Vermont Yankee II*”). But scholars in the “*Vermont Yankee II*” camp have hitherto been “sorely disappointed.” Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 859 (2007).

¹⁰² Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 154 n.20 (2007) (citing Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L.

sets a maximum standard for judicial analysis of agency procedural requirements, it ostensibly does not affect the permissibility of stringent judicial review of the substance (i.e., the reasonableness) of agency decision-making.¹⁰³

b. Heightened Judicial Scrutiny of Independent Agencies

Justice Scalia's faithful adherence to the text of the APA and rejection of judicial common-law-like elaboration won the day in *FCC v. Fox Television Stations, Inc.*,¹⁰⁴ a sharply divided (5–4) Supreme Court case involving the Federal Communications Commission's revision of its indecency policy from permitting a single "fleeting" use of an expletive to a policy that made no such exception.

The dissent by Justice Breyer, relying on *State Farm*, would have required the FCC to justify its change in policy with reasoned explanations of why it departed from the previous policy.¹⁰⁵ Although the dissent resisted the majority's characterization of its application of a "heightened standard" of judicial review,¹⁰⁶ the dissent did nod in

REV. 505, 530 (1985)). *But see* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986) (interpreting *Vermont Yankee* to mean that "procedural questions ultimately call for the same type of analysis that substantive agency rulings do"); Sunstein & Vermeule, *supra* note 56 (manuscript at 39–40) (arguing that the Supreme Court intervened in *Balt. Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983), to preclude "stringent arbitrariness review of [agency] decisions, a course that the *Vermont Yankee* opinion had left open, perhaps incautiously"). Given the "conflicting signals," *supra* notes 88–91 and accompanying text, sent by the Supreme Court in *State Farm* (which was handed down a few weeks after *Baltimore Gas & Electric*), I am not persuaded that *Baltimore Gas & Electric* put this issue to rest.

¹⁰³ In fact, as Judge Carl McGowan of the D.C. Circuit suggested, the effect of *Vermont Yankee's* restriction on augmenting procedural requirements may have been to augment courts' scrutiny at the substantive review level. *See* Carl McGowan, *Reflections on Rulemaking Review*, 53 TUL. L. REV. 681, 695 (1979); *see also* Beermann & Lawson, *supra* note 101, at 858–59 (criticizing *Vermont Yankee* for creating rigorous substantive judicial review which raises "essentially the same problems of law and policy as did the procedural doctrines rejected by the Court"); Gillian E. Metzger, *From the Files of the Supreme Court: The Hidden Story of Vermont Yankee*, ADMIN. & REG. L. NEWS, Winter 2006, at 5, 5 (suggesting that the *Vermont Yankee* procedural limitations have simply forced judges either to "root[] their procedural demands (however implausibly) in the text of [APA] § 553" or to channel their scrutiny into substantive review).

¹⁰⁴ 556 U.S. 502 (2009).

¹⁰⁵ *Id.* at 550 (Breyer, J., dissenting) ("[T]he agency must explain *why* it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?"). Moreover, Justice Kennedy's concurrence expresses support—at least in some instances—for this reason-giving requirement. *See id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment) ("[A]n agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so.>").

¹⁰⁶ *Id.* at 550 (Breyer, J., dissenting) ("Contrary to the majority's characterization of

that direction by highlighting that independent agencies are designed to be insulated from “political oversight, . . . [b]ut that [independent] agencies’ comparative freedom from ballot-box control makes it all the more important that courts review [their] decision-making to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons.”¹⁰⁷ Justice Breyer’s dissent thereby links independent agencies’ “freedom from ballot-box control” to the need for careful judicial scrutiny.

The *Fox* majority bristled at the notion of subjecting independent agencies to heightened judicial scrutiny. With great rhetorical flourish, Justice Scalia retorted: “There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch, by letting Article III judges—like jackals stealing the lion’s kill—expropriate some of the power that Congress has wrested from the unitary Executive.”¹⁰⁸ Justice Scalia elaborated (with more mundane language): “The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”¹⁰⁹ Moreover, as Justice Scalia reminds, “[t]he Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency, nor in the standards for reviewing agency action.”¹¹⁰

Significant for purposes of this Article, the exchange between Justices Scalia and Breyer in *Fox* draws attention to the possibility that judicial review could apply differently to independent regulatory agencies and executive agencies.¹¹¹ And while Justice Scalia’s view prevails in *Fox*, it by no means settles the dispute.¹¹²

this dissent, it would not (and *State Farm* does not) require a ‘heightened standard’ of review. Rather, the law requires application of the same standard of review to different circumstances, namely circumstances characterized by the fact that change is at issue.”)

¹⁰⁷ *Id.* at 547.

¹⁰⁸ *Id.* at 525–26 (opinion of Scalia, J.) (citations omitted).

¹⁰⁹ *Id.* at 523. *But see* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 460–62, 491–98 (2008) (presenting data demonstrating presidential political influence over independent agency officials).

¹¹⁰ *Fox*, 556 U.S. at 525 (citations omitted) (citing 5 U.S.C. §§ 701(b)(1), 706 (2012)).

¹¹¹ Randolph May likewise reads *Fox* for “what the opinions may portend concerning the question of a differential standard of review for executive branch and independent agencies.” Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433, 437 (2010).

¹¹² It is worth noting that Justice Kennedy (who provided the fifth vote with his

First, it is worth pointing out that Justice Scalia did not claim that that APA *prohibits* a court from adjusting its level of judicial scrutiny on the basis of whether the agency is independent or executive, but merely noted that the APA does not require it.

Second, Justice Breyer's argument for (de facto) heightened judicial review is a general, across-the-board argument premised on "political accountability," namely that judicial review of independent agency actions should be more stringent because independent agencies are less accountable to the President. Such a general argument for heightened scrutiny of independent agencies premised on political accountability is not, however, the only (or strongest) justification.¹¹³

I take insights from *Fox* in a different direction. This Article seeks to build a more limited argument for heightened judicial scrutiny premised on a "reasoned decision-making" basis (which commanded a majority of the Court)¹¹⁴—namely, that judicial review of certain types of independent agency actions should be more stringent because their determinations are not subject to information-forcing executive oversight.¹¹⁵ More specifically, with respect to the

concurrence) signaled that his position hinged in large part on the fact that the FCC's policy change had more to do with its interpretation of law than its findings of facts. *Fox*, 556 U.S. at 538 (Kennedy, J., concurring in part and concurring in the judgment) ("The present case does not raise the concerns addressed in *State Farm*. Rather than base its prior policy on its knowledge of the broadcast industry and its audience, the FCC instead based its policy on what it considered to be our holding in *FCC v. Pacific Foundation*. The FCC did not base its prior policy on factual findings." (citations omitted)).

¹¹³ Justice Breyer's dissent implies that judicial scrutiny should vary inversely with political accountability. But if the problem is the insulation of independent agencies from ballot-box control, why give more power to an institution (courts) that is even more insulated from ballot-box control? I am grateful to Richard Revesz for prompting this question.

¹¹⁴ See *supra* note 105 (providing the reasoning shared by the dissent and concurrence in *Fox*, namely that an agency must provide a reasoned explanation for its decision when it changes course).

¹¹⁵ Additional arguments may support more stringent judicial review, even of executive branch agencies subject to meaningful executive oversight. For example, judicial review could serve as a corrective to overtly politicized agency determinations. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (characterizing *Massachusetts v. EPA*, 549 U.S. 497 (2007), as "part of a trend in which the Court has at least temporarily become disenchanted with executive power and the idea of political accountability, and is now concerned to protect administrative expertise from political intrusion"). Thus, Justice Scalia's invocation of *Massachusetts v. EPA* as a counterexample of an executive branch agency subject to searching judicial review hardly refutes the proposition that independent regulatory agencies merit heightened judicial review. See *Fox*, 556 U.S. at 525 (opinion of Scalia, J.) ("Nor does any case of ours express or reflect the 'heightened scrutiny' [the dissent] would impose. Indeed, it is hard to imagine any closer scrutiny than that we have given to the Environmental Protection Agency, which is not an independent agency." (citing

specific agency decision-making realms of cost-benefit analysis and conflict preemption determinations, executive oversight and judicial review play central information-forcing roles vis-à-vis agencies (be they independent or executive) and can serve as functional substitutes.

This Article highlights salient examples in both contexts (explored in the subsequent two Parts) in order to illustrate heightened judicial review imposed in the absence of executive oversight.¹¹⁶

III

AGENCY COST-BENEFIT ANALYSIS

Cost-benefit analysis is the core of OIRA’s regulatory review. By executive order in 1981, then-President Ronald Reagan ushered in an era of executive oversight of agency rulemaking based primarily on cost-benefit analysis. This has persisted for more than three decades and seems to be a permanent feature of the regulatory landscape.¹¹⁷

An agency’s failure to conduct a regulatory impact analysis pursuant to the executive order is not judicially reviewable.¹¹⁸ Nor are agencies expressly required to conduct cost-benefit analysis by the plain text of the arbitrary and capricious standard of section 706 of the APA.¹¹⁹ To some, that should end the inquiry into whether courts can legitimately require agencies to engage in quantified cost-benefit analysis, let alone apply heightened scrutiny to the agency’s effort.¹²⁰

But others, most prominently Cass Sunstein, align with Justice

Massachusetts v. EPA, 549 U.S. at 533–35)).

¹¹⁶ Moreover, there might be extensions to pursue in different realms. Consider, for example, judicial review of environmental impact statements required under the National Environmental Policy Act. If the EPA decides that an action is environmentally unsatisfactory, it refers the matter to the Council on Environmental Quality, a central agency that is part of the Executive Office of the President, which can weigh in on the matter with published findings. As an empirical matter, one might ask, do courts apply a more stringent standard of judicial review to an agency’s environmental impact statement when the CEQ has published negative findings? *See, e.g.,* Sierra Club v. U.S. Army Corps of Eng’rs, 701 F.2d 1011, 1030 (1983) (“[T]he court may properly be skeptical as to whether an EIS’s conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.”). I am grateful to Karen Bradshaw Schulz for suggesting this example to me.

¹¹⁷ *See supra* note 16 (describing the pervasiveness of cost-benefit analysis in the regulatory state).

¹¹⁸ Exec. Order No. 12,291, § 9, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

¹¹⁹ *See* 5 U.S.C. § 706 (2012) (no mention of cost-benefit analysis).

¹²⁰ For example, Adrian Vermeule argues emphatically against the existence of “any warrant for reading a presumptive requirement of quantification . . . directly into Section 706 of the APA, under the rubric of arbitrary and capricious review.” Sunstein & Vermeule, *supra* note 56 (manuscript at 36–37).

Breyer's evolutionary approach to the judicial development of arbitrariness review: "[I]t would generally seem arbitrary for an agency to issue a rule that has net costs (or no net benefits), at least unless a statute requires it to do so."¹²¹ Still, critics might insist that such administrative common law development by courts must be premised on congressional authorization, either explicitly or, at a minimum, by some statutory hook.¹²²

Given this debate, at the outset I attempt to make the case that—at least with respect to the particular realms of agency cost-benefit analysis and agency conflict preemption determinations—objections to the legitimacy or authority of judicial review absent explicit congressional authorization might be tempered.

I am persuaded that cost-benefit analysis and conflict determinations are prime examples of fact-based decisions resting upon expertise that Congress has implicitly delegated to agencies. Congress legislates against the backdrop of the executive orders on cost-benefit analysis and federalism that have taken place in the decades since the APA.¹²³ Congress's silence could thus plausibly be interpreted as authorizing both cost-benefit analysis and conflict preemption determinations—albeit limited to executive branch agencies subject to the relevant executive orders.

But, separate and apart from such a theory of implicit congressional delegation, there are two additional responses to the strong-form legitimacy concerns which apply to executive and independent agencies alike. First, in practice, the statutory "hooks" relied upon by courts in these realms may be more suggestive than determinative.¹²⁴ Second, if agencies (be they executive or

¹²¹ *Id.* at 34. Sunstein equivocates: "To be sure, this argument is not self-evidently correct. Plausible questions might be raised. . . . But as a matter of principle, that approach has some appeal, and it would not be beyond the pale." *Id.*

¹²² Indeed, Sunstein invokes such a statutory hook when he characterizes his approach as "an effort to link arbitrariness review to the statutory requirement to consider the relevant effects." *Id.*

¹²³ *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (establishing cost-benefit analysis requirements for some agency decision-making); Exec. Order No. 13,563, 76 Fed. Reg. 3281 (Jan. 18, 2011) (same); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999) (establishing guiding policies on federalism).

¹²⁴ *See infra* note 158 and accompanying text (noting the statutory hook for judicial review of cost-benefit analysis provided by the 1996 National Securities Markets Improvement Act, which listed the "efficiency, competition, and capital formation" as factors for the SEC to consider).

Taking this even further, Michael Livermore and Richard Revesz have argued that, where the Court has explicitly required the EPA to consider health-based standards in the context of air quality, "consideration of costs in the face of congressional silence should be prohibited only in cases in which it would lead to compromising the stringency of the health-based standards, . . . not where it would lead to strengthening them." Michael A.

independent) do undertake a cost-benefit analysis, courts will review it.¹²⁵ In this way, I claim that regulatory impact analyses should—and as a practical matter do—play a role in substantive judicial review of the underlying regulation under *State Farm* arbitrary and capricious review. I turn now to the innovative further question at the heart of this Article.

To what extent is judicial review of cost-benefit analysis under *State Farm* affected by the presence or absence of prior executive oversight? It seems plausible that courts would apply a “softer” *State Farm* review to regulations whose cost-benefit analyses have withstood OIRA’s scrutiny.¹²⁶ And, indeed, there is some (albeit limited) anecdotal evidence that this is so.¹²⁷

Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1263 (2014). The Livermore and Revesz view draws support from *Energry Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009) (holding that the EPA permissibly relied on cost-benefit analysis in promulgating regulations under a vague environmental provision), and may also be reflected in the Supreme Court’s recent decision in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014), in which the Court affirmed the EPA’s authority, where Congress has been silent or ambiguous, to take costs into account when implementing environmental regulations. In vociferous dissent, Justice Scalia charges that the EPA reads in cost-benefit analysis despite the absence of a congressional mandate. *Id.* (Scalia, J., dissenting).

¹²⁵ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–57 (1983) (reviewing the NHTSA’s cost-benefit analysis in connection with its decision to revoke a previous passive-restraint requirement); James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit’s Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1831 (2012) (“In *State Farm*, the agency was under no express statutory obligation to weigh the rule’s potential costs and benefits. Yet the agency did so anyway. The Supreme Court proceeded to assess the agency’s actions on the agency’s own terms.”).

¹²⁶ It is intriguing to observe that the period of more general deferential *State Farm* review evolved contemporaneously with the dawn of OIRA regulatory review.

¹²⁷ I count as “soft evidence” cases in which judges mention, in a context that suggests significance, the fact that the regulation at issue has garnered OIRA’s imprimatur. See, e.g., *National Mining Ass’n v. MSHA*, 599 F.3d 662, 667 (D.C. Cir. 2010) (rejecting a challenge to a regulation, noting that, under Executive Order 12,866, it was subject to review for compliance with “efficiency requirements”); *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1256 (D.C. Cir. 2004) (rejecting a challenge to NHTSA’s proposed unbelted rigid barrier crash test for passenger cars, noting that NHTSA had submitted a draft final regulation to OIRA for review); *Cactus Corner, LLC v. U.S. Dep’t of Agric.*, 346 F. Supp. 2d 1075, 1087 (E.D. Cal. 2004) (rejecting a challenge to a USDA/APHIS rule allowing and setting conditions for importation of Spanish clementines, noting that under Executive Order 12,866, APHIS prepared a Regulatory Impact Analysis to assess costs and benefits), *aff’d*, 450 F.3d 428 (9th Cir. 2006).

Conversely, in several cases, courts have invalidated regulations while noting an agency’s failure to adhere to OIRA’s recommendations. See, e.g., *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 49–52 (2d Cir. 2003) (invalidating a NHTSA regulation subject to OIRA review as arbitrary and capricious, where NHTSA had rejected OIRA’s suggestions in its return letter to the agency); *Defenders of Wildlife v. Salazar*, 842 F. Supp. 2d 181, 188 n.4 (D.D.C. 2012) (invalidating regulations as arbitrary and capricious

More to the point of this Article, I argue that a court *should* take into account whether OIRA has given its imprimatur to the agency's cost-benefit analysis when calibrating the level of scrutiny it directs to the task at hand.¹²⁸ It follows that courts should subject cost-benefit analyses conducted by independent regulatory agencies (not subject to OIRA review) to more stringent review. While here, too, I am not aware of any evidence that courts systemically treat independent agencies differently from executive branch agencies in this respect, I have again uncovered some (scant) anecdotal evidence that courts sometimes consider this distinction.¹²⁹ In any event, I argue that they should.

*Business Roundtable v. SEC*¹³⁰ provides a potentially significant illustration of a new administrative law model where judges successfully calibrate the stringency of their review of cost-benefit analysis by taking into account OIRA's prior scrutiny. Whether or not one agrees with the particular result in *Business Roundtable* (with

under *State Farm*, noting that “the Office of Management and Budget . . . complained about the failure to adequately define key terms”); Brief for Petitioners at 13, *Mineta*, 340 F.3d 39 (No. 02-4237), 2002 WL 32392046, at *13 (discussing OIRA review process and noting that OIRA directed NHTSA to “reconsider its determination”); Plaintiffs’ Motion for Summary Judgment at 29, *Salazar*, 842 F. Supp. 2d 181 (No. 04-1230), 2005 WL 6173738 (“[D]efendants were determined to adopt the rule, although even officials with [OMB] . . . were at a loss to understand precisely what problem the Regulation was designed to ‘fix,’ or even what projects the Regulation actually covers.”).

It would be a worthwhile (albeit difficult) empirical study to conduct. Cf. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 765–66 (2008) (noting the lack of literature on courts’ rate of invalidation of agency regulations under *State Farm*).

¹²⁸ Cf. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 80 (1993) (“[T]he judicial tendency to review less closely than in the past agency policy determinations for reasonableness argues for some such centralized reviewing capacity, perhaps within the Executive Branch itself.”).

¹²⁹ In his concurring opinion in *In re Aiken County*, Judge Kavanaugh, noting the “uneven effectiveness” of independent agencies, particularly with regard to the financial crisis, suggested that the independent agencies’ uneven performance might be due, at least in part, to the fact that independent agencies are subject to less executive oversight than executive agencies. 645 F.3d 428, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring). Of even greater significance, Judge Kavanaugh hinted at agreement with Justice Breyer’s position in *Fox* that “judicial review under the [APA’s] arbitrary and capricious standard perhaps should be more intensive when courts review actions of independent agencies.” *Id.* It seems fairly apparent, however, that Judge Kavanaugh’s position has roots in Justice Breyer’s “political accountability” argument—i.e., that judicial review of independent agency actions should be more stringent because independent agencies are less accountable to the President. See *supra* notes 105–07 and accompanying text (discussing Justice Breyer’s dissent in *Fox*). By contrast, in this Article, I seek to build an argument premised on a “reasoned decision-making” basis—namely, that judicial review of independent agency actions should be more stringent because their decisions are not subject to expertise-forcing executive oversight.

¹³⁰ 647 F.3d 1144 (D.C. Cir. 2011).

respect to striking down the regulation at issue), it is hard to take issue with the information-forcing role that its stepped-up judicial review provided. In the wake of the *Business Roundtable* decision, there is emerging evidence in support of this information-forcing role at federal banking agencies.

A. OIRA Oversight of Executive Branch Agencies

Executive branch agencies are under executive mandate to conduct cost-benefit analyses.¹³¹ They have been required by executive order to conduct cost-benefit analyses for most, if not all, of their economically significant rules since the Reagan Administration.¹³²

In January 2011, President Barack Obama signed Executive Order 13,563 (“Improving Regulation and Regulatory Review”). E.O. 13,563 incorporates the requirements of prior E.O. 12,866¹³³ and requires agencies to provide OMB with an analysis of anticipated consequences of economically significant regulatory actions.¹³⁴ E.O.

¹³¹ All agencies listed as “independent regulatory agenc[ies]” in the Paperwork Reduction Act are exempt from this requirement. *See* 44 U.S.C. § 3502(5) (2012) (defining independent agencies). Not all agencies with heads that are removable for cause are exempt from OIRA review under this definition.

Many agencies—both executive and independent—are also subject to statutory mandates to conduct cost-benefit analysis. *See, e.g.*, 7 U.S.C. § 19(a) (2012) (CFTC must consider costs and benefits of an action of the Commission); 15 U.S.C. § 2058(f)(2) (2012) (stating that before issuing a rule, the CPSC must prepare a “final regulatory analysis”). Federal banking agencies are required to consider “any administrative burdens” on depository institutions in addition to the benefits of regulations. 12 U.S.C. § 4802(a) (2012) (with “federal banking agency” defined elsewhere). For more information on independent agencies and cost-benefit analysis, see Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies*, ADMIN. CONF. U.S. (Apr. 30, 2013), <http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf> (recommending strategies for independent regulatory agencies to improve their economic analyses).

¹³² Executive Order 12,291, signed by President Reagan in 1981, established executive oversight of agency rulemakings based on cost-benefit analysis. This basic framework has persisted for the past three decades, during four subsequent presidential administrations from both political parties. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

¹³³ Under President Reagan, Executive Order 12,291 required agencies to prepare extensive RIAs for all major rules. President Clinton largely carried forward the same framework in E.O. 12,866. E.O. 12,866 requires an “assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation.” Exec. Order No. 12,866.

¹³⁴ E.O. 12,866 creates a category of “significant regulatory action” under section 3(f). All significant regulatory actions are reviewed by OIRA and require some minimal analysis per section 6(a)(3)(B). But only those deemed significant under section 3(f)(1)—what OMB refers to as “economically significant”—require a full-blown cost-benefit

12,866 directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”¹³⁵

The mandated regulatory impact analysis requires an executive agency to conduct an information-intensive examination of the costs and benefits that extends not only to the agency’s preferred course of action, but also to the viable alternatives rejected by the agency.¹³⁶ OMB Circular A-4 provides guidance for implementing regulatory impact analysis as required by executive orders.¹³⁷ The cost-benefit analysis should explain the need for the proposed action, carefully examine alternative approaches, and evaluate costs and benefits of the proposed action and alternatives.¹³⁸ OIRA, located within OMB, manages agency compliance with Executive Orders 13,563 and 12,866.¹³⁹ OIRA/OMB has unbridled discretion to designate any rule as “economically significant,” as well as to waive the cost-benefit analysis requirement for any major rule.¹⁴⁰

OIRA’s regulatory oversight is information forcing in the way advocated by this Article.¹⁴¹ Over the years, agencies responded to

analysis. A regulatory action is economically significant if it is anticipated (1) to have “an annual effect on the economy of \$100 million or more” or (2) to “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* § 1.

¹³⁷ OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY IMPACT ANALYSIS (2003), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

¹³⁸ *Id.*

¹³⁹ Exec. Order No. 12,866, § 1 (“The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President’s regulatory policies.”).

¹⁴⁰ See, e.g., Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 20–21 (2013) (discussing how “OIRA quickly approved publication of the [Department of Agriculture’s proposed rule to speed up the processing of chickens] even though the agency had not yet completed the cost-benefit analysis that was required because it was an economically-significant rule”); see also Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. (forthcoming 2014) (manuscript at 1) (on file with the *New York University Law Review*) (“[T]he rules reviewed [by OIRA] are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers.”).

¹⁴¹ See Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, YALE L.J.F. (forthcoming 2014) (manuscript at 11) (arguing that cost-benefit analysis “creates the right incentive to acquire additional information”). Indeed, as Sunstein eloquently put it, a virtue of “the aspiration to full analysis of costs and benefits is that the aspiration can itself

these cost-benefit analysis requirements by hiring additional economists and generally focusing more attention on creating a robust regulatory record of the net benefits of proposed rules.¹⁴²

B. Heightened Judicial Review in the Absence of Executive Oversight

If executive oversight of cost-benefit analysis via OIRA gives agencies better incentives to amass a robust regulatory record, what consequence, if any, should the lack of such oversight have? This Article posits that, on this information-forcing dimension, judicial review can, and in some cases should, serve as a substitute.¹⁴³ In other words, absent executive oversight of agency cost-benefit analysis, courts should apply heightened scrutiny to the agency’s work product. It follows that such a heightened “*State Farm* with teeth” standard should apply to judicial review of cost-benefit analysis by independent agencies—at least those not subject to OIRA oversight.¹⁴⁴

be information-forcing.” *Id.* (manuscript at 14).

¹⁴² See Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 626 (2014) (“In part as a response to the cost-benefit analysis requirement and OIRA review, EPA has made substantial investments in building its environmental economics capacity.”); see also Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1051 (2011) (highlighting the fact that necessitating cost-benefit analysis by courts and OIRA will “expand[] the range within which economists, scientists, and other nonlegal professionals effectively choose agency policy”).

¹⁴³ By positing that judicial review and executive oversight can serve as functional substitutes, I do not mean to suggest that they are equivalents. See *supra* note 1 (recognizing that executive oversight promotes coordination between different parts of the executive branch, whereas judicial review supports separation of powers). It is of course significant that OIRA and executive branch agencies are subject to political control by the President, whereas the judiciary is not. Moreover, executive oversight by OIRA is collaborative and ongoing, whereas judicial review is typically one-shot, entering only at the conclusion of the agency regulatory process. These salient differences will certainly affect the manner in which the oversight takes place. My point instead is that a case can be made that, with respect to the expertise- and information-forcing role, executive oversight and judicial review may well be functional substitutes.

¹⁴⁴ Recall that executive branch, but not independent, regulatory agencies must submit cost-benefit analyses for all economically significant regulations to OIRA for review. See *supra* note 134 (noting that, under E.O. 12,866, only those regulatory actions deemed “economically significant” require a full-blown cost-benefit analysis). OIRA has not tested the constitutional question whether it could sweep independent regulatory agencies into its cost-benefit analysis purview. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 32 (2010) (“[P]residents have avoided this constitutional confrontation by making the political choice to exempt independent agencies . . . from having to submit a cost-benefit analysis of their rules to OIRA.”).

Scholars differ with respect to what constitutes the hallmark(s) of an independent agency. See *id.* at 16 (“[T]he defining hallmark of an independent agency is that it is

1. “State Farm with Teeth” Applied to Independent Agencies

In summer 2011, a shock wave reverberated throughout the banking and financial services community. In *Business Roundtable v. SEC*, the D.C. Circuit overturned the SEC’s proxy access rule—the first rule promulgated under the Dodd-Frank Act.¹⁴⁵ Judge Douglas Ginsburg, writing for a unanimous panel of the court, criticized the SEC for its subpar economic analysis of the rule and struck down the rule as “arbitrary and capricious” under section 706 of the Administrative Procedure Act, as interpreted by *State Farm*.¹⁴⁶

The Dodd-Frank Act triggered an unprecedented flurry of rulemaking from federal banking agencies, including the SEC, the

headed by someone who cannot be removed at will by the President but instead can be removed only for good cause.”); Lisa S. Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 609–10 (2010) (noting that although prominent independent agencies show variety in design, they often share significant features: regulatory authority in areas of significant economic import, adjudicative authority, rulemaking authority, for-cause removal, and multimember commissions with staggered terms led by a chairman selected by the President).

Kirti Datla and Richard Revesz make the case for an extension of regulatory review executive orders to all agencies, effectively obliterating the distinction between independent and executive agencies as not grounded in the Constitution or statute. Datla & Revesz, *supra* note 46, at 839–40. They are joined by former OIRA officials, who likewise argue in favor of subjecting independent agencies to executive regulatory review. See *Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 43–45 (2011) (statement of C. Boyden Gray, Former Counsel to the Reagan Admin. Task Force on Regulatory Relief) (supporting the extension of executive regulatory review to independent agencies); *Federal Regulation: A Review of Legislative Proposals, Part II: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 216–17 (2011) (statement of Sally Katzen, Former OIRA Adm’r) (same).

The American Bar Association has also publicly supported expanding executive oversight to cover at least some independent regulatory agencies for more than two decades. Letter from H. Russell Frisby, Chair, Am. Bar Ass’n Section of Admin. Law & Regulatory Practice, to Mabel Echols, Office of Info. & Regulatory Affairs (Mar. 16, 2009), [available at](http://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf) http://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf. President Obama’s bipartisan Council on Jobs and Competitiveness has also urged that independent agencies be subject to OIRA review, as this process “serves as an independent audit of agencies’ analysis, provides analytical feedback and ensures that new regulations are consistent with applicable laws and do not conflict with actions or proposed regulations from other agencies.” PRESIDENT’S COUNCIL ON JOBS & COMPETITIVENESS, TAKING ACTION, BUILDING CONFIDENCE: FIVE COMMON-SENSE INITIATIVES TO BOOST JOBS AND COMPETITIVENESS 28 (2011), [available at](http://files.jobs-council.com/jobs-council/files/2011/10/Jobscouncil_InterimReport_Oct11.pdf) http://files.jobs-council.com/jobs-council/files/2011/10/Jobscouncil_InterimReport_Oct11.pdf.

¹⁴⁵ *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). The proposed rule would have required public companies to include, in their own proxy materials, the names of certain shareholder-nominated candidates for election to the board of directors. *Id.* at 1147.

¹⁴⁶ *Id.* at 1148–49.

CFTC, the FDIC, the Federal Reserve, and the OCC.¹⁴⁷ *Business Roundtable* serves as a warning that these federal agencies’ rulemakings might face stepped-up judicial scrutiny.¹⁴⁸ The decision came amidst outside calls—from congressional committees and industry groups—for stricter examination of the economics behind the anticipated flurry of Dodd-Frank regulations.¹⁴⁹ The decision has, in turn, inspired litigants and commentators to advocate heightened scrutiny.¹⁵⁰ The decision, moreover, has invigorated industry groups to challenge other new Dodd-Frank regulations.¹⁵¹ For example, the Chamber of Commerce brought a challenge (albeit one ultimately rebuffed by the D.C. Circuit) to the CFTC’s recent Dodd-Frank rules.¹⁵²

¹⁴⁷ See *Dodd-Frank Act Rulemaking Areas*, CFTC, <http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/index.htm> (last visited June 7, 2014) (“As a result of the Dodd-Frank Wall Street Reform Act . . . [t]he CFTC has identified 38 areas where rules will be necessary.”); *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC, <https://www.sec.gov/spotlight/dodd-frank.shtml> (last visited June 7, 2014) (“[The Dodd-Frank Act] contains more than 90 provisions that require SEC rulemaking, and dozens of other provisions that give the SEC discretionary rulemaking authority.”).

¹⁴⁸ Cf. Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 881 (2013) (describing *Business Roundtable* as having been “thought to have significantly raised the bar for rulemaking by independent agencies”).

¹⁴⁹ See *infra* notes 288–92 and accompanying text (discussing the Senate Committee on Banking, Housing, and Urban Affairs’s May 2011 request for a review of five federal agencies’ rulemaking economic analyses, and the House Committee on Oversight and Government Reform’s April 2012 hearing on the SEC’s cost-benefit analyses).

¹⁵⁰ Litigants have relied upon *Business Roundtable* to urge courts to adopt exacting standards of judicial review. See, e.g., Brief in Support of Plaintiffs’ Motion for Preliminary Injunctive Relief at 18, *Kobach v. U.S. Election Assistance Comm’n*, No. 13-4095-EFM-DJW (D. Kan. Oct. 23, 2013) (citing *Business Roundtable* as support for the argument that internally inconsistent agency decisions are arbitrary); Reply Memorandum of Law in Further Support of Defendant Gary A. Prince’s Motion for Partial Summary Judgment at 8 n.2, *SEC v. Brown*, No. 1:09-CV-01423(GK) (D.D.C. Mar. 23, 2012) (citing *Business Roundtable* as support for the claim that, as a matter of law, an SEC definition was entitled to no judicial deference); see also Raymond E. Areshenko, *Business Roundtable v. Securities and Exchange Commission: The SEC’s First Big Shot at Proxy Access in the Shadow of Dodd-Frank*, 32 J. NAT’L ASS’N ADMIN. L. JUD. 719, 756–57 (2012) (praising the D.C. Circuit in *Business Roundtable* for having essentially forced the SEC to develop effective rules to govern the corporate sphere).

¹⁵¹ See Steven Sloan, *Cost-Benefit Analysis Puts the Brakes on Dodd-Frank*, BLOOMBERG (May 7, 2012, 11:18 AM), <http://www.bloomberg.com/news/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank.html> (discussing litigation and letters to regulators from industry groups).

¹⁵² Following the financial crisis and the passage of the Dodd-Frank Act, the CFTC began considering regulations that would enhance its oversight of registered investment companies, which many believed to have been exploiting regulatory exemptions in their derivative trading practices. See *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 374 (D.C. Cir. 2013) (summarizing the relevant rulemaking process). Per the Commodity Exchange Act, the CFTC is required to conduct a particular form of cost-benefit analysis of proposed

Looked at narrowly, *Business Roundtable* is primarily an SEC decision that follows directly from two earlier D.C. Circuit decisions that overturned SEC rules.¹⁵³ Against this backdrop, the court found the SEC's analysis in *Business Roundtable* particularly wanting. The SEC was overly dismissive of the potential costs of the proxy access rule, having not even tried to quantify them.¹⁵⁴ In one example the court cited as particularly egregious, the SEC argued that the costs corporations would incur in campaigning for management nominees against shareholder nominees were attributable to state laws that give shareholders the right to nominate and elect directors, and *not* to the fact that the SEC's proposed proxy access rule would have required such shareholder nominees to be included in the company's proxy materials.¹⁵⁵ As the court explained, "this type of reasoning, which fails to view a cost at the margin, is illogical and, in an economic analysis, unacceptable."¹⁵⁶

Business Roundtable can likewise be cabined by expressly linking the heightened scrutiny of the SEC's economic analysis to a congressional mandate to conduct cost-benefit analysis.¹⁵⁷ The SEC has a statutory obligation to determine the economic implications of its rules. Specifically, the SEC is to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."¹⁵⁸ It is worth highlighting that

regulations. 7 U.S.C. § 19(a) (2012). Count One of the Chamber's complaint was for "Violation of the Commodity Exchange Act and Administrative Procedure Act—Insufficient Evaluation of Costs and Benefits." Complaint at 39, *Inv. Co. Inst. v. CFTC*, 891 F. Supp. 2d 162 (D.D.C. 2012) (No. 1:12-cv-00612), 2012 WL 1292673. For discussion of this case and additional post-*Business Roundtable* challenges to regulations, see *infra* notes 161–64, 178–79 and accompanying text.

¹⁵³ See *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177, 179 (D.C. Cir. 2010) (vacating equity-indexed annuities rule on arbitrary and capricious grounds); *Chamber of Commerce v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005) (vacating mutual fund rule because of failure to consider costs and alternatives).

¹⁵⁴ See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (critiquing the SEC's analysis).

¹⁵⁵ See *id.* at 1155 (taking issue with the SEC's erroneous attribution).

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 77 Fed. Reg. 32,184, 32,198 (May 31, 2012) (order on rehearing and clarification) (rejecting plaintiffs' reliance on *Business Roundtable* to challenge a FERC order on the ground that "*Business Roundtable* dealt with a failure by the SEC to comply with specific provisions of the Exchange Act and the Investment Company Act of 1940 that require it to assess the economic impacts of a new rule").

¹⁵⁸ 15 U.S.C. § 77b(b) (2012). Section 23(a)(2) of the Exchange Act requires that the Commission "consider . . . the impact . . . on competition" and prohibits the adoption of any rule that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." Securities Exchange Act of 1934 § 23(a)(2), 15 U.S.C. § 78w(a)(2) (2012). The same standard is found in all four relevant

this mandate to consider “efficiency, competition, and capital formation” is not tantamount to an express statutory requirement to conduct cost-benefit analysis for rulemaking.¹⁵⁹ The SEC, nonetheless, publicly claimed that it conducts cost-benefit analysis as part of its rulemakings when a former SEC chairman represented to Congress a longstanding commitment to the practice.¹⁶⁰

Subsequent D.C. Circuit cases, moreover, have suggested that the heightened degree of judicial scrutiny applied in *Business Roundtable* is not solely a function of the SEC-specific “efficiency, competition, and capital formation” mandate, but that this more aggressive form of review may be generally applicable. For example, in *American Petroleum Institute v. EPA*, the court rebuffed a challenge to an EPA rule regarding the national ambient air quality standards (NAAQS) for nitrogen dioxide, promulgated under the Clean Air Act.¹⁶¹ The court (per Judge Ginsburg) distinguished *Business Roundtable* on the ground that the EPA’s reasoning process had been “materially better” than the cost-benefit analysis that the SEC had conducted in promulgating the proxy access rule.¹⁶²

securities acts.

¹⁵⁹ See, e.g., Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 1993 (2013) (arguing that the provision does not describe a straightforward cost-benefit analysis, but rather “is best understood as an unusual means for Congress to force SEC consideration of substantive factors not prioritized by its organic statutes, nor capable of ready incorporation into those statutes”); Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 714 (2013) (“[T]he language . . . merely directs the SEC to consider specific factors; Congress did not tell the SEC how to balance these factors against each other, specify a dominant factor, or mandate a net positive outcome.”). But see Rachel A. Benedict, Note, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278, 282 (2012) (noting that the SEC’s congressional directive has been construed as a mandate to conduct economic analysis).

¹⁶⁰ *The SEC’s Aversion to Cost-Benefit Analysis: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 10–11 (2012) [hereinafter *SEC Hearing*] (prepared statement of Mary Schapiro, Former Chairman, SEC) (“No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities, but—since at least the early 1980s—the Commission has considered potential costs and benefits in its rulemaking as a matter of good regulatory practice.”).

¹⁶¹ *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1345 (D.C. Cir. 2012). The Clean Air Act requires NAAQS to be set at a level to protect the public health with an adequate margin of safety. Under *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 471 (2001), the EPA is prohibited from conducting a cost-benefit analysis when setting NAAQS.

¹⁶² *American Petroleum*, 684 F.3d at 1351. Judge Ginsburg, moreover, took the opportunity to reiterate his critique of the SEC in *Business Roundtable*, which had not only ignored several studies submitted by commentators, but also failed as a more general matter to justify its decisions in light of the body of evidence that weighed against the agency’s chosen path. *Id.*

Nowhere does the court even mention the differences in statutory language between the Securities Exchange Act and the Clean Air Act.¹⁶³

Nor does *American Petroleum Institute* stand alone. In subsequent challenges to rulemakings promulgated by agencies other than the SEC, the D.C. Circuit has distinguished *Business Roundtable* not based on the applicability of the congressional mandate, but on the ground that the regulatory analyses at issue were superior to the cost-benefit analysis proffered by the SEC in support of the proxy access rule.¹⁶⁴

Looked at more broadly (and consistent with this emerging strand in the D.C. Circuit's jurisprudence), *Business Roundtable* is a potentially revolutionary decision in the field of administrative law.¹⁶⁵ The SEC's cost-benefit analysis regulatory record in *Business Roundtable* was far more thorough than the records of the two previous ill-fated SEC rules cited by the D.C. Circuit. In a seventy-three-page assessment, the SEC canvassed various costs of the proxy

¹⁶³ *Id.*

¹⁶⁴ See, e.g., *Cellco P'ship v. FCC*, 700 F.3d 534, 551 (D.C. Cir. 2012) (considering a challenge to an FCC data-roaming rule). Other D.C. Circuit case law, however, sends mixed signals with respect to the importance of the statutory mandate to heightened judicial scrutiny in *Business Roundtable*. In *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 447 (D.C. Cir. 2012)—involving a challenge to the Department of Education's requirements for postsecondary institutions' participation in the Title IV HEA program—the court rejected the plaintiff's invitation to apply *Business Roundtable*. The court highlighted the absence of a “‘unique’ statutory obligation” facing the Department of Education. *Id.* at 447–48 (“In *Business Roundtable*, we found a regulation to be arbitrary and capricious, because, in promulgating it, the SEC had failed to satisfy its ‘unique [statutory] obligation to consider the effect of a new rule upon “efficiency, competition, and capital formation.”’” (quoting *Business Roundtable*, 647 F.3d 1144, 1148 (D.C. Cir. 2011))). But the court then distinguished the case at hand from *Business Roundtable* on the basis of the Department of Education's more thorough treatment of the available quantitative data. *Id.* at 448 (“[In this case, there is] no data or study the Department ignored and thus *Business Roundtable* is of no help to its argument.”). The D.C. Circuit's analysis of the CFTC's rule on commodity pool operators in *Investment Co. Institute v. CFTC*, 720 F.3d 370, 377–78 (D.C. Cir. 2013), is also illustrative of a mixed approach. The CFTC is subject to a statutory mandate to consider and evaluate potential costs and benefits, 7 U.S.C. § 19(a) (2012), but, according to the court, “Where Congress has required ‘rigorous, quantitative economic analysis,’ it has made that requirement clear in the agency's statute, but it imposed no such requirement here.” 720 F.3d at 379. The court nonetheless specifically distinguished *Business Roundtable* on the ground that the CFTC had engaged in a more thorough consideration of the regulatory landscape than had the SEC. *Id.* at 378.

¹⁶⁵ Cf. Sunstein & Vermeule, *supra* note 56 (manuscript at 4) (describing *Business Roundtable* as one doctrinal pillar that fits a newly emergent judicial approach that “seeks to use administrative law to push and sometimes shove policy in libertarian directions”). But note that while heightened judicial scrutiny applied in the cost-benefit analysis realm might tilt in an antiregulatory direction, it leans in the opposite direction when applied in the conflict preemption realm. For elaboration, see *infra* Part V.A.6.

access rule.¹⁶⁶ By contrast, in one of the prior cases, *Chamber of Commerce v. SEC*, the economic analysis of the rule at issue—requiring seventy-five percent of directors of public corporations to be independent—was largely absent.¹⁶⁷ In *Chamber of Commerce*, the SEC’s cost-benefit analysis was not faulty; it was never done.¹⁶⁸ The SEC had proposed three ways to comply with the rule’s independent directorship requirements, but neglected to estimate—indeed, did not even “hazard a guess” as to—the costs of any of the options.¹⁶⁹ Nor was the court persuaded by the SEC’s explanation that, given the myriad ways of complying with the rule, determination of the costs

¹⁶⁶ Moreover, commentators have argued that the court chided the SEC for failing to assess costs that largely presuppose a breach of fiduciary obligations. See, e.g., Anthony W. Mongone, Business Roundtable: *A New Level of Judicial Scrutiny and Its Implications in a Post-Dodd-Frank World*, 2012 COLUM. BUS. L. REV. 746, 765–66 (2012) (assessing the court’s critique of the SEC’s analysis of costs); Michael E. Murphy, *The SEC and the District of Columbia Circuit: The Emergency of a Distinct Standard of Judicial Review*, 7 VA. L. & BUS. REV. 125, 159 (2012) (same).

¹⁶⁷ See 412 F.3d 133, 143–44 (D.C. Cir. 2005) (critiquing the SEC for failing to adequately consider the costs imposed). Similarly, the SEC rulemaking record for the fixed indexed annuities regulation challenged in *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), devoted only nine pages to cost-benefit analysis and three pages to consideration of the rule’s anticipated effects on “efficiency, competition, and capital formation.” Indexed Annuities and Certain Other Insurance Contracts, 74 Fed. Reg. 3138, 3160–72 (Jan. 16, 2009). While the SEC did quantify certain costs associated with the rule (e.g., those that it was required to calculate under the Paperwork Reduction Act), it provided only qualified descriptions of the rule’s benefits. *Id.* The Commission’s most fatal mistakes, however, were its conclusory assertions that the rule would confer benefits by increasing competition and efficiency. The SEC concluded that the rule would promote competition by increasing price transparency and information disclosure, but did not ascertain the degrees of price transparency and information disclosure that already existed under state law regulatory regimes. See *Am. Equity*, 613 F.3d at 178 (critiquing this aspect of the SEC’s competition analysis). Without obtaining such a baseline, the Commission could not have accurately assessed the effects that its rule would have on these variables. Quoting *Chamber of Commerce*, the D.C. Circuit held that this insufficient consideration of the rule’s economic implications rendered the regulation arbitrary and capricious. *Id.*

¹⁶⁸ The SEC rejected an empirical study done by Fidelity Investments that purported to demonstrate that an independent chairman did not have an effect upon fund performance. There is no evidence in the record that the SEC considered the costs of the requirement of seventy-five percent independent directors. Instead, the SEC argued that because boards typically have the authority under state law to hire staff to help board members, the condition would not create any new staffing costs. In a footnote, the SEC noted that even if the independent chairman condition resulted in increased staffing costs, there was “no reliable basis” upon which to estimate those costs. Investment Company Governance, 69 Fed. Reg. 46,378, 46,387 n.81 (Aug. 2, 2004).

¹⁶⁹ *Chamber of Commerce*, 412 F.3d at 143. The court recognized that the SEC may only be able to determine “the range within which a fund’s cost of compliance will fall, depending upon how it responds to the condition,” but agreed with the Chamber that “it does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the rule it has proposed.” *Id.*

was impossible.¹⁷⁰

The *Business Roundtable* court was also revolutionary in its willingness to upend the typical deference to agency cost-benefit analysis.¹⁷¹ The court faulted the SEC for inadequate explanations of its rejection of various empirical studies and, conversely, the court found the studies that the SEC did credit to be “unpersuasive.”¹⁷² In sharp contrast, in *Chamber of Commerce*, the court refrained from second-guessing the SEC’s analysis of data submitted during the notice-and-comment process: “Although a more detailed discussion of the study might have been useful, the Commission made clear enough the limitations of the study, and we have no cause to disturb its ultimate judgment that the study was ‘unpersuasive evidence.’”¹⁷³ The court elaborated that it “owes [an] ‘extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.’”¹⁷⁴ Moreover, if the agency “ma[kes] clear enough the limitations of [a] study,” the court has “no cause to disturb” the agency’s finding that the study was unpersuasive.¹⁷⁵ The court likewise rejected the Chamber’s argument that the SEC’s “[failure] to develop new, and to consider extant, empirical data comparing the performance of funds respectively led by inside and by independent chairmen” was arbitrary and capricious.¹⁷⁶

There is thus a case for characterizing *Business Roundtable*’s heightened scrutiny of the SEC as “*State Farm* with teeth.”¹⁷⁷ And subsequent decisions can be read as having applied such heightened

¹⁷⁰ See *id.* at 143–45 (asserting the SEC’s obligation to consider the relevant costs and alternatives).

¹⁷¹ See Cox & Baucom, *supra* note 125, at 1828 (“[T]he ultimate effect of the *Chamber of Commerce* and *Business Roundtable* decisions appears to be nothing less than establishing a new review standard.”).

¹⁷² *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011).

¹⁷³ *Chamber of Commerce*, 412 F.3d at 143.

¹⁷⁴ *Id.* (quoting *Hüls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996)).

¹⁷⁵ *Id.* According to the court, the SEC’s determinations that the Fidelity Study (1) failed to use a reliable method of calculating fund expenses, and (2) did not rule out other important differences that explained the rules, warranted extreme deference. *Id.*

¹⁷⁶ *Id.* at 142.

¹⁷⁷ A criticism of this move is that the D.C. Circuit has thereby rewritten the SEC mandate, making the agency effectively no longer independent. *Cf.* Cox & Baucom, *supra* note 125, at 1826–28 (arguing that the D.C. Circuit had defied Supreme Court precedent in *Business Roundtable* and *Chamber of Commerce* by requiring the agency to engage in cost-benefit analysis, when Congress had expressly imposed no such requirement). Such a critique is blunted, however, if one adopts the view that questions the sharp distinction between executive and independent agencies. See Datla & Revesz, *supra* note 46, at 773 (arguing that agencies should be thought of as being on a “continuum” between executive and independent status).

judicial scrutiny on occasion.¹⁷⁸ Particularly relevant are cases in which the D.C. Circuit has carefully scrutinized an agency’s cost-benefit analysis in light of the available record evidence.¹⁷⁹

¹⁷⁸ See, e.g., *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 448 (D.C. Cir. 2012) (holding that the Department of Education’s compensation regulation was arbitrary and capricious unless the Department provided “some better explanation” for its choice to eliminate a “safe harbor” provision within the regulation, which was based on anecdotal examples of situations in which the provision had been abused); *Berge v. United States*, 879 F. Supp. 2d 98, 134–35 (D.D.C. 2012) (rejecting Department of Defense action as arbitrary and capricious based in part on the court’s conclusion that the medical literature and technology assessments relied on by the Department did not support the Department’s conclusions).

¹⁷⁹ See *Cellco P’ship v. FCC*, 700 F.3d 534, 550–51 (D.C. Cir. 2012) (holding that the FCC’s cost-benefit analysis, which provided a quantified estimate as to the rule’s economic impact and was supported by “substantial record evidence,” represented “a thoughtful and nuanced balance of the costs and benefits” of the data-roaming rule at issue); see also *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1351 (D.C. Cir. 2012) (assessing the scientific literature—including several epidemiological studies and a meta-analysis of nineteen underlying studies on the effects of nitrogen dioxide and health—that the EPA relied on in promulgating the regulation at issue).

In other cases, however, courts have been less willing to deploy heightened judicial scrutiny and have instead deferred to the agency even in regard to decisions that could have been—but were not required to be—supported by empirical data or evidence. See *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 368 (D.C. Cir. 2014) (“The [plaintiff] thinks the final rule reaches too far But that is a question of judgment for the Commission, which we will not second-guess. The Commission’s explanation was ‘rational,’ and that is enough.” (citation omitted)), *overruled in part on other grounds by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (2014) (en banc); *id.* at 369 (holding that an agency is not obligated to undertake a “‘rigorous, quantitative economic analysis’ unless the statute explicitly directs it to do so” (citation omitted)); see also *Inv. Co. Inst. v. CFTC*, 891 F. Supp. 2d 162, 220 (D.D.C. 2012) (“[W]hether the benefits of the Final Rule outweigh its costs is within the sound discretion of the agency. The agency must only show the Court that it considered and evaluated the costs and benefits as it was required to do by statute.”), *aff’d* 720 F.3d 370 (D.C. Cir. 2013).

But the conflicts mineral rule at issue in *National Ass’n of Manufacturers* is distinguishable on two grounds: (1) Congress directed the SEC to promulgate it on the basis of specifically identified humanitarian grounds, see *Nat’l Ass’n of Mfrs.*, 748 F.3d at 363 (explaining that the disclosure regime, devised in response to the conflict in the Congo, requires described persons to disclose whether their conflict minerals originated in the Congo or adjoining countries), and (2) it “concern[s] a subject about which the [SEC] has no particular expertise,” *id.* at 369. The SEC claimed that the purpose of the regulation (as indicated by Congress in its statutory directive to the agency)—to promote peace and stability in the Democratic Republic of Congo—made it exceptional, given that the humanitarian benefits were utterly unquantifiable. *Conflict Minerals*, 77 Fed. Reg. 56,274, 56,335 (Sept. 12, 2012); see also *id.* at 56,342 (expressing similar inability to quantify the expected costs of the regulation “because reliable, empirical evidence regarding the effects is not readily available to the Commission”).

The more deferential treatment of the financial regulation at issue in *Investment Co. Institute* is more perplexing (and seemingly at odds with heightened judicial scrutiny). The CFTC’s cost-benefit analysis spans a mere eight pages; moreover, the CFTC made little if any effort to quantify the relevant costs and benefits. See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11,252, 11,275–83 (Feb. 24, 2012) (considering costs and benefits); *id.* at 11,344 (dissenting statement of

This Article posits a novel justification for this heightened standard of judicial review: the absence of executive oversight of the independent agency's cost-benefit analysis. (It is worth emphasizing—albeit parenthetically—that, while I put forth *Business Roundtable* as an illustrative example of a court imposing a heightened “*State Farm with teeth*” standard that is justified in the absence of executive review of the cost-benefit analyses of independent regulatory agencies, I do not mean to endorse the court's application of the standard, which may have gone too far.¹⁸⁰)

2. *Information-Forcing Heightened Judicial Review*

The stepped-up judicial review in *Business Roundtable* has been indisputably information forcing. Moreover, the impact of information-forcing judicial review could prompt an agency to bolster its own internal expertise, which would then, over time, earn greater deference from the courts.¹⁸¹

Just as executive agencies did in response to the original cost-benefit analysis executive order,¹⁸² independent federal banking agencies have responded to more aggressive judicial review by

Commissioner Jill E. Sommers) (criticizing the regulations as unsupported by adequate cost-benefit analysis). The lower federal court relied on the “predictive” nature of the information-gathering requirement, which was designed not to remedy an existing problem, but to thwart future crises by promoting greater transparency. In these situations, according to the court, “complete factual support in the record for the [CFTC's] judgment or prediction is not possible or required.” 891 F. Supp. 2d at 186. And the D.C. Circuit expressly held that “predictive judgments” are entitled to greater deference under the “arbitrary and capricious” standard of review. 720 F.3d at 380. For further discussion regarding the viability of cost-benefit analysis for prudential financial regulations that rely on similar predictive judgments, see *infra* note 258.

¹⁸⁰ To quote Cass Sunstein, *Business Roundtable* may “represent[] an excessively aggressive exercise of the power of judicial review, with undue second-guessing of the administrative record.” Sunstein & Vermeule, *supra* note 56 (manuscript at 34). “The real problem with the court's approach,” Sunstein continues, “lies in its fly-specking of the administrative record.” *Id.* (manuscript at 35). In a similar vein, Leen Al-Alami argues that the court makes the same mistake for which it is criticizing the SEC by discounting some studies. Leen Al-Alami, Comment, *Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation*, 15 U. PA. J. BUS. L. 541, 555–57 (2013). He further argues that the court underestimates the difficulty of accurately predicting the impact of rules to make a truly robust cost-benefit analysis. *Id.* at 559; *cf.* Sunstein, *supra* note 141 (manuscript at 10–11) (suggesting that, in a situation involving evidentiary uncertainty, an agency should be able to act so long as it acknowledges the lack of evidence and explains the assumptions that would support a particular approach).

¹⁸¹ *Cf.* Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 472 (2007) (discussing how constraining agency discretion may force the agency to develop its expertise).

¹⁸² See *supra* text accompanying note 142 (discussing executive agencies' responses to OIRA review of cost-benefit analyses).

instituting measures designed to buttress their respective regulatory records on cost-benefit analysis. The SEC has, in the last few years, reformed its rulemaking process, documented in a March 16, 2012, SEC Memorandum,¹⁸³ which one legal commentator has called “an almost revolutionary turnaround from the past practices and culture of that agency.”¹⁸⁴ A new internal Division of Risk, Strategy, and Financial Innovation now plays a key role in rulemaking initiatives.¹⁸⁵ The SEC—along with other banking agencies—has also sought to hire additional economists.¹⁸⁶ Former SEC Chairman Mary Schapiro announced a more than doubling of the Division’s economists.¹⁸⁷ One implication of this staffing change is a transfer of authority within the agency from lawyers to economists. Moreover, by bringing the economists within the agency itself, there is a concomitant shift from outside to in-house economists.¹⁸⁸

The CFTC has followed a different approach, entering into a Memorandum of Understanding with OIRA, whereby OIRA agrees to “provide technical assistance to the [CFTC] staff during the implementation of the Dodd-Frank [Act], particularly with respect to the consideration of the costs and benefits of proposed and final

¹⁸³ Memorandum from U.S. Sec. & Exch. Comm’n, Div. of Risk, Strategy & Fin. Innovation & Office of Gen. Counsel, to the Staff of the Rulewriting Divs. & Offices, Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16 2012), available at http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_seculemaking.pdf.

¹⁸⁴ *SEC Hearing*, *supra* note 160, at 50 (written testimony of Henry Manne, Dean Emeritus, George Mason Univ. Sch. of Law); see also Elisse Walter, *Using Economic Analysis in SEC Rulemaking*, HARVARD L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 29, 2012, 11:13 AM), <https://blogs.law.harvard.edu/corpgov/2012/06/29/using-economic-analysis-in-sec-rulemaking/> (discussing the Commission’s heightened focus on economics and cost-benefit analysis).

¹⁸⁵ See Craig M. Lewis, Chief Economist & Dir. of Div. of Risk, Strategy & Fin. Innovation, U.S. Sec. & Exch. Comm’n, Speech at SIFMA Compliance & Legal Society Luncheon: The Expanded Role of Economists in SEC Rulemaking (Oct. 16, 2012), available at <https://www.sec.gov/News/Speech/Detail/Speech/1365171491420#.U4goGq1dXW4> (discussing developments at the RSFI pursuant to the SEC guidance policy changes).

¹⁸⁶ See *id.* (indicating intent to hire more economists); see also Andrew Ackerman, *Wanted: SEC Chief Economist*, WALL ST. J. (Jan. 7, 2014, 12:19 PM), <http://blogs.wsj.com/moneybeat/2014/01/07/wanted-sec-chief-economist/> (noting that the Financial Industry Regulatory Authority and the Municipal Securities Rulemaking Board have followed the Commission’s lead in strengthening the role of economic impact analysis within the rulemaking process).

¹⁸⁷ See *SEC Hearing*, *supra* note 160, at 26 (testimony of Mary Schapiro, Former Chairman, SEC) (“We . . . are in the process of hiring 20 additional economists this year.”). According to Manne’s 2012 testimony, there were sixteen economists among over three thousand employees at the SEC. *Id.* at 52 (written testimony of Henry Manne, Dean Emeritus, George Mason Univ. Sch. of Law).

¹⁸⁸ While beyond the scope of this Article, each of these developments could have significant implications with respect to both institutional design and output of the agency.

rules.”¹⁸⁹

This raises the intriguing issue whether an independent regulatory agency might *voluntarily* submit to OIRA review.¹⁹⁰ President Obama’s most recent regulatory review executive order states that “[t]o the extent permitted by law, independent regulatory agencies should comply with these provisions as well.”¹⁹¹ Of course, the “should” language differs markedly from the “must” and “shall” language directed toward executive agencies.¹⁹²

Under the framework I propose here, the agency might trade a dimension of its independence for a degree of insulation from otherwise-heightened judicial review.¹⁹³ Consider, for example,

¹⁸⁹ Memorandum of Understanding Between the Office of Info. & Regulatory Affairs and the U.S. Commodity Futures Trading Comm’n (Mar. 9, 2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf. The MOU includes the following caveat: “The sharing of draft and final CFTC documents and other information with OIRA staff pursuant to this technical assistance shall not constitute submission of such materials to OIRA for review.” *Id.*

¹⁹⁰ *See, e.g.*, Barkow, *supra* note 144, at 37 (“[E]ven though agencies are not required to submit to OIRA regulatory review, some do on a voluntary basis to stay in the President’s good graces and ensure access to resources such as coordination with other agencies, office space, and legal services.”).

This might make sense at least for those independent agencies whose statutes either explicitly require cost-benefit analysis or for which courts have read in the requirement. Moreover, given that OIRA review is designed not only to promote regulatory efficiency but also to enhance policy coordination, this move would also lead to greater coordination between executive branch and independent agencies, which increasingly are operating in joint regulatory space. *See* Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 329 (addressing the need for horizontal coordination across federal agencies).

¹⁹¹ Exec. Order No. 13,579, 76 Fed. Reg. 41,587, 41,587 (July 11, 2011) (stating that independent agencies “should consider how best to promote retrospective analysis of rules that may be outmoded” and “should develop” a plan under which it will periodically review existing significant regulations); *see also* Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 212 (2013) (“This language [in E.O. 13,579], though seemingly innocuous, is more assertive than that typically used by Presidents when addressing independent agencies.”); Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 175 n.31 (2014) (discussing the relationship of independent agencies to OIRA review).

¹⁹² *See, e.g.*, Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2263 n.195 (2012) (“President Obama has indicated a desire for independent agencies to comply with his orders but has not required them to do so.”).

¹⁹³ *Cf.* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 339 (2013) (“While OIRA review would entail a loss of independence, independent agencies should be happy to discuss econometrics with OIRA if by doing so they preclude second-guessing by the D.C. Circuit.”). Moreover, in addition to being in the independent agency’s self-interest, submission to OIRA as the chosen form of oversight could entail societal benefits in the sense that executive oversight can improve upon a regulation before the regulation sees the light of day (let alone reaches a court). And, as I recognized above, *supra* note 143, courts are fundamentally different institutions

whether the SEC might accept this Hobson’s choice in light of its particularly harsh treatment by the D.C. Circuit in *Business Roundtable*.¹⁹⁴ And, if so, would it have adequate assurance that reviewing courts would live up to this bargain? Quibbles aside, the proposed framework gives an added incentive to the SEC to submit to OIRA cost-benefit review.

IV

AGENCY CONFLICT PREEMPTION

In recent years, agency preemptive rulemaking has attracted scholarly and judicial attention.¹⁹⁵ While this aspect of agency decision-making has been studied in its own right, it has yet to share the stage with cost-benefit analysis. This Article purposefully draws the two together, highlighting a dimension of agency conflict preemption determinations that is, in essence, a particular form of cost-benefit analysis: the assessment of whether a state law imposes prohibitive costs (net of benefits) on a federal regulatory scheme, such that it so interferes with the federal scheme as to violate the Supremacy Clause’s mandate that federal law remain “the supreme

from OIRA on all sorts of dimensions, including expertise and political accountability, such that one might have reason to prefer one institution over another as overseer.

¹⁹⁴ Of course, in reality, the Hobson’s choice—submit to OIRA or face heightened judicial review—is not so dichotomous. Suppose, for example, that the SEC voluntarily submits its cost-benefit analysis to OIRA, which rejects it. At that point, the SEC can nonetheless go ahead and publish the proposed rule as is. That option is not taken off the table by its voluntary submission to OIRA, given that, as an independent agency, the SEC is exempted from the Executive Order. At that point, the SEC would forgo deferential *State Farm* review. But, at the outset, the SEC does not face a true Hobson’s choice. That said, it may well be that the political dynamic changes once the agency agrees to submit to OIRA. For further discussion of the political dimension, see *infra* Part V.A.3. I am grateful to Sidney Shapiro for pushing me on this point.

¹⁹⁵ See, e.g., *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 523–24 (2009) (addressing a regulation promulgated under the National Bank Act purporting to preempt state law enforcement); *Wyeth v. Levine*, 555 U.S. 555, 563 (2009) (determining whether the FDA’s drug-labeling regulations preempt state law product liability claims); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (finding that a motor vehicle statute and regulation preempt a state common-law tort action); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 695 (2008) (observing how federal agencies are “taking aim” at state law through preemption); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 741 (2004) [hereinafter Mendelson, *Chevron and Preemption*] (examining how to reconcile preemption doctrine with *Chevron*); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 5 (2011) (assessing three recent preemption decisions vis-à-vis the improvement of federal regulation and federal agency performance); Sharkey, *Federalism Accountability*, *supra* note 25, at 2127–28 (asserting that federal agencies could be reimagined as the best protectors of state regulatory interests); Sharkey, *Inside Agency Preemption*, *supra* note 54, at 523 (claiming that federal agencies, rather than Congress or the courts, now play the dominant role regarding preemption questions).

law of the land.” As argued above, I believe that there is a significant factual dimension to this inquiry. But unlike cost-benefit analysis, this dimension has been overlooked or downplayed within the current regulatory oversight regime. With this Article, I challenge this state of affairs.

With respect to executive oversight, OIRA could—but largely does not—review an agency’s factual predicates for its conflict preemption determination as part and parcel of its compliance with the Executive Order on federalism.¹⁹⁶ The lack of executive oversight (at least in practice) with respect to executive branch agencies’ conflict preemption determinations supplies a novel argument for heightened judicial review.

Challenges to agency preemptive rulemaking are not limited to APA challenges. Indeed, unlike challenges to cost-benefit analyses, such direct challenges of preemptive rules under the APA are quite rare. Instead, courts entertain what are in effect indirect challenges to agency preemptive rulemakings and interpretive positions: Parties raise preemption defenses to civil claims in contexts where there is an underlying federal regulator, such as in banking and numerous areas of products liability (e.g., automobiles, recreational boats, pharmaceuticals, medical devices). The Supreme Court’s 2009 decision in *Wyeth v. Levine* provides a high-profile example of such an indirect challenge to an FDA preemptive preamble to a rule.¹⁹⁷ And *Wyeth* shows that the “*State Farm* with teeth” judicial review standard would be appropriate, given the lack of prior executive oversight.

The argument for heightened judicial scrutiny of conflict preemption determinations by independent agencies—entirely outside the purview of OIRA review—is even stronger. Scholars have recently highlighted that, in the Dodd-Frank Act, Congress explicitly specified that the OCC’s preemptive rulemaking is to be subject to heightened scrutiny by courts.¹⁹⁸ In what may be the first time that Congress has specified the level of judicial review for such preemptive rules, Congress seems to be attempting to rein in an agency whose preemption positions were overly aggressive.

But what has hitherto gone unnoticed is that in a rather obscure

¹⁹⁶ See Exec. Order 13,132, 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999) (establishing special requirements for preemptive rulemaking).

¹⁹⁷ 555 U.S. 555 (2009).

¹⁹⁸ See Roderick M. Hills, Jr., *Exorcising McCulloch: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. PA. L. REV. 1235, 1238 (2013) (noting that, under the Dodd-Frank Act, the OCC’s preemption findings receive only *Skidmore* (not *Chevron*) deference, and field preemption is barred entirely).

provision of the Dodd-Frank Act, Congress also transformed the OCC from an executive branch to an independent regulatory agency.¹⁹⁹ And while it very well could be that Congress simply desired to put the agency more firmly under its control, this Article offers a provocative alternative explanation that merges these two seemingly unrelated provisions: The transformation of the agency from an executive branch to an independent regulatory agency no longer subject to executive oversight strengthens the case for increased judicial scrutiny of the agency’s conflict preemption determinations.²⁰⁰

A. OIRA Oversight of Executive Branch Agencies

In theory—if not in practice—OIRA oversees federal agencies’ compliance with the executive order on federalism (E.O. 13,132) and the President’s Memorandum on Preemption.²⁰¹ Pursuant to OMB guidelines, each agency and department is to designate a “federalism official” to (among other responsibilities) “ensure that the agency considers federalism principles in its development of regulatory and legislative policies with federalism implications.”²⁰² For any draft final regulation with federalism implications that is submitted for OIRA review under Executive Order 12,866 (i.e., for “significant” proposed regulations), the federalism official must certify that the requirements of Executive Order 13,132 have been met in a “meaningful” way.²⁰³

In practice, however, OIRA does not appear to have focused on federalism issues generally, or on preemption specifically.²⁰⁴ In

¹⁹⁹ See *infra* note 221 and accompanying text (discussing the “Federal Information Policy” section of the Dodd-Frank Act).

²⁰⁰ Congress’s decision to specify more stringent judicial review of the OCC’s preemption determinations might have been motivated simply by its desire to rein in the overly aggressive preemption maneuvers of this one agency. Even so, the OCC’s heavy-handed use of preemptive regulations in the pre-Dodd-Frank period was not checked by executive oversight. It is plausible that this absence of meaningful executive oversight (over what was then an executive agency) emboldened the OCC’s remarkably aggressive strategy. If this were the case, then Congress’s directive for heightened judicial scrutiny would still be directly linked to the absence of meaningful executive oversight.

²⁰¹ OIRA is responsible for monitoring agencies’ compliance with Executive Order 13,132 (“Federalism”). Memorandum from Jacob J. Lew, Dir., Office of Mgmt. & Budget, to the Heads of Exec. Dep’ts & Agencies & Indep. Regulatory Agencies, Guidance for Implementing E.O. 13132, “Federalism” (Oct. 28, 1999).

²⁰² *Id.* at 2.

²⁰³ Exec. Order No. 13,132, § 8(a), 3 C.F.R. at 209.

²⁰⁴ See Sharkey, *Inside Agency Preemption*, *supra* note 54, at 592–93 (discussing evidence that “casts some doubt on the vigor of OIRA’s policing of agency compliance with E.O. 13132”). A 2003 GAO report examined eighty-five rules over a year-long period and found only a single instance in which OMB questioned an agency’s conclusion regarding the absence of federalism implications in a rule. See U.S. GEN. ACCOUNTING

previous work, I have proposed various reforms designed to reinvigorate executive oversight of agencies' conflict preemption determinations.²⁰⁵ These involve such recommendations as having OIRA include review of the federalism implications of agency preemptive rules within its checklists under the A-4 Circular and requiring agency certification of compliance with E.O. 13,132's federalism mandates for all agency rulemakings that preempt state law (not just those subject to cost-benefit analysis under E.O. 12,866).²⁰⁶

But, consistent with the premise of this Article, in addition to considering bolstering executive oversight, it is worth considering stepped-up judicial review in the absence of meaningful executive oversight. As discussed in the next Subpart, with respect to agency conflict preemption determinations, this heightened standard would apply not only to independent agencies but to executive branch agencies as well, at least so long as OIRA fails to provide meaningful oversight.

B. Heightened Judicial Review in the Absence of Executive Oversight

A major implication of my thesis here is that, in the absence of meaningful executive oversight, courts should apply heightened scrutiny to input from federal agencies when deciding conflict preemption questions. In theory, OIRA could provide oversight of executive branch agencies' federalism impact statements, which should be required in instances of preemptive rulemakings. But where OIRA has not given its imprimatur to the agency's analysis—in particular, the factual predicate underpinning its finding of conflict between state law and a federal regulatory scheme—courts should impose a more stringent “*State Farm* with teeth” standard.

OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS app. at 182 (2003), available at <http://www.gao.gov/new.items/d03929.pdf> (noting that OIRA expressed concern in that specific instance with the EPA's conclusion that the proposed rule did not have federalism implications). Stuart Shapiro—who worked on federalism issues as an assistant branch chief at OIRA—also confirmed that federalism issues “were a lower priority at OIRA than those more central to the analytical mission of the agency.” Sharkey, *Inside Agency Preemption*, *supra* note 54, at 593 (quoting E-mail from Stuart Shapiro, Assoc. Professor & Dir. of Pub. Policy Program, Rutgers Univ., to Catherine M. Sharkey, Professor of Law, N.Y. Univ. Sch. of Law (Nov. 2, 2010, 10:32 EST) (on file with the *New York University Law Review*)).

²⁰⁵ See Sharkey, *Inside Agency Preemption*, *supra* note 54, at 592–94 (outlining proposal for OIRA to “include a more thorough review of preemption in the regulatory review process”).

²⁰⁶ *Id.* at 594.

Moreover, with respect to independent regulatory agencies—which are not subject to OIRA oversight at all—the argument for more stringent judicial review is even stronger. While it is difficult to discern any trend that has emerged to date with respect to courts’ application of heightened scrutiny to preemptive rules promulgated by independent agencies, Congress took a bold stance with respect to reining in the OCC in the Dodd-Frank Act. In the Act, Congress directed courts to apply heightened scrutiny to preemptive rules promulgated by the OCC.²⁰⁷ Congress also simultaneously transformed the OCC from an executive branch agency into an independent regulatory agency.²⁰⁸ It thus provides a provocative example of heightened judicial review that—per this Article’s thesis—is justifiable given the removal of the OCC’s conflict preemption determinations from OIRA’s purview.

1. “State Farm *with Teeth*” Applied to Agency Input on Preemption

*Wyeth v. Levine*²⁰⁹ is a high-profile example of a successful indirect challenge to a federal agency’s preemption statement. At the time of its initial notice of proposed rulemaking for a prescription drug-labeling regulation, the FDA had stated in the preamble that its regulations were minimum standards and did not preempt state tort claims.²¹⁰ Indeed, the FDA expressly stated: “[T]his proposed rule does not contain policies that have federalism implications or that preempt State law.”²¹¹ But, when the FDA issued its final rule, it included preemptive language in the preamble: “FDA approval of labeling under the act . . . preempts conflicting or contrary State law.”²¹²

In *Wyeth*, the Supreme Court declined to give deference to the preemptive preamble of the FDA’s regulation. The Court explained that the FDA’s failure to “offer[] States or other interested parties

²⁰⁷ See 12 U.S.C. § 25b(b)(5)(A) (2012) (identifying the standard of review for such preemption determinations).

²⁰⁸ *Comptroller of the Currency as Regulator*, Fed. Banking L. Rep. (CCH) ¶ 35-061 (2013), available at 2009 WL 3685981 (“The Dodd-Frank Wall Street Reform and Consumer Protection Act reestablished the OCC as an independent agency housed within the Treasury Department.”).

²⁰⁹ 555 U.S. 555 (2009).

²¹⁰ Requirements on Content and Format of Labeling for Human Prescription Drugs and Biologics; Requirements for Prescription Drug Product Labels, 65 Fed. Reg. 81,082, 81,103 (proposed Dec. 22, 2000) (to be codified at 21 C.F.R. pt. 201).

²¹¹ *Id.*

²¹² Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601).

notice or opportunity for comment” rendered its views on state law “inherently suspect.”²¹³ Prior to *Wyeth*, several lower federal courts likewise withheld deference to the FDA on the ground that the agency had failed to comply with the executive order on federalism (with the result being that the agency had thereby evaded OIRA review as well).²¹⁴

Wyeth is in line with the “agency reference” theory of preemption that I have developed in previous work. A foundational premise of the agency reference theory is that “courts should take advantage of what federal agencies, which are uniquely positioned to evaluate the impact of state regulation and common law liability upon federal regulatory schemes, have to offer.”²¹⁵ But an important corollary is that courts should, in assessing defendants’ preemption defenses, scrutinize the input from agencies regarding the impact of state law (legislation and common law) on federal regulatory schemes—including data in support of the risk of states exporting costs onto other states or onto the federal government.²¹⁶ The agency reference theory of preemption thus harnesses the federal administrative process—including *State Farm*’s hard-look review of an agency’s factual determinations and *Skidmore*’s “power to persuade” deference²¹⁷—for purposes of judicial resolution of preemption challenges in civil litigation (where the agency is not a party).

Viewed within the framework of this Article, this means courts should import a “*State Farm* with teeth” standard from APA rulemaking challenges, which is especially warranted due to the absence of meaningful executive branch oversight. In their exercise of

²¹³ *Wyeth*, 555 U.S. at 577.

²¹⁴ See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 240 (E.D.N.Y. 2007) (doubting “the adequacy and candor of representations to the FDA and of robustness of inquiry and decisions of the FDA” given that “the FDA’s own research is limited and that it relies heavily on self-motivated representations and studies by the pharmaceutical industry”); *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964, 968 n.3 (D. Neb. 2006) (refusing to give deference to the FDA’s preemption preamble on the ground that “the FDA failed to comply with its requirements [under the federalism executive order] to communicate with the states and to allow the states an opportunity to participate in the proceedings prior to a preemption decision”).

²¹⁵ Sharkey, *Federalism Accountability*, *supra* note 25, at 2129.

²¹⁶ See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 477–78, 491–502 (2008) (proposing the “agency reference” model for judicial preemption decision-making and specifying judicial scrutiny of input from agencies); Sharkey, *Federalism Accountability*, *supra* note 25, at 2185–91 (elaborating on the extension of *State Farm* hard-look review in the context of courts’ preemption decisions).

²¹⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

searching judicial review, in turn, courts should insist on substantial evidence in the rulemaking record to support an agency’s conclusion that state law conflicts with, or frustrates the purposes of, a federal regulatory scheme. And courts should accord *Skidmore* “power to persuade”²¹⁸ deference (rather than mandatory *Chevron* deference) to an agency’s interpretive views on preemption based upon the consistency, care, formality, and relative expertise of the agency.²¹⁹

This framework should have the salutary effect of nudging agencies toward more thorough determinations of federal-state conflicts based on substantial evidence in the administrative record. An agency, anticipating greater judicial scrutiny, will have an incentive to make its conflict determinations based upon record evidence from either a more robust adjudicative process or notice-and-comment rulemaking.²²⁰

2. *Dodd-Frank and the OCC: Enhanced Judicial Review for an Independent Agency*

In an obscure provision of the Dodd-Frank Act (entitled “Federal Information Policy”), Congress transformed the OCC from an executive branch agency into an independent regulatory agency—at least for purposes of removing it from OIRA’s purview.²²¹ At least

²¹⁸ *Id.*

²¹⁹ See William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1249–53 (2010) (supporting “weak or *Skidmore* deference” for agency interpretations involving implied preemption); Mendelson, *Chevron and Preemption*, *supra* note 195, at 797–98 (arguing that courts should be free to give *Skidmore* deference to agency interpretations that thoroughly consider the balance of state autonomy as well as the extent to which state law interferes with federal regulation). *But see* Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557, 561 (2009) (arguing that it is the judiciary’s duty to interpret issues of federal supremacy (i.e., without giving any deference to agencies) for both constitutional and policy reasons).

²²⁰ See William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1528 (2009) (suggesting that courts should grant greater policymaking latitude following open, deliberative, interactive, and transparent political processes).

²²¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 315, 124 Stat. 1376, 1524 (2010). Section 315, entitled “Federal Information Policy,” reads in its entirety: “Section 3502(5) of title 44, United States Code [Paperwork Reduction Act], is amended by inserting ‘Office of the Comptroller of the Currency,’ after ‘the Securities and Exchange Commission.’” *Id.* All agencies listed as “independent regulatory agencies” in the Paperwork Reduction Act are exempt from OIRA oversight. See *supra* note 131 and accompanying text (discussing the different requirements regarding cost-benefit analysis and OIRA oversight for executive and independent agencies). There is no discussion of this provision in the legislative history of the Act. The Senate Committee Report simply states that section 315 “clarifies that the OCC is an independent agency for purposes of Federal information policy.” S. REP. NO. 111-176, at 67 (2010).

in theory, congressional oversight substitutes for executive oversight of the agency's actions.²²² Independent agencies have been characterized as less permeable to regulatory capture, and scholars have argued that Congress was wary of the OCC's courting of the banking industry that it regulates.²²³ But, under the framework developed here, another primary consequence should be enhanced judicial review in the absence of executive oversight. And indeed—at least with respect to preemption determinations—more stringent judicial review accompanies the OCC's transformation from executive agency to independent agency.

As part of the Dodd-Frank Act, Congress implemented a framework for the OCC's preemption of state consumer financial protection laws that highlights both the factual predicate necessary for the agency's conflict preemption determinations and the importance of heightened judicial review. First, the Dodd-Frank Act bars “field preemption.”²²⁴ Second, the statute requires “specific finding[s] regarding . . . preemption” that must be backed by “substantial evidence, made on the record of the [agency] proceeding.”²²⁵ Third, courts reviewing agency determinations of preemption are directed to apply *Skidmore* “power to persuade” (not *Chevron* “mandatory”) deference.²²⁶

This was yet another endorsement of my proposed agency reference model, with its focus on the factual underpinnings of agency preemption determinations, the role of courts in scrutinizing agency factual determinations for “substantial evidence,” and in the use of

²²² Congress may have wanted specifically to remove any executive influence over the OCC's preemption position. This appears to be Senator Corker's position. When questioning Comptroller Thomas Curry during his confirmation hearings, the Senator asked the Comptroller whether he would keep the OCC “independent” and “not . . . let the Treasury browbeat you into a different position.” *Nominations of Martin J. Gruenberg, Thomas J. Curry, and S. Roy Woodall: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 112th Cong. 16 (July 26, 2011) [hereinafter *Nominations*].

²²³ See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. (forthcoming Apr. 2014) (manuscript at 17) (on file with the *New York University Law Review*) (“Congress mandated mere *Skidmore* deference in light of the OCC's history of controversial preemption decisions based on conflict-of-interest and regulatory capture concerns.”); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 951 (2011) (“[M]embers of Congress and analysts agreed that the [financial services] industry has exercised excessive influence over bank regulators during the period leading up to the financial crisis.”); see also Barkow, *supra* note 144, at 44–45 (arguing that banking regulators like the OCC, seeking the operating fees from regulated entities, would use their regulatory power to preempt state laws unfavorable to banks and thrifts).

²²⁴ Dodd-Frank Act § 1044(b)(4).

²²⁵ *Id.* § 1044(a).

²²⁶ *Id.*

Skidmore deference to agency interpretive views.²²⁷

Before the Dodd-Frank Act, the OCC and the OTS took an aggressive, pro-preemption position with regard to state regulation of federally chartered banks and thrifts.²²⁸ These federal banking agencies used their rulemaking powers to expressly preempt entire fields of state law,²²⁹ issued orders declaring that specific state banking laws were preempted,²³⁰ and filed amicus briefs arguing for preemption of state laws that regulated national banks.²³¹

²²⁷ Hills, *supra* note 198, at 1298 (noting that the Dodd-Frank Act’s new preemption language contains three provisions strongly suggestive of “what Professor Catherine Sharkey has termed the ‘agency reference’ theory of preemption” at least with respect to consumer finance protection laws that are expressly referenced by that language).

²²⁸ See Wilmarth, *supra* note 223, at 910–15 (discussing the OCC’s position on preemption prior to the Dodd-Frank Act).

²²⁹ In the mid-1990s, states passed laws that regulated abusive lending practices and imposed other restrictions on banks doing business in the state. In 1996, the OTS issued a regulation declaring that “OTS hereby occupies the entire field of lending regulation for federal savings associations.” Lending and Investment, 61 Fed. Reg. 50,951, 50,972 (Sept. 30, 1996). The regulation was repealed by the Dodd-Frank Act. See Dodd-Frank Act § 1044(b)(4) (“This title does not occupy the field in any area of State law.”).

In 2001, the OCC issued its “Subsidiary Rule,” which declared that “State laws apply to a national bank operating subsidiary to the same extent that they apply to the parent national bank”—i.e., generally not at all. Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,786 (July 2, 2001). In 2004, the OCC issued several preemption regulations in a rulemaking entitled “Bank Activities and Operations.” Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004); Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004). The broad rules preempted all state laws that “obstruct, impair, or condition a national bank’s ability to fully exercise its Federally authorized . . . powers” in four broadly defined areas: real estate lending, lending not secured by real estate, deposit-taking, and other operations. *Id.* at 1904, 1911. The rules also preempted all state laws that restricted nonprime lending by federally chartered depository institutions. *Id.* at 1904. The “Visitorial Powers Rule” prohibited state authorities from ordering the production of books and records from national banks, and preempted state enforcement actions against national banks. *Id.* The OCC has revised the Visitorial Powers Rule in light of the Dodd-Frank Act. Office of Thrift Supervision Integration; Dodd-Frank Implementation, 76 Fed. Reg. 30,557, 30,564 (proposed May 26, 2011) (to be codified at 12 C.F.R. pts. 4–5, 7–8, 28 and 34).

²³⁰ The OCC and the OTS issued orders declaring that specific state banking laws were preempted by their regulations. For example, the OTS issued an order declaring that a New Mexico statute that prohibited balloon payments, negative amortization, prepayment penalties, loan flipping, and lending without regard to the borrower’s ability to repay was within the federally occupied field. Wilmarth, *supra* note 223, at 911.

²³¹ The OCC submitted amicus briefs in support of three large national banks—Wachovia, Wells Fargo, and National City—that filed lawsuits to preempt efforts by several states to regulate the mortgage lending subsidiaries of national banks. Brief for the United States as Amicus Curiae Supporting Respondents, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (No. 05-1342), 2006 WL 3203255; see also Wilmarth, *supra* note 223, at 912 (discussing the lawsuits). The OCC also supported preemption of the New York State Attorney General’s investigations of, and enforcement actions against, several national banks for alleged violations of New York’s fair-lending statute. The OCC filed a

Congress pushed back with the preemption provisions of the Dodd-Frank Act. Section 1044 “clarifie[s]” the framework for national banks and subsidiaries to preempt state consumer financial laws.²³² State consumer financial laws are preempted in limited circumstances where the state law “prevents or *significantly interferes* with the exercise by the national bank of its powers.”²³³ Section 1044 also specifies the standard of judicial review for the OCC’s preemption regulations. The reviewing court “shall” consider (i) the thoroughness evident in the consideration of the agency, (ii) the validity of the reasoning of the agency, (iii) the consistency with other valid determinations made by the agency, and (iv) other factors the court finds persuasive and relevant.²³⁴ The OCC’s preemption regulations are thus no longer given *Chevron* deference and instead are accorded *Skidmore* deference under the Dodd-Frank Act.

The OCC can argue for preemption in several ways. It can (a) issue a regulation expressly preempting state law, (b) issue an order declaring that a state law does not apply to national banks, or (c) file an amicus brief in a case in which there is a preemption dispute. If the OCC issues an express preemption regulation, a party can directly challenge that regulation under the Administrative Procedure Act as “unsupported by substantial evidence.”²³⁵

A party in a preemption dispute can also indirectly challenge an OCC preemption regulation.²³⁶ For example, suppose the OCC issued a regulation declaring that the state law in question is preempted. Then suppose that the plaintiff sues a national bank alleging a violation of that state law. Under the Dodd-Frank Act, a court does not have to defer to the OCC’s preemptive rule if it is not supported by substantial evidence. The difference here is that the regulation is

lawsuit against the New York Attorney General seeking declaratory and injunctive relief. *Office of the Comptroller of the Currency v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005), *aff’d in part, rev’d in part sub nom. Cuomo v. Clearing House Ass’n*, 557 U.S. 519 (2009).

²³² A “State consumer financial law” is defined as a “State law that does not directly or indirectly discriminate against national banks” and that “directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.” Dodd-Frank Act § 1044(a)(2).

²³³ *Id.* § 1044(b)(1)(B) (emphasis added) (citing *Barnett Bank of Marion Cty. v. Nelson*, 517 U.S. 25 (1996)). State laws are also preempted where (1) the law “would have a discriminatory effect on national banks, in comparison with the effect” on state-chartered banks, *id.* § 1044(b)(1)(A), or (2) a federal law other than the Dodd-Frank Act would preempt the state law, *id.* § 1044(b)(1)(C).

²³⁴ *Id.* § 1044(b)(5)(A).

²³⁵ 5 U.S.C. § 706(2)(E) (2012).

²³⁶ For a discussion of indirect preemption challenges, see *supra* text accompanying notes 209–13.

not invalidated, as it would be if it failed a direct challenge, but rather just not accorded deference in the particular case.²³⁷

Finally, with respect to the OCC’s amicus briefs,²³⁸ courts should only give *Skidmore* deference to the OCC’s preemption determinations, and only when they satisfy the Dodd-Frank Act’s “substantial evidence” requirement.²³⁹

What kind of evidence must the OCC record contain in order to sustain a preemption regulation against an attack under the Dodd-Frank Act? Courts have yet to consider the validity of any OCC preemption regulations under the new Dodd-Frank Act “substantial evidence” standard.²⁴⁰ OCC officials have “expressed skepticism that the ‘substantial evidence’ standard would appreciably affect their rulemakings, aside from perhaps mandating explicit reference to the new standard.”²⁴¹ But, at the same time, the OCC is now keenly

²³⁷ *Cf., e.g.,* *Wyeth v. Levine*, 555 U.S. 555, 556 (2013) (holding that the agency action did not deserve deference because it was at odds with available evidence). This is discussed further in Part IV.B.1.

²³⁸ The OCC’s position is represented by the Justice Department in courts.

²³⁹ Kent Barnett has suggested that the call for substantial evidence review after an on-the-record proceeding creates an obligation for the OCC to use formal rulemaking and adjudication. *See* Kent Barnett, *Improving Agencies’ Preemption Expertise with Chevmore Codification*, 83 *FORDHAM L. REV.* (forthcoming 2014) (manuscript at 18) (on file with the *New York University Law Review*). If that is so, then the tie between fact-finding and preemption determinations is even tighter.

²⁴⁰ Sidney Shapiro and Richard Levy suggest that, due to the doctrinal indeterminacy surrounding the two scopes of review (“arbitrary and capricious” and “substantial evidence”), judges are free to pursue outcome-oriented decision-making, rendering inconsequential which standard is used. Shapiro & Levy, *supra* note 91, at 1064–68; *see also* Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 *VA. L. & BUS. REV.* 301, 358 (2012) (arguing that Congress’s use of “substantial evidence” in lieu of “arbitrary and capricious” makes no meaningful difference to judicial review of the OCC’s preemption determinations); David Zaring, *Reasonable Agencies*, 96 *VA. L. REV.* 135, 166–67 (2010) (arguing that “substantial evidence” review and “arbitrary and capricious” review are effectively identical standards). Richard Pierce argues, by contrast, that there are major differences in the substantial evidence standard and the arbitrary and capricious standard. Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 *DUKE L.J.* 1110, 1113–14, 1118 (1995). He concedes, however, that many courts apply the arbitrary and capricious standard to findings of fact, yielding “essentially the same results as application of the substantial evidence test.” Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 *TEX. L. REV.* 1175, 1186 (1981); *see also* *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (“[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.”).

²⁴¹ *See* Sharkey, *Inside Agency Preemption*, *supra* note 54, at 582 (quoting from a telephone interview with various OCC officials from the litigation division and the legislative and regulatory activities division). Moreover, during his confirmation hearings, Comptroller Thomas Curry pledged that he “will zealously enforce and uphold the National Bank Act, particularly where it relates to Federal preemption.” *Nominations*, *supra* note 222, at 16. A federal district court has expressed skepticism about the OCC’s

“aware that proffering evidence in support of preemption enhances the likelihood that a court will adopt its preemption conclusions.”²⁴²

Moreover, at least some OCC preemption rules that were given a high level of deference before the Dodd-Frank Act would not be given deference under the new Dodd-Frank standard. An example is the 2004 OCC Visitorial Powers Rule.²⁴³ The OCC’s Final Rule did not contain any factual findings, did not explain why preemption was necessary in the specific context, and did not articulate what conflicts between state law and federal regulations justified preemption. Instead, the final rule contained an argument for why the OCC was legally allowed to preempt state law, reading like a legal brief rather than an agency rulemaking.²⁴⁴ On review, the Second Circuit Court of Appeals noted that the “OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth.”²⁴⁵ The court nonetheless gave the OCC’s interpretation of the National Bank Act *Chevron* deference, concluding that it was “bound to uphold the agency’s rule so long as it is not ‘arbitrary, capricious, or manifestly contrary to the statute.’”²⁴⁶ Under the new Dodd-Frank standard, courts cannot give *Chevron* deference to the OCC’s preemption regulations or interpretive positions. Nor, in light of the lack of justification given, would *Skidmore* deference have saved the rule.²⁴⁷

V

CAVEATS AND EXTENSION

Inevitably, when one proposes a new paradigm, there are caveats and objections. Here, I address in turn some potentially formidable

current preemption stance in light of the Dodd-Frank Act. See *Sacco v. Bank of Am., N.A.*, No. 5:12-cv-00006-RLV-DCK, 2012 WL 6566681, at *8 n.7 (W.D.N.C. Dec. 17, 2012) (“Presuming Dodd-Frank to apply to this case, such a blanket regulatory stance would appear to violate . . . the Act.”).

²⁴² Sharkey, *Inside Agency Preemption*, *supra* note 54, at 582.

²⁴³ Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004). For a description of the Visitorial Powers Rule, see *supra* note 229.

²⁴⁴ See Sharkey, *Inside Agency Preemption*, *supra* note 54, at 580–81 (discussing the inadequacy of the agency record that accompanied the OCC’s Visitorial Powers Rule).

²⁴⁵ *Clearing House Ass’n v. Cuomo*, 510 F.3d 105, 119 (2d Cir. 2007), *aff’d in part, rev’d in part*, 557 U.S. 519 (2009).

²⁴⁶ *Id.* at 119 (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984)).

²⁴⁷ The OCC subsequently revised the Visitorial Powers Rule in light of the Dodd-Frank Act. Office of Thrift Supervision Integration; Dodd-Frank Implementation, 76 Fed. Reg. 30,557, 30,564 (proposed May 26, 2011) (to be codified at 12 C.F.R. pts. 4–5, 7–8, 28 and 34).

objections to the “*State Farm with teeth*” framework: (1) a misguided focus on agency information production as opposed to regulatory outcomes; (2) an undue fact-finding burden imposed upon agencies; (3) the specter of insincere performance and political manipulation that accompanies “forced” information from the agencies; (4) the challenges judges face in taking on an overseer role; (5) the potential for ossification of rulemaking; (6) and the possibility that resource constraints dominate the incentive-based issues that are the target of this Article.

But apart from the caveats to the “*State Farm with teeth*” framework—indeed answering, at least in part, some of the potential objections—this Part also explores an extension based on the theoretical underpinnings of the framework. It highlights the potential for Congress to play a novel information-forcing role, setting the terms of the court-agency interaction with respect to cost-benefit analysis and conflict preemption.

A. Caveats

1. Outcomes Matter, Not Information

In the final analysis, information production is a tool designed to produce better outcomes in terms of regulatory policies. This raises the question: Will more robust agency regulatory records—whether regarding cost-benefit analyses or conflict preemption determinations—lead to better outcomes?

There is some empirical evidence that OIRA oversight does have a significant impact on agency decision-making.²⁴⁸ This evidence supports the argument that executive oversight serves an information-forcing function that actually impacts rules, which may lead to better agency decision-making, especially on the cost-benefit analysis front,²⁴⁹ and is also consistent with the call for less stringent judicial review when such rules are challenged.

But some have taken a more pessimistic view (including economists generally supportive of cost-benefit analysis):

²⁴⁸ See, e.g., Barkow, *supra* note 144, at 31 (citing a GAO study determining that OIRA significantly impacted twenty-five of the eighty-five rules studied, U.S. Gen. Accounting Office, GAO-03-929, Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews 5–6 (2003)).

²⁴⁹ See, e.g., Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 MICH. L. REV. 1497, 1507 (2007) (suggesting that regulations that are subject to OIRA oversight may be sharper and better supported than regulations that are not subject to OIRA review, given the agency’s concern about being rebuked). Note that Sally Katzen is a former OIRA Administrator.

[T]he use of economic analysis in improving regulations has hardly been an overwhelming success. There is no evidence it has had a significant general impact, the economic analysis supporting it is frequently done poorly (if at all), and there is only anecdotal evidence to suggest that it has made a difference.²⁵⁰

If this is so, we might doubt that information-forcing enhanced judicial review will help. And some fear it will cause harm. Thomas McGarity, for example, believes that “overly aggressive judicial application of the findings and reasons requirement [leads courts] to overturn rules that are as well supported as the available information reasonably allows.”²⁵¹

Still, cost-benefit analysis does force agencies to look for lower-cost ways to fulfill their statutory mandates, and this should count in any assessment of outcomes. “Benefit-cost and risk analyses cannot tell, nor are meant to tell, the political decision-maker what to do. But they provide invaluable information for decision-makers by separating fact from fiction, by accurately describing relationships among data sets, and by assessing alternative courses of action to solve problems.”²⁵²

There is even more reason to believe that agencies’ amassing a regulatory record of empirical facts backing conflict preemption positions would lead to not only a more deliberative decision-making process, but also better outcomes. Much work, however, would need to be done in terms of structuring the notice-and-comment process to facilitate participation by all relevant players.²⁵³

2. *Fact-Finding Burden on the Agency*

A pre-Dodd-Frank banking preemption case illustrates the tendency of courts (and commentators) to cower in front of the

²⁵⁰ Hahn & Tetlock, *supra* note 38, at 78.

²⁵¹ McGarity, *supra* note 61, at 1444. Scholars are especially concerned about this possibility in the context of financial regulations. *See infra* note 258 (discussing how accurate cost-benefit analysis may be impractical in financial regulation and other areas in which the results of a proposed rule are highly unpredictable).

²⁵² Arbuckle, *supra* note 71, at 887; *see also* Hahn & Sunstein, *supra* note 53, at 3–6 (discussing the potential benefits of economic regulatory analysis).

²⁵³ For elaboration, see Sharkey, *Federalism Accountability*, *supra* note 25, at 2163–72. Such a process would address the concern, raised by some scholars, that the *Business Roundtable* standard of review is highly problematic as applied to high-profile regulations developed through the notice-and-comment process because of the role that interest groups play in the process. *See* Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 767–68 (2013) (discussing interest groups’ abilities to manipulate the notice-and-comment process); Lee, *supra* note 148, at 892–93 (noting that estimates as to costs and benefits are often provided by interest groups, and thus may be skewed).

specter of a formidable fact-finding burden imposed on an agency. The California Supreme Court deemed “unworkable in practice” the idea of requiring national banks advocating preemption under the National Banking Act to furnish factual support of impairment of a federal regime by the challenged state law.²⁵⁴ According to the court, the impracticality of the approach stemmed from the absence of a precise “yardstick” for measuring “significant impairment.”²⁵⁵ In reaching this conclusion, the court relied entirely on arguments by amici curiae the American Bankers Association and the California Bankers Association that such a “new evidentiary requirement will make it difficult for national banks to predict, in advance, with which state laws they must comply.”²⁵⁶

Such a fact-finding critique applies to any information-forcing rationale for judicial review. As then-Professor Stephen Breyer asked rhetorically of *State Farm*: “[W]as the court fully aware of how difficult it is for an agency seeking to set standards to obtain accurate, relevant, unbiased information?”²⁵⁷ Sometimes the information is simply difficult to find. Erik Gerding has shown, for example, that the benefits of certain prophylactic financial regulations, like those designed to mitigate systemic risk, are difficult to quantify because of causal complexity in financial crises and difficulties in detecting success; that is, one never witnesses financial crises that are averted.²⁵⁸

²⁵⁴ *Parks v. MBNA Am. Bank, N.A.*, 278 P.3d 1193, 1203 (Cal. 2012).

²⁵⁵ *Id.* at 1204.

²⁵⁶ *Id.* Indeed, the court copied from their brief verbatim. Brief of the American Bankers Ass’n & California Bankers Ass’n as Amici Curiae in Support of Defendant/Respondent at 13, *Parks*, 278 P.3d 1193 (No. S183703), 2011 WL 2115039, at *13.

²⁵⁷ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388 (1986).

²⁵⁸ ERIK F. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION 150, 168–69 (2013). I recognize this concern that the structure of administrative law weighs against prudential banking regulations. It may well be that agencies should be required not to fully monetize the relevant costs and benefits, but instead provide substantial evidence in the regulatory record that backs their decisions. For further discussion of the inherent problems of cost-benefit analysis in financial regulation, see John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. (forthcoming 2014) (manuscript at 9), available at <http://ssrn.com/abstract=2375396> (“[F]ull quantification in CBA/[Financial Regulation] is likely to be difficult because finance is at the heart of the economy, because it involves activities of groups of people (firms, markets) interacting in complex, difficult-to-study or difficult-to-predict ways, and because the forces that shape finance change rapidly through history.”); Jeffrey Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 48 J. LEGAL STUD. (forthcoming 2014) (manuscript at 8), available at <http://ssrn.com/abstract=2378562> (“[I]t is not only the rules but the adaptation to them, including the regulatory arbitrage, that creates the system of finance. These continuous second order effects make the benefits and costs of rule adoption impossible to quantify in a meaningful way.”)

Politics is another barrier. If there are cohesive, well-financed groups on only one side of a regulatory issue, an agency may acquire a lopsided view of the universe rather than a full picture of a regulation's societal costs and benefits. This may be particularly true in areas—such as tax and systemic risk regulations—in which industry groups can externalize costs on diffuse members of the public. Compared, for example, to environmental law, these areas may also offer fewer psychic benefits for civil society groups to participate in the process.²⁵⁹

Casting strong doubt on the reasoning of the California Supreme Court in the national banking context, the Dodd-Frank Act now imposes a requirement on the OCC to present “substantial evidence” in the form of factual findings to meet the burden of demonstrating that a state law conflicts with the federal banking scheme. So Congress at least did not balk at imposing such a fact-finding burden on the agency. Keep in mind, too, that agencies must give sensible responses to others' facts (e.g., studies developed by academics, interested parties, etc.), not develop facts in the first instance.

For the opposing view—that “there is no reason to believe that [benefit-cost analysis] would be appropriate for environmental or workplace regulation and not for financial regulation”—see, for example, Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation*, J. LEGAL STUD. (forthcoming 2014) (manuscript at 1), available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1647&context=law_and_economics; Eric A. Posner & E. Glen Weyl, *Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms*, YALE L.J.F. (forthcoming 2014) (manuscript at 1–2), available at <http://ssrn.com/abstract=2436538> (responding to criticisms made by Coates and Gordon). See also Sunstein, *supra* note 141 (manuscript at 6) (“[I]t would be a large mistake to take . . . the existence of wide ranges[] as a basis for skepticism about cost-benefit analysis Even when technical experts disagree, one or another view might [turn out to be] implausible or instead convincing, and agencies are entitled to decide which view falls in which category.”).

²⁵⁹ This is a difficult proposition to measure empirically. Moreover, there is reason to believe that new mobilization forces could alter the status quo. Consider, in this light, a recent three-hundred-page submission by “Occupy the SEC” on the SEC’s proposed Volcker Rule. See *Occupy the SEC, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships With, Hedge Funds and Private Equity Funds*, OCCUPY SEC (2012), <http://www.occupythesecc.org/letter/OSEC%20-%20OCC-2011-14%20-%20Comment%20Letter.pdf> (comment in response to a notice of proposed rulemaking implementing section 619 of the Dodd-Frank Act). The comment also garnered significant media attention. I thank Matthew Shahabian for bringing this comment to my attention.

Moreover, while I recognize this concern, I would not suggest that courts customize review based on whether there is an organized interest group that can produce information, or to take into account whether one side of an issue clearly has standing but the other may not. Agencies may, however, need to be more transparent with their overseers—whether the executive or courts—with respect to the inherent limitations they face.

Moreover, the fact-finding burden—even if significant—is put into perspective when one considers the alternative, namely decisions justified by the agency’s say-so. Courts could rely on the say-so of the OCC, or they could require some quantum of evidence to back the OCC’s claims of prohibitive costs inflicted by state law on the national scheme.

3. *Performance and Political Manipulation*

There remains a danger that “forced” information from agencies might be pure performance. Moreover, it may be subject to political manipulation. Critics of cost-benefit analysis have for some time argued that it is a tool manipulated for political purposes.²⁶⁰ Even avid supporters concede the heavy hand of politics. Consider Donald Arbuckle’s insider perspective:

My observation from the vantage point of OIRA is that White House decisionmakers do indeed desire, support, and use good risk and benefit-cost analysis. But the result of this analysis is always at risk of being overwhelmed by the power of politics. In a head-on battle between analysis and politics, politics will generally win.²⁶¹

Judicial review might mitigate the risk of capture of agencies by the parties they regulate.²⁶² And it may well be that heightened judicial scrutiny could apply where it can be demonstrated that OIRA has been less attentive to regulatory oversight than it should be, whether due to resource scarcity or political capture. But the comparative risks of agency capture versus OIRA capture, and the potential for judicial review to mitigate such risks, are topics beyond the scope of this Article.²⁶³

²⁶⁰ See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 35 (2004) (noting that cost-benefit analysis has become a powerful weapon for opponents of regulation); Heinzerling, *supra* note 140 (manuscript at 16) (criticizing the view that OIRA is a kind of neutral information-aggregator, noting that it has the power to “impose cost-benefit analysis wherever the law allowed; and to transform cost-benefit analysis from an analytical tool into a rule of decision” (internal quotation marks omitted)); Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, 6 REG. & GOVERNANCE 189, 199–200 (2012) (examining the role of politics in cost-benefit analysis).

²⁶¹ Arbuckle, *supra* note 71, at 886.

²⁶² See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (describing how federal judges in the 1960s wielded judicial review to police agency capture).

²⁶³ For contrasting opinions as to OIRA’s susceptibility to capture, compare Livermore & Revesz, *supra* note 1, at 1340, 1374–75 (arguing that OIRA is less prone to capture than other agencies given that it is a “generalist institution” whose administrators traditionally come from “careers in academia or generalized administrative law practices [which]

There is also a danger that ideology, channeled through the courts, will swamp hard-nosed agency cost-benefit analyses or conflict preemption determinations. As a general matter, some fear that heavy-handed judicial review allows judges to vote their policy predilections and thereby inappropriately inject politics into the review of agency action.²⁶⁴

Indeed, critics have raised *Business Roundtable* as a prime example of this core concern, namely that judges with ideological aversion to increased regulation (which is the thrust behind Congress's enactment of the Dodd-Frank Act) can substitute their own view of the merits of the substantive regulation for that of the expert federal agency.²⁶⁵ This worry about judicial politics or ideology invading the province of agency expertise has a considerable historical pedigree. And recent empirical scholarship has documented the proliferation of political ideology into decided cases.²⁶⁶

Expecting analysis to win a head-to-head battle with politics goes too far. Ensuring evidence-based decision-making subject to

bolsters the claim that OIRA Administrators tend to be independent”), with Barkow, *supra* note 144, at 35 (“OIRA itself is prone to be captured by the very same industry forces And because the OIRA review process is less transparent than the agency process, it is that much easier for industry groups to influence OIRA without being checked.”).

Jennifer Nou describes how agencies can weaken OIRA review by overtaxing its resources or using judicially or congressionally imposed time limits. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1790, 1796–97 (2013). In cases in which an agency appears to be taking advantage of third-party deadlines to rush OIRA, courts could likewise adjust their standard of review. Admittedly, cases of overtaxing OIRA would be difficult to detect, as would instances of agency capture.

²⁶⁴ See generally Keller, *supra* note 68 (criticizing hard-look review as giving judges significant discretion to invalidate agency rules based on politics).

²⁶⁵ See Sunstein & Vermeule, *supra* note 56 (manuscript at 57–58) (arguing that a subset of judges on the D.C. Circuit have used administrative law principles to arrive at judicial outcomes that reflect or promote libertarian ideals).

²⁶⁶ Consider these striking findings from an empirical study of a large data set—consisting of all published appellate rulings from 1996 to 2006 involving review of EPA and NLRB decisions either for arbitrariness or for lack of substantial evidence—conducted by Thomas Miles and Cass Sunstein:

When the agency decision is liberal, the Democratic validation rate is 72 percent and the Republican validation rate is 58 percent. When the agency decision is conservative, the Democratic validation rate drops to 55 percent and the Republican validation rate rises to 72 percent. For both Republican and Democratic appointees, then, the likelihood of a vote to validate is significantly affected by whether the agency's decision is liberal or conservative.

Miles & Sunstein, *supra* 127, at 764–69. *But see* Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 759 n.108 (2014) (reviewing the Sunstein and Miles study and suggesting that EPA and NLRB rulemakings are “expected to be especially ideologically contentious, which probably reduced the level of deference the courts of appeals displayed”).

oversight, however, remains an effective prophylaxis against wanton political decision-making in the bureaucracy. While the specter of political manipulation cannot be ignored—either on the part of the agency in terms of papering the record, or on the part of judges engaging in judicial review—the requisite agency findings, with sufficient evidentiary backing, should stymie at least purely ideological decisions. The transparency engendered by judicial review of a robust regulatory record should, at a minimum, reduce the most egregious examples of political or pretextual determinations.²⁶⁷

4. *Judicial Competence*

But even if we assume good faith (or nonpartisanship) on the part of judges who take up the task of analyzing and evaluating the economic underpinnings of agency regulations, are they equipped to do so? Judges tend not to have the training in economics and statistics necessary to evaluate the empirical studies that form the foundation of the agencies’ cost-benefit analyses.²⁶⁸ Under a “*State Farm* with

²⁶⁷ Cf. David J. Barron, Foreword, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1147–48 (2008) (arguing that the “expertise-forcing mode of judicial review” of *State Farm* hard-look review be used to force federal agencies to “demonstrat[e] to the courts that such preemption decisions are not themselves strongly influenced by political considerations”). The same applies to purely political decisions by OIRA to forgo cost-benefit analysis for economically significant rules. For example, with respect to the USDA’s chicken-processing rule, discussed *supra* note 140, where OIRA approved the rule without reviewing the cost-benefit analysis, the absence of executive oversight should trigger heightened judicial review. Admittedly, however, it would be much more difficult (and problematic) for judicial review to vary depending upon the thoroughness of OIRA’s executive oversight.

²⁶⁸ Then-Professor Stephen Breyer has set forth the canonical critique:

An appellate judge cannot ask an expert to answer his technical questions or go outside the record to determine the present state of scientific or technical knowledge. . . . Even if fairly complete, a cold record does not allow the judge to prove the case in great depth. . . . [T]he judges will not have time to familiarize themselves with the enormously lengthy records. How can they analyze fully a record, for example, reflecting 10,000 comments made in response to a notice of proposed rulemaking? Can judges, when faced with such complexity and detail, do more than ask, somewhat superficially, whether the agency’s result is reasonable? Can they do more than catch the grosser errors? Can they conduct the thorough, probing, in-depth review that they promise? These realities about court review provide little basis for any hope that such review will lead to significantly better policy.

Breyer, *supra* note 257, at 389–90; see also Sunstein, *supra* note 60 (manuscript at 5) (noting that Justice Breyer’s “frequent votes in favor of validating the outcomes of democratic processes, resisting occasional trends toward heightened judicial scrutiny, reflect the epistemic case for judicial modesty”). Sunstein astutely notes, however, a caveat to Justice Breyer’s signature judicial modesty involving “the duty of reasoned decision making”; namely, Justice Breyer “appears to find that duty to be part of the rule

teeth” regime, judges become arbiters of conflicting empirical studies. The force of this judicial competence criticism is somewhat (albeit weakly) blunted in light of the fact that the D.C. Circuit operates essentially as a specialized administrative law court.²⁶⁹

An alternative response would be to focus on buttressing the corresponding executive oversight, thus strengthening the case for according judicial deference. Kip Viscusi, among others, has pointed in this direction:

Turning the courts into venues of economic inquiry also presumes a degree of economic expertise that courts currently lack. Instead of dealing with these issues in the courts, the OMB and its staff of regulatory overseers could provide the needed institutional check on misguided regulatory policies once the criteria for regulations were altered.²⁷⁰

Moreover, agencies themselves (who likewise have a comparative advantage over judges in terms of expertise) may be prompted by the specter of judicial review to buttress their own internal expertise or submit to executive oversight, as the experiences of the SEC and the CFTC attest.²⁷¹

5. *Ossification*

Any proposal for stepped-up judicial review of agency action must confront the ossification critique.²⁷² More specifically, in this

of law, and he insists on its exercise as a kind of quid pro quo for deference.” *Id.* (manuscript at 8).

²⁶⁹ See Douglas H. Ginsburg, *Remarks upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL’Y 1, 3–5 (2012) (presenting statistics on where administrative law cases are heard). Of course, not every regulatory challenge will end up in the D.C. Circuit.

²⁷⁰ W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1460 (1996). Cass Sunstein, a former OIRA Administrator, is likewise a strong proponent of the necessity of executive oversight to constrain agency discretion. See, e.g., Sunstein, *supra* note 141 (manuscript at 11–12) (arguing that, because expert agency officials might sometimes hold divergent professional opinions based simply on ideological differences, it makes little sense to defer to an expert’s preferred approach in the absence of evidence as to the superiority of the approach); *id.* (manuscript at 12) (“[I]n the context of financial regulation, ‘professional judgment,’ generally unaccompanied by disciplined analysis of costs and benefits, helped to produce the financial crisis in the first place.”).

²⁷¹ See *supra* Part III.B.2 (noting steps taken by the SEC and the CFTC to strengthen their regulatory records on cost-benefit analysis in the aftermath of *Business Roundtable*).

²⁷² See, e.g., SUNSTEIN, *supra* note 16, at 125 (“A serious problem with intense judicial review of agency action is that it creates delay—and hence ensures a bias in favor of the status quo.”). See generally JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (describing the political, legal, and bureaucratic obstacles that agencies face in trying to achieve their goals); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN L. REV. 59 (1995) (discussing the ossification thesis and how to solve it).

context, the charge is that “*State Farm* with teeth” will not be information forcing, but will instead stymie agency regulatory decision-making altogether. Thomas McGarity’s worry (shared by others) is that any heightened judicial review of required agency findings, backed by evidence, would induce agencies to avoid taking rulemaking action in the first instance.²⁷³ Taken to an extreme, this view embraces the “cost-benefit paralysis” argument that cost-benefit analysis is ultimately antiregulatory.²⁷⁴

As an initial matter, the ossification critique is not built on strong empirical foundations.²⁷⁵ Moreover, there is a corresponding positive view of heightened judicial review, namely that “the mere presence of an evaluation, along with an evaluation process, may prevent agencies and others from adopting economically unsound regulations in the first place.”²⁷⁶

Separate and apart from inducing regulatory paralysis, hard-look review might encourage agencies when adopting policies to move away from notice-and-comment rulemaking and formal adjudication towards informal adjudication, official guidance, or consent decrees

²⁷³ See McGarity, *supra* note 61, at 1426 (arguing that “overly intrusive judicial review” makes agencies “reluctant to undertake new rulemaking initiatives, to experiment with more flexible regulatory techniques, and to revisit old rulemaking efforts”).

²⁷⁴ See, e.g., David C. Vladeck & Thomas O. McGarity, *Paralysis by Analysis: How Conservatives Plan to Kill Popular Regulation*, AM. PROSPECT, Summer 1995, at 1 (arguing that antiregulatory politicians seek to cripple agencies by “enacting procedural reforms that sound neutral but make effective regulation impossible”); see also McGarity, *supra* note 61, at 1386 (“[T]he same inertial forces that slow down the process of formulating and implementing new rules can impede rulemaking to achieve deregulatory goals.”). Regulatory impact analysis is also a specific target of McGarity’s critique. *Id.* at 1387; see also Recent Case, *D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis – Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), 125 HARV. L. REV. 1088, 1094–95 (2012) (suggesting that the standard of review in *Business Roundtable* would result in the ossification of the SEC’s regulatory process).

²⁷⁵ See, e.g., Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1436–39 (2012) (arguing that the ossification thesis has not been subjected to serious empirical testing); see also William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 (2000) (finding, in a study of D.C. Circuit rulemaking cases from 1985 to 1995, that “agencies have successfully implemented their policies in approximately 80% of the instances in which courts have originally remanded rules as arbitrary and capricious”). But see Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1494 (2012) (“[N]othing in the Yackees’ study contradicts or undermines the ossification hypothesis.”).

²⁷⁶ Hahn & Tetlock, *supra* note 38, at 79; see also Lee, *supra* note 148, at 885–86 (arguing that a more stringent level of judicial review will help prevent or avoid inefficient regulations).

with regulated entities as a means to evade judicial review.²⁷⁷ But such a strategy of evasion would be thwarted by courts' adoption of the agency reference model, coupled with *Skidmore* "power to persuade" deference.²⁷⁸ The information-forcing framework proposed here is designed to encourage an agency to develop a robust factual record for cost-benefit analysis and conflict preemption determinations. It may well be burdensome for the agency, but it is also the "price" for judicial deference to agency policy-making.

Moreover, my proposal, which would avoid applying both OIRA oversight and stringent hard-look judicial review to the same agency decision-making process, would also alleviate some of the concerns associated with regulatory paralysis.

6. *Resource Constraints*

This Article is premised on—and thus directed primarily at—an incentive-based problem, to which stepped-up judicial review, in the absence of executive oversight, is posited as an information-forcing solution. Moreover, there is emerging evidence that the threat of heightened judicial scrutiny has indeed been information forcing, such as independent agencies' (including the SEC's and the CFTC's) adoption of measures designed to buttress their respective regulatory records on cost-benefit analysis.²⁷⁹ But what if agency resources, not incentives, are the root of the problem?

It does not seem satisfactory for me to simply assert that resource constraints fall outside the main frame of this Article (though they do). At a minimum, I must acknowledge the consequence under the scheme I propose if agencies fail to produce the requisite information,

²⁷⁷ See, e.g., Stuart Shapiro, *Agency Discretion as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 528–29 (2014) (arguing that the costliness of informal rulemaking leads agencies to choose other, less formal approaches). In one striking example, the EPA, rather than adopting new policies under the Clean Water Act via rulemaking, entered into two thousand identical consent decrees with animal feeders. The D.C. Circuit held that because the policies were adopted through repeat settlements, a decision not to enforce the law, the EPA's determinations were "committed to agency discretion" and unreviewable. *Association of Irrigated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2009) (quoting 5 U.S.C. 701(a)(2) (2012)); see also *In re Genelink, Inc.*, No. 112-3095, 2014 WL 187458, at *11 (F.T.C. Jan. 7, 2014) (approving a consent decree entered into by the FTC with companies that deceptively marketed their nutritional supplements by requiring, in the future, that their health benefits be supported by two randomized trials). I thank Adam Zimmerman for bringing these examples to my attention.

²⁷⁸ For more on the agency reference model, see *supra* notes 215–20 and accompanying text.

²⁷⁹ See *supra* Part III.B.2 (presenting evidence of information-forcing effects on federal banking agencies in light of *Business Roundtable*).

not due to lack of incentives, but because they do not have the resources to do so. In the cost-benefit analysis context, the outcome would be no regulation (i.e., deregulation) or else ineffective regulation. In the preemption context, it would be a kind of antipreemption default. As a general matter, the political valences on these defaults point in opposite directions—a conservative (or libertarian) antiregulation proponent would applaud the deregulatory thrust in the first instance, but lament having the deck stacked against preemption in the latter. Perhaps the cross-cutting political valences lend support to my pursuit of expertise-reinforcing improvements in agency decision-making by advocating the same framework across these domains, letting the political chips fall where they may.

But this is cold comfort in the face of the reality that my proposal might encourage those with ulterior motives. To give one salient example, some consider it an “open secret” that enemies of the Dodd-Frank Act are battling this proregulatory reform in courts by insisting on more judicial review, but also seeking to deprive the SEC and other financial regulatory agencies of resources to perform adequate cost-benefit analyses.²⁸⁰ I doubt that it is feasible for either OIRA oversight or judicial review to take into account the budget or resource constraints faced by a particular agency.²⁸¹ That said, drawing attention to the issue might alert Congress, which certainly has a key role to play in this regime. It would play an even larger role in what I posit in the next Subpart: calibrating the balance between agencies and courts.²⁸²

B. Extension: A Novel Information-Forcing Role for Congress

Recall that the *Fox* majority (per Justice Scalia) highlights increasing congressional oversight (in lieu of presidential oversight)

²⁸⁰ See Arthur E. Wilmarth, *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 CINN. L. REV. 1283, 1321 (2013) (“As an additional method for slowing down Dodd-Frank’s implementation, Republicans blocked any significant increases in the budgets of the CFTC and SEC during 2010, 2011 and 2012.”); see also Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1680 (2013) (“Winning can also mean incapacitating the agency by reducing its annual appropriation, repealing the agency’s organic act, or whittling away its regulatory authority through rifle-shot riders attached to must-pass legislation.”).

²⁸¹ Cf. Ian D. Ghrist, *How to Sufficiently Consider Efficiency, Competition, and Capital Formation in the Wake of Business Roundtable*, 14 TRANSACTIONS: TENN. J. BUS. L. 221, 243 (2013) (arguing that the fact that agency resources are limited should not justify a lax standard of judicial review).

²⁸² Moreover, if Congress fails to fund an agency, that is simply a democratic expression of the desire to roll back government or reverse delegation, and Congress has that right.

for independent agencies.²⁸³ It is worth considering whether traditional congressional oversight can serve the kind of information-forcing function at the heart of this Article.²⁸⁴

Perhaps the most important tools Congress has at its disposal for what I have termed information-forcing agency oversight are the Offices of Inspector General, the GAO's investigatory powers, and committee hearings.²⁸⁵ With respect to both cost-benefit analysis and conflict preemption, there is some evidence that investigations by the Inspector General as well as committee hearings have served a productive information-forcing role.²⁸⁶

Recall that the D.C. Circuit decided *Business Roundtable* amidst congressional inquiries into SEC rulemaking.²⁸⁷ In May 2011, several members of the Senate Committee on Banking, Housing, and Urban Affairs requested that the inspectors general of five federal agencies—the SEC, the CFTC, the Federal Reserve Board, the Department of the Treasury, and the FDIC—conduct a review of the economic analyses performed by the agency and prepare a written report.²⁸⁸ In June 2011, the agencies conducted reviews and submitted

²⁸³ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (“[I]ndependent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”).

²⁸⁴ The traditional view that Congress cannot exercise much control over administrative policymaking garners support from the “rarity of any visible use by Congress of its . . . levers of control” coupled with a “lack of knowledge and interest among members of Congress” with respect to the adequacy of administrative decision-making. Kagan, *supra* note 64, at 2256. Scholars and members of the judiciary have challenged this traditional view, especially as it pertains to independent agencies. *See id.* at 2257 (citing JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 14, 34–37 (1990)) (discussing a study demonstrating “a large increase in formal methods of legislative oversight, such as committee hearings and investigations, in the 1970s and 1980s”).

²⁸⁵ For example, inspectors general (IG) report their findings and recommendations semi-annually to the agency head, who must transmit the IG report to Congress within thirty days, with comments and suggestions. Inspector General Act of 1978 § 5(b), 5 U.S.C. app. at 501, 506–07 (2012).

²⁸⁶ I tend to agree with Robert Ahdieh, however, that as a general matter, Congress has been relatively inattentive to the SEC; moreover, the SEC’s “mere consideration of efficiency, competition, and capital formation seems unlikely to generate useful information for the President or Congress in monitoring the SEC.” Ahdieh, *supra* note 159, at 2044.

²⁸⁷ *See supra* text accompanying note 149 (discussing the congressional and industry push for review of the agency’s cost-benefit analyses).

²⁸⁸ The Senators explained that their “request arises from our concern that regulatory agencies are conducting rulemakings to implement Dodd-Frank without adequately considering the costs and benefits of their rules and the effects those rules could have on the economy.” Letter from Sen. Richard C. Shelby et al., Senate Comm. on Banking, Hous. & Urban Affairs, to Elizabeth A. Coleman, Inspector Gen., Fed. Reserve Bd., et al.

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reports to the Senate Committee.²⁸⁹

In a follow-up report, the SEC OIG concluded that, while the SEC had “conducted a systematic cost-benefit analysis for each of the . . . rules,” the cost-benefit analyses were deficient in terms of “a lack of macro-level analysis and a lack of quantitative analysis on the impact of the rules.”²⁹⁰ The SEC OIG further concluded that the SEC used multiple baselines in cost-benefit analysis that were ambiguous or internally inconsistent.²⁹¹ On the heels of these investigations, in April 2012, the House Committee on Oversight and Government Reform held a hearing pointedly entitled “The SEC’s Aversion to Cost-Benefit Analysis.”²⁹² The SEC’s rulemaking record, in other words, was used by members of Congress to chastise the SEC for its “aversion” to cost-benefit analysis.

Committee hearings have likewise shined a light on deficiencies in the agency preemption context. In 2008, the House Committee on

(May 4, 2011) (on file with the *New York University Law Review*).

²⁸⁹ *E.g.*, OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM’N, REPORT OF REVIEW OF ECONOMIC ANALYSES PERFORMED BY THE SECURITIES AND EXCHANGE COMMISSION IN CONNECTION WITH DODD-FRANK ACT RULEMAKINGS (2011), *available at* http://www.sec.gov/about/offices/oig/reports/audits/2011/report_6_13_11.pdf; OFFICE OF INSPECTOR GEN., U.S. COMMODITY FUTURES TRADING COMM’N, A REVIEW OF COST-BENEFIT ANALYSES PERFORMED BY THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH RULEMAKINGS UNDERTAKEN PURSUANT TO THE DODD-FRANK ACT (2011), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf; OFFICE OF INSPECTOR GEN., EVALUATION OF THE FDIC’S ECONOMIC ANALYSIS OF THREE RULEMAKINGS TO IMPLEMENT PROVISIONS OF THE DODD-FRANK ACT (2011), *available at* <http://fdicig.gov/reports11/11-003EV.pdf>; *see also* COUNCIL OF INSPECTORS GEN. ON FIN. OVERSIGHT, ANNUAL REPORT OF THE COUNCIL OF INSPECTORS GENERAL ON FINANCIAL OVERSIGHT (2011), *available at* http://www.sec.gov/about/offices/oig/reports/reppubs/other/cigfo_%20annual_report_july_2011.pdf (describing the Council of Inspectors General on Financial Oversight and consolidating reports on the individual agencies’ work issued by inspectors general members).

²⁹⁰ OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM’N, REP. NO. 499, FOLLOW-UP REVIEW OF COST-BENEFIT ANALYSES IN SELECTED SEC DODD-FRANK ACT RULEMAKINGS, at iii–iv (2012), *available at* http://www.sec.gov/about/offices/oig/reports/audits/2012/rpt499_followupreviewofd-f_costbenefitanalyses_508.pdf. The Report also noted that the level of involvement of the SEC’s Division of Risk Strategy and Financial Innovation varied considerably rule by rule. *Id.* at iii.

²⁹¹ *Id.* at vi.

²⁹² *SEC Hearing, supra* note 160. The testifying witnesses included Mary Schapiro, Former SEC Chairman, and Jacqueline McCabe, Executive Director for the Research Committee on Capital Markets Regulation, as well as three law professors. *Id.* at III. Ms. McCabe expressed a concern that “the inadequate cost-benefit analysis in the vast majority of rulemakings under Dodd-Frank could expose these rules to judicial challenge, prevent important rules from taking effect, and contribute to uncertainty in our markets over their fate.” *Id.* at 56.

Oversight and Government Reform issued a report that raised red flags regarding the FDA's internal decision-making process leading up to its assertion of preemption in a preamble to a drug-labeling rule.²⁹³

While acknowledging that the inspector general investigations and committee hearings have brought considerable attention to deficiencies (and may even have been information forcing) in agency cost-benefit analyses and conflict preemption determinations, I am not sanguine about the ability of generalized oversight of congressional committees to substitute as a general matter for the more detailed and issue-specific review that OIRA or the courts can provide.²⁹⁴

But the Dodd-Frank–OCC example above presents a novel information-forcing role that Congress might play. To my knowledge, section 1044 of the Dodd-Frank Act represents the first instance where Congress uses the *Skidmore* factors to specify the level of judicial review courts are to apply to the OCC's preemption determinations, which must be supported by “specific findings.” Congress has thus “wade[d] into management of judicial doctrine.”²⁹⁵ With this move, Congress has, in a sense, inverted the settled expectations of the primary role that it should play in preemption disputes. The time may be ripe for such a move.

In the last decade or so, Congress has essentially been on the

²⁹³ See STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 110TH CONG., FDA CAREER STAFF OBJECTED TO AGENCY PREEMPTION POLICIES 4 (Comm. Print 2008), available at <http://oversight-archive.waxman.house.gov/documents/20081029102934.pdf> (“[T]he Office of Chief Counsel ignored the warnings from FDA scientists and career officials that the preemption language [of the 2006 preamble] was based on erroneous assertions about the ability of the drug approval process to ensure accurate and up-to-date drug labels.”), quoted in *Wyeth v. Levine*, 555 U.S. 555, 578–79 n.11 (2009).

²⁹⁴ My aim is not to present an exhaustive comparison of congressional and executive oversight along the information-forcing dimension, but instead to set the stage for introducing a novel role that Congress could play. That said, there are several inherent limitations of the congressional oversight model. First, congressional oversight would most likely occur only after a final rule is promulgated, whereas OIRA review focuses directly on the adequacy of the agency's cost-benefit analysis and can provide immediate feedback and suggestions for improvement. Second, the consequences of failing to satisfy OIRA are direct and immediate—the record, and possibly the rule, must be improved to withstand scrutiny whereas the consequences of congressional disapproval may be more remote and speculative. Third, OIRA reviews many more rules than Congress does and thus has built up comparative expertise in evaluating the adequacy of cost-benefit analyses. And—critical to the argument at the core of this Article—courts reviewing rules can take into account the fact that OIRA gave its imprimatur to the cost-benefit analysis supporting the rule, whereas congressional oversight typically occurs only when there is a severe problem to be flagged.

²⁹⁵ Jacob E. Gerson, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 718 (2013).

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sidelines of the products-liability preemption debate.²⁹⁶ The move in the Dodd-Frank Act signals a new way for Congress to get back in the game. More specifically, Congress has intervened not to answer the difficult and context-specific preemption questions, but instead to set the parameters for judicial review of the agency’s fact-based conflict preemption determinations. Congress sets the rules of the game—the standards for judicial review—but then allows preemption to be decided by the courts with fact-based input from the underlying regulating agency.

CONCLUSION

While courts and commentators have considered the information-forcing role of executive oversight and judicial review of agency action, the interrelationship between the two has yet to be considered. Here, I put forth a novel justification for heightened judicial scrutiny in the absence of meaningful executive oversight. Agency cost-benefit analyses and agency conflict determinations—two realms rarely if ever considered together—are compared in terms of their underlying reliance on factual predicates and contrasted in terms of the existing framework for executive and judicial review of agency determinations. A heightened judicial review standard—what I term “*State Farm with teeth*”—should guide courts’ evaluations of agencies’ cost-benefit analyses that are not subject to OIRA oversight (as illustrated by the recent D.C. Circuit *Business Roundtable* decision). Moreover, this same standard should be imported into judicial review of agency conflict determinations in the preemption context. The OCC banking preemption example illustrates the role for enhanced judicial review of agency conflict preemption determinations given the absence of executive oversight. The Dodd-Frank–OCC example, moreover, highlights a novel information-forcing role for Congress: setting the parameters for judicial review of an agency’s fact-based conflict preemption determination.

²⁹⁶ See Sharkey, *Federalism Accountability*, *supra* note 25, at 2148 (suggesting that Congress may even have “altogether abdicated responsibility in this realm”).