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A NEGATIVE EXTERNALITY BY ANY OTHER NAME: USING EMISSIONS CAPS AS MODELS FOR CONSTRAINING DEAD-WEIGHT COSTS OF REGULATION

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Emissions caps work on a simple and compelling premise. Regulated entities, in the process of creating something desirable, like energy, create and expel a problematic byproduct, such as carbon. They do this because they exclusively reap a significant set of benefits (e.g., profits, market share, job security) from their efforts in the process of providing the generalized benefits that accrue from adding more energy resources to the market, and providing that energy to their customers. However, they suffer the harms caused by their emissions only diffusely and incidentally, along with the rest of society. These emissions, paid for primarily by the rest of society, are called negative externalities. Emissions-cap regimes are designed to make regulated entities more directly accountable for the costs of their emissions and give them heightened incentives to minimize those emissions. This process is known as internalizing the externalities.

Perhaps ironically, regulatory agencies occupy a position markedly similar to that of the regulated emitters. Agencies, in the process of creating something desirable, such as a cleaner environment, also create and impose externalities, such as burdens on business and

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the economy. They do this because they reap particular benefits (e.g., job security and prospects, additional authority and powers, prestige, and self-worth) from their efforts, while suffering the harms caused by the dead-weight costs of their regulations only diffusely and incidentally, along with the rest of society. Emissions-cap regimes therefore provide a condign—though nevertheless imperfect—model for establishing a system by which regulatory agencies can be obliged meaningfully to take account of, and to minimize, the efficiency and economic losses occasioned by their regulations.

This Article will propose and elaborate on a regulatory "Compliance-Cost Cap" system derived from emissions-cap models and the principles that animate such models, designed to oblige regulatory agencies to constrain the deadweight costs of their regulations.

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INTRODUCTION

The regulatory state deserves credit for many successes.[1] The United States, for instance, boasts an environment massively cleaner and healthier than was true a century or even a few decades ago.[2] Much credit for this improvement surely goes to environmental regulations established over the past few decades.[3] Increased regulation, however, hardly represents an unalloyed blessing.[4] Whatever its benefits, regulation has important negative characteristics as well: much of it makes it harder for business to grow, develop, or even survive; harder for economic development of any sort to occur; and harder for private individuals to support themselves.[5] And as with most other goods, the benefits from regulation occur primarily at the early stages of regulation; as the low-hanging fruit is reaped, additional regulation tends to harvest increasingly small rewards (environmental or otherwise) at increasingly high costs.[6] The *Code of Federal Regulations* (CFR) now runs well in excess of 150,000 pages. More than 3,500 new regulatory rulemakings per year generate upwards of 8,000 additional federal regulations annually (to say nothing of state and municipal contributions).[7] Compliance with federal regulations alone may cost regulated entities (including both businesses and individuals) well in excess of one trillion dollars per year.[8] These high costs highlight the need

1. *See, e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2010) [hereinafter OMB 2010] (quantifying the partial benefits from regulation by the federal government from 1999–2009 at $128 to $616 billion); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1490 (2002); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 74 (1990).

2. *See, e.g.*, RONALD J. RYCHLAK & DAVID W. CASE, ENVIRONMENTAL LAW xiv (2010); CRAIG COLLINS, TOXIC LOOPHOLES: FAILURES AND FUTURE PROSPECTS FOR ENVIRONMENTAL LAW 37–38, 58, 86 (2010).

3. *See* RYCHLAK & CASE, *supra* note 2, at xiv; COLLINS, *supra* note 2, at 37–38, 86.

4. *See, e.g.*, SUNSTEIN, *supra* note 1, at 74–110 (reviewing ways in which regulations fail).

5. *Id.* This should prove troubling even from a regulation-maximizing point of view: high compliance costs make society poorer which, on top of everything else, means that fewer resources are available to support additional regulatory or other government programs. *See also infra* notes 51–57 and accompanying text.

6. This is a fairly standard insight: the easiest, highest-reward tasks tend to get done early in a project, leaving the relatively hard, relatively expensive, and relatively low-yield tasks for later. *See* Keith H. Hirokawa, *Driving Local Governments to Watershed Governance*, 42 ENVTL. L. 157, 160 (2012) (identifying the principle at work in the regulatory context).

7. *See infra* notes 117–118 and accompanying text.

8. *See infra* Part I.C.

for structural mechanisms to constrain them. Such structures should be designed to achieve the greatest regulatory benefit at the least cost, whether by enacting new, modifying existing, or repealing superannuated, duplicative, and otherwise inefficient regulation.

The regulatory Compliance-Cost Cap (CCC) program proposed in this Article presents such a mechanism. For more than thirty years, each federal administration has made at least nominal efforts to control regulatory-compliance costs and to ensure more regulatory benefit for each compliance-cost dollar.[9] The central such effort has been the obligation that agencies employ cost–benefit analysis (CBA) to evaluate prospective regulation.[10] CBA, however, has failed to restrain the seemingly inexorable rise in regulatory-compliance costs.[11] This is hardly surprising, as CBA-proper has traditionally applied only to executive agencies, not independent agencies.[12] Agencies face no penalties if they fail to undertake CBA, no consequences if they fail to follow the "recommendations" of CBA, and no obligation to follow a specific CBA formula.[13] Moreover, it is in the very nature of their position as regulators that agency personnel—who will be particularly aware of and partial to the benefits arising from regulation, but uniquely underattentive to the costs—are not in a good position to conduct CBA, because they find themselves essentially in the role of judging their effectiveness in their own cases.[14] Additionally, CBA has been subject to numerous critiques questioning which factors should be counted as part of the costs and benefits of regulation, and how (or whether) those factors should be counted.[15]

The CCC program is designed to remedy the shortcomings of CBA,[16]

9. *See infra* Part I.B; John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis,* 62 DUKE L.J. 1603, 1606 (2013) (listing executive orders that have mandated cost benefit analysis (CBA) since 1981); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1120 (2002) (analysis required for "any proposed regulation that would impose annual costs of more than $100 million on the economy"); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–71 (2012) (codifying the CBA requirement).

10. *See* sources cited *supra* note 9.

11. *See generally infra* Part I.C; J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 765, 776–82 (2003) (recounting failed initiatives and noting that "direct initiatives to cull regulations have been abject failures").

12. *See* OMB 2010, *supra* note 1, at 3–4; *see also infra* Part I.B. President Obama's Regulatory "Czar," Cass Sunstein, has notionally extended CBA obligations to independent agencies, but in the same toothless version critiqued herein. *See, e.g.*, Exec. Order No. 13,579, 3 CFR 256 (2011).

13. *See infra* Part I.B.

14. *See id.*

15. *See infra* notes 243–47 and accompanying text.

16. *See infra* note 101 (detailing the shortcomings and failures of CBA).

and to provide a genuinely effective means of containing regulatory-compliance costs and generating increased efficiencies from regulatory agencies without undermining the real benefits arising from well-considered and well-constructed regulatory regimes. It takes as its model emissions-cap regimes, the most familiar perhaps being a carbon-cap program popularly known as "cap-and-trade" (though there are emissions-cap programs, and even cap-and-trade programs, for other pollutants as well).[17] The central insight of emissions-cap programs is that entities subject to the cap, in the course of producing a valuable good such as energy, also produce harmful byproducts, such as carbon.[18] They pay too little attention to the byproducts, called "negative externalities," because many of the advantages flowing from their production of goods—advantages such as profits, job security, and job satisfaction—accrue to them directly, while the costs of the negative externalities flow out onto society generally.[19] As will be discussed below, though, private exchanges also produce positive externalities—i.e., *benefits* flowing from the exchange that are not fully captured by the bargaining parties.[20] In order to awaken producers to the negative externalities they create, emissions-cap programs limit, and then eventually reduce, the amount of negative externalities the regulated entities are permitted to produce, thus requiring them either to increase their goods-to-negative-externalities production ratio or to decrease production.[21]

The CCC program recognizes that regulatory agencies are in a materially similar position to that of the entities they regulate. Like regulated entities, agencies create a valuable good: the benefits of regulation.[22] As a result, regulators are rewarded with job security, promotion, job satisfaction, and other benefits.[23] Like their regulated counterparts, agencies are unable to capture all of the benefits arising from the goods they create: much of the benefit—as intended by the system—spills out to the public generally. One of the marginal dissimilarities between regulated entities and regulatory agencies is that regulated entities are generally able to capture a larger quantum of the benefit created by their production than are regulatory agencies. As a result, compliance-cost caps cannot follow the emissions-cap model precisely.[24] Regulatory agencies also, however, create a byproduct: the costs of complying with

17. *See infra* Part II.
18. *See id.*
19. *See infra* Part III.
20. *See id.*
21. *See infra* Part II.
22. *See infra* Part III.
23. *See infra* Parts I.B, III–IV.
24. *See infra* Parts IV–V.

their regulations, which are borne not by them, but by society.[25]

While agencies and regulators face incentives and inclinations to maximize regulatory reach and activity, to minimize their own efforts, and to maximize the positive-externality public benefits of their regulations, they face essentially no material incentives to minimize the negative-externality costs of complying with those regulations.[26] In order to make regulatory agencies attend meaningfully to the negative externalities they create, the CCC program will cap, and then for a time gradually and slowly reduce, the amount of negative externality that regulatory agencies are permitted to produce. The program will thus require agencies to increase the efficiency of their regulations or to decrease regulation, presumably by pruning away outdated, duplicative, or highly inefficient regulation, and by revising necessary but poorly crafted regulation.[27]

The CCC program would, for the first time, establish a real and meaningful check on the growth of regulatory-compliance costs and would genuinely incentivize regulatory agencies to do the work required to weed out or revise inefficient regulation. Unlike CBA and its brethren, CCC would set obligatory requirements, according to standards established and monitored by neutral arbiters.[28] It would force government, as an initial matter, to catalogue—and, as it were, index by entity regulated—the whole of its regulations, an effort which, regrettably, has never been undertaken.[29] It would require the government to acknowledge the costs associated with this totality of regulation, according to an objective metric to be applied consistently.[30] It would apply the capping mechanism to all costs imposed by government that do not arise from the taxing power or from genuine adjudication.[31] This would render all of government more transparent and responsible.[32] Thereafter, the caps on the costs of regulatory compliance would slowly fall for a period, creating pressures on regulators to wring excesses and inefficiencies from their regulations. Once a reasonable amount of tightening had occurred, compliance costs would be permitted to rise only in step with some coherent and constraining metric, such as real gross domestic product (GDP) or population growth.[33] Any increases in the total CCC outside of these constraints—whether for a specific new or

25. *See id.*
26. *See infra* Part V.
27. *See infra* Parts IV–V.
28. *See infra* Part I.B.
29. *See infra* note 115 and accompanying text.
30. *See infra* Part V.B.
31. *See infra* Part V.A.1–2.
32. *See id.*
33. *See infra* Part V.B.

existing agency, or for all agencies in general—would require an explicit act of Congress, thus again increasing transparency and accountability.[34]

In Part I, below, I review the reasons why we must develop an effective method to constrain the growth of regulatory-compliance costs, and to require regulatory agencies to promulgate efficient regulations and to revise or discard inefficient or ineffective regulations. In sum, the American economy is burdened by an unprecedented level of regulatory costs, rendering inefficient, outdated, or unproductive regulations particularly problematic. Regulatory agencies and regulators, meanwhile, presently have little structural incentive to minimize compliance costs, and require some formal mechanism that will oblige them to create and to become more efficient at creating the benefits of regulation at lower dead-weight costs. In Part II, I provide a brief summary of how emissions-cap programs work, and why they have been applied and proven effective.

In Part III, I establish that entities regulated under emissions caps and regulatory agencies are markedly similar. Each creates—and is rewarded for the creation of—valuable products, but also creates negative externalities to which they necessarily pay too little attention unless otherwise obliged. In Part IV, I provide an overview of the CCC program. I explain how it would require regulatory agencies to stop expansion, and eventually to reduce, compliance-cost externalities and create more efficient regulation. In this Part, I present various models for how the cap could be set so as to account for inflation and possibly for GDP growth. I consider how the cap deflator should be established, and review the limits of automatic deflation caps. I also consider the question of whether new agencies or programs should be provided additional regulatory compliance-cost budgets. I conclude that the purposes of CCC would best be achieved by establishing a single "global" compliance-cost cap when CCC is implemented and requiring that the compliance-cost budget for new agencies or initiatives be withdrawn from other regulatory agencies. I recognize that even if this conclusion is not followed—even if Congress should grant new regulatory agencies or initiatives new compliance-costs budgets that expand the global compliance-cost cap—the central CCC goals of transparency and accountability will still be served.

In Part V, I add detail to the model. In Part V.A, I consider which government acts should be considered regulation, and what government-engendered costs should qualify as regulatory-compliance costs. I conclude that government activities that result in private expenditure that are not taxation (government action that results in money flowing directly to government coffers for a reason other than the imposition of a fine or other

34. *See infra* Parts III–IV.

penalty) or genuine adjudication should qualify as regulation. In Part V.B, I explain how and by whom compliance costs should be calculated and why absolute cost calculations matter less under CCC. The cost-calculation model employed should be objectively established and applied and be used consistently for the calculation of all compliance costs, cost caps, and cost savings. I also explain why the benefits of regulation should play no more a role in compliance-cost cap determinations than the value of the goods produced by entities regulated under emissions caps are considered in determining those caps. Continuing, I consider the practical and prudential limits of cost-cap deflation. I recognize that just as sensible emissions caps do not generally set caps at zero, because the result of zero negative externalities might well be zero goods produced, so too the cost-cutting mechanisms of CCC cannot proceed forever, but merely for a period reasonably estimated to result in significant diminution of excessive or inefficient externalities. Thereafter, compliance costs may be permitted to grow, but growth must be restrained by some objective standard, so as to avoid a return to the unregulated growth of compliance-cost negative externalities that exists today. Potential standards might include inflation-only growth or, more capaciously, growth that accounted for GDP change.

I. THE NEED FOR STRUCTURAL INCENTIVES TO CONSTRAIN REGULATORY-COMPLIANCE COSTS

The American economy has struggled since at least the "credit crunch" of autumn 2008.[35] Economists disagree strenuously about the causes of and solutions to the malaise, but one cannot doubt that one economic handicap is the steady growth of regulation and regulatory-compliance costs.[36] Whatever the concomitant benefits of regulation, its costs include the constraint of entrepreneurial vitality and a significant dampening of the engines of the American economy.[37] This, in turn, has negative consequences for individuals as they try to provide for themselves and their families; and likewise hampers government efforts to improve the environment, fund entitlement programs, or fulfill other national obligations or promises.[38]

35. *See* Paul Wiseman, *Economic Recovery Is Weakest Since World War II*, YAHOO NEWS (Aug. 15, 2012, 12:41 PM), http://news.yahoo.com/economic-recovery-weakest-since-world-war-ii-152031546—finance.html.

36. *See id. Cf.* Hahn & Sunstein, *supra* note 1, at 1491 (arguing that, "[e]specially in a period in which economic growth and improved safety and health are among government's highest priorities," it is "a major problem" if costs of regulation "are high and the benefits low or nonexistent").

37. *See* Hahn & Sunstein, *supra* note 1, at 1490.

38. *See id.*

For more than thirty years, every federal administration has grappled with this negative externality of regulation, and has sought to limit its effects, primarily (though not exclusively) by requiring CBA of major regulations issued by executive agencies.[39] These requirements have been relatively toothless and agencies have honored the requirements largely in the breach, or at best only incompletely.[40] The task of constraining compliance costs has been handed, without oversight or independent consequence, exactly to those whose central charge and focus is to produce public-protecting regulation, not to consider its costs and to constrain its reach[41]—with the unsurprising result that regulatory-compliance costs have not been constrained, but grow at a significant clip.[42] Given present circumstances, these ineffectual efforts at compliance-cost constraint and negative-externality reduction are insufficient. A more rigorous program, one that effects meaningful regulatory-cost containment, is required.

A. Economic Sclerosis

The American economy has been in real trouble since the credit crisis of late 2008.[43] Economic stress continues, and promises to continue.[44] Economic growth remains stalled below the level necessary to compensate for population growth;[45] total employment still remains far below its peak before the crisis began;[46] and government debt has skyrocketed.[47] Even if

39. *See generally infra* Part I.B. President Reagan introduced the first CBA executive order during his first month in office. *See* Exec. Order No. 12,291, 3 CFR 127 (1981). Each administration since has renewed the order. *See* Bronsteen et al., *supra* note 9, at 1606 (listing executive orders that have mandated CBA since 1981). Additionally, in the 1990s, Congress partially codified the obligation. *See* Unfunded Mandates Reform Act, 2 U.S.C. §§ 1501–71 (2012) (codifying the CBA requirement).

40. Bronsteen et al., *supra* note 9, at 1606.

41. *See id.*

42. *See infra* Part I.C.

43. *See, e.g.*, Wiseman, *supra* note 35.

44. *See, e.g.*, David M. Schizer, *Fiscal Policy in an Era of Austerity*, 35 HARV. J.L. & PUB. POL'Y 453, 454–60 (2012) (summarizing current economic conditions); Kenneth Casebeer, *O My Sons and Daughters, How Do I Immiserate Thee: Let Me Count the Ways*, 29 HOFSTRA LAB. & EMP. L.J. 1, 1–3 (2011) (same). Even the President, who might have been expected to embrace the outer edges of optimism during his reelection campaign recognized that full recovery will take some years more. *See* David Nakamura, *With Hope Dampened, Obama Changes Pitch*, WASH. POST, Aug. 27, 2011, at A1.

45. *See, e.g.*, Schizer, *supra* note 44, at 456; Peter Coy, *U.S. Jobless Rate Drops for the Worst of All Reasons*, BLOOMBERG BUSINESSWEEK (Sept. 7, 2012), http://www.businessweek.com/articles/2012-09-07/weak-jobs-report-shows-obamas-long-road-ahead ("The share of working-age people who are either working or looking for work—known as the labor-force participation rate—fell to its lowest level since September 1981.").

46. *See, e.g.*, James Pethokoukis, *Chart of the Day: America's Missing 11 Million Workers,*

the economy were to gain steam, national obligations will mount extravagantly over coming decades.[48] The baby boomers have begun to retire, and fewer workers shoulder the massive burden of paying boomers' retirement and healthcare expenses.[49] The "graying" of American society and the economic consequences of that graying will strain national resources and dampen economic growth for years.[50]

The size, scope, and cost of regulation contribute to the paucity of recovery. Regulatory compliance—even when the regulation efficiently serves some valuable social purpose—generally hinders business investment, development, expansion, and mutability.[51] It is, as a general rule, cheaper to conduct business without having to comply with a regulation than having to comply with it.[52] Nor are the effects limited to

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AEIDEAS, (Aug. 3, 2012, 1:22 PM), http://www.aei-ideas.org/2012/08/chart-of-the-day-americas-missing-11-million-workers/; Gregor MacDonald, *Total Employment in the U.S. Falls Again*, GREGOR.US, (Aug. 5, 2011), http://gregor.us/economics/total-employment-in-the-us-falls-again/ (graphing information drawn from United States Total Employment in Millions (seasonally adjusted) 2001–2011, BUREAU OF LABOR STATISTICS).

47. Ian Katz, *U.S. Government Debt Reaches $16 Trillion for First Time*, BLOOMBERG BUSINESSWEEK, (Sept. 4, 2012, 6:14 PM), http://www.bloomberg.com/news/2012-09-04/u-s-government-debt-reaches-16-trillion-for-first-time.html (debt was $6.2 trillion a decade ago, $13 trillion in June 2010, $14 trillion in December 2010, and $15 trillion in November 2011). The debt is, for the first time, larger than U.S. gross domestic product (GDP). *See, e.g.*, News Release, Bureau of Economic Analysis, U.S. Dep't of Commerce, Gross Domestic Product: Second Quarter 2012 (Second Estimate); Corporate Profits: Second Quarter 2012 (Preliminary), (Aug. 29, 2012), *available at* https://www.bea.gov/news releases/national/gdp/2012/gdp2q12_2nd.htm (calculating annualized GDP as of end of second quarter 2012: $15.61 trillion).

48. *See, e.g.*, Susan A. Channick, *Taming the Beast of Health Care Costs: Why Medicare Reform Alone is Not Enough*, 21 ANNALS HEALTH L. 63, 63 (2012) (describing the tremendous increase in healthcare costs over the next decade).

49. *See, e.g.*, Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 987–88 (2000).

50. *See, e.g.*, Channick, *supra* note 48, at 67 (citing the COB's finding that federal healthcare expenditures will increase to 10% of GDP in 2035); Nicholas Eberstadt, *Are Entitlements Corrupting Us? Yes, American Character Is at Stake,* WALL ST. J., Aug. 31, 2012, http://online.wsj.com/news/articles/SB10000872396390444914 (recounting exponential growth of entitlement programs and payments over the last 40 years).

51. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 759 ("While rules promulgated by agencies have created obvious benefits, they have equally generated economic and liberty costs to regulated parties and society at large.") (citing Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 409, 411 (1990)).

52. The point here is not that regulations can never make doing business cheaper. It is that most regulation will add to the cost of doing business even if the regulation has some countervailing social justification. For instance, we might as a society determine that restaurants must include calorie information in their menus. See, e.g., Christine Cusick, Comment, *Menu-Labeling Laws: A Move from Local to National Regulation,* 51 SANTA CLARA L.

private lives and private enterprise. President Obama's early calls for a vigorous economic stimulus designed to fund "shovel-ready" initiatives[53] withered under the realization, as the President himself eventually acknowledged,[54] that there are no shovel-ready projects in this age of regulation. Regulatory-compliance obligations put years between the conception and initiation of such projects and materially add to their completion time.[55] Some political commentators, meanwhile, point to the government funded and managed success of the Hoover Dam as a model for, and defense of, public works spending,[56] without recognizing that the

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REV. 989, 995–1004 (2011) (recounting local and federal menu-labeling requirements, including, most recently, nationwide requirements included in the Affordable Care Act). This may be a public good, but complying with it is almost always going to cost facilities providers more than *not* complying with it. This conclusion is obvious for private business facility providers because if providing the features required by the regulation had been a money-making proposition, the businesses would have provided those features already. This logic fails only if the government genuinely knows better than businesses how those businesses can make money, and if its regulations successfully and efficiently incorporate this insight. Even in the rare instances in which this is true with regard to *some extant* businesses, it is not true for marginal competitors and for would-be market entrants; rather, the increased mandatory costs of compliance force marginal competitors (who can least bear those additional costs) out of business, and discourage new market entrants (who face higher barriers to entry). *See, e.g.*, Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform,* 73 TUL. L. REV. 845, 872, 907–08, 911, 918–20 (1999); Nicole V. Crain & W. Mark Crain, *The Regulation Tax Keeps Growing*, WALL ST. J., Sept. 27, 2010 at A17 (arguing that their studies demonstrate that regulatory costs per worker fall disproportionately on small businesses). As a result of fewer competitors entering the market and some being forced out, the otherwise-available supply of the product or facility to which the regulation applies has been reduced, thus raising the price of that product or facility for all users. *See, e.g.*, Zywicki, *supra*, at 854.

53. Brian Naylor, *Stimulus Bill Gives "Shovel-Ready" Projects Priority,* NPR, (Feb. 9, 2009, 12:49 AM), http://www.npr.org/templates/story/story.php?storyId=100295436 ("As President Obama urges Congress to pass the $800 billion-plus stimulus package, one of his favorite selling points is the thousands of projects nationwide that he calls 'shovel ready'—meaning planning is complete, approvals are secured and people could be put to work right away once funding is in place.").

54. *See, e.g.*, Peter Baker, *The Education of a President*, N.Y. TIMES, (Oct. 12, 2010), http://www.nytimes.com/2010/10/17/magazine/17obamat.html?gwh=7F81C785446123B1416714C1059CA8C5&gwt=regi (quoting the President as "realiz[ing] too late that 'there's no such thing as shovel-ready projects' when it comes to public works").

55. *See, e.g.*, Adam J. White, *Infrastructure Policy: Lessons from American History*, NEW ATLANTIS Spring 2012, at 3, 31; *Federal Permitting Process Overhaul: Hearing on H.R. 4377 Before the H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of William L. Kovacs, Senior Vice President, Envtl., Tech. & Regulatory Affairs, U.S. Chamber of Commerce).

56. *See* NBC News, *Rachel Maddow: The Hoover Dam*, YOUTUBE (Apr. 22, 2011) http://www.youtube.com/watch?v=s0gNga6v9EY ("We've got to figure out whether or not we are still a country that can think this big."); *see also* President Obama, Remarks by the

modern regulatory state makes any such projects effectively impossible today.[57]

Moreover, increased regulation is hardly the only driver of environmental or general social improvement. Substantial research suggests that one of the most important factors indicating ecological health is a country's wealth: richer societies can afford to be cleaner.[58] Wealthier societies may well achieve a portion of this additional quantum of greenery (or other benefits positively correlated with increased wealth) through the regulatory process.[59] It still holds, though, that the most efficient and least compliance-cost generating regulations will, *ceteris paribus,* achieve society's

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President at the Building and Construction Trades Dep't Conference (Apr. 30, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/04/30/remarks-president-building-and-construction-trades-department-conference (declaring that a new Hoover Dam or similar project can be built now if "you've got enough people with the same goal, pulling in the same direction, looking at the same game plan").

57. The Hoover Dam is not an example of a modern successful public works project because it is highly improbable that it, or other western dams, would be built today because of the negative effects that they have had on the habitats of local species. *See, e.g.*, Michael Cohen, *The Delta's Perennial Drought: Instream Flows for an Over-Allocated River,* 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 115 (2006) (detailing and objecting to the effect of the Hoover Dam on the Colorado River ecosystem).

58. Actually, the research has demonstrated that societies tend to follow a U-shaped curve, called "the environmental Kuznets curve," which describes this progression:

> At low levels of development, both the quantity and the intensity of environmental degradation are limited to the impacts of subsistence economic activity on the resource base and to limited quantities of biodegradable wastes. As agriculture and resource extraction intensify and industrialization takes off, both resource depletion and waste generation accelerate. At higher levels of development, structural change towards information-based industries and services, more efficient technologies, and increased demand for environmental quality result in levelling-off and a steady decline of environmental degradation.

THEODORE PANAYOTOU, ECONOMIC GROWTH AND THE ENVIRONMENT, ECONOMIC SURVEY OF EURPOE 2003, NO. 2 45–46 (2003), *available at* http://www.unece.org/fileadmin/DAM/ead/sem/sem2003/papers/panayotou.pdf.

These studies confirm what a broad knowledge of American history would illustrate, that the United States (along with most developed and many developing countries) are on the upslope of this U-shaped curve (though perhaps not for all possible environmental-pollution factors). *See, e.g.*, *id.* at 45–56 (reviewing the literature to conclude that consensus has been reached on this broad conclusion); Jesse H. Ausubel & Paul E. Waggoner, *Dematerialization: Variety, Caution, and Persistence,* 105 PROC. OF THE NAT'L ACAD. OF THE SCI. OF THE U.S. 12,774, 12,779 (2008), *available at* http://www.pnas.org/content/105/35/12774.full.pdf+html (reviewing history to reach the same conclusion).

59. And there is every reason to believe that in virtually all developed countries, environmental regulation does play a significant role in the greening process, but arguably not the primary role, and it is certainly not the sole factor. *See generally supra* note 58 and accompanying text.

regulatory goals with the least possible diminishment of the country's wealth. This in turn will foster a virtuous cycle (as compared to the less-efficient-regulation alternative): achieving the regulatory goals while leaving more wealth and permitting more wealth accumulation, which will in turn engender more support for a yet cleaner environment and more resources with which to achieve those ends, and so on.[60] Even from a maximum-possible-regulation standpoint, then, it proves beneficial to demand—and to establish structures that will engender—the most efficient (or at least more efficient) regulation.[61]

More broadly, President Kennedy was essentially correct: a rising tide does lift all—or nearly all—boats. Americans of all income levels have unprecedented access to technologies, conveniences, quality-of-life benefits and even luxuries that were wholly unavailable—at any price—to any of their grandparents because of economic growth.[62] If the legitimate purpose of regulation is to improve the lives of citizens, as it must be, then inefficient regulation will work directly against its intended purpose by stymying economic growth, no matter how well intentioned in the first place.[63]

We have been warned that we face an era of shared sacrifice—higher taxes, fewer benefits, extended working lives.[64] Regulation, too, must share

60. *Cf.* Hahn & Sunstein, *supra* note 1, at 1493 ("Expensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty). Resources now being devoted to small or imaginary problems might be diverted instead to areas where, by all accounts, they could produce far more good.").

61. *See, e.g.*, *id.*; Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1642–43 (1991) ("The federal . . . approach has had success but has run out of steam, and has little chance of dealing effectively with the major air pollution problems that threaten our atmosphere on a global basis. We cannot save the environment just by creating more regulations.").

62. *See, e.g.*, Brian Palmer, *How Rich are Poor People?*, SLATE (Sept. 14, 2011, 6:24 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/09/how_rich_are_poor_people.html; ROBERT RECTOR & RACHEL SHEFFIELD, HERITAGE FOUND., BACKGROUNDER NO. 2575, AIR CONDITIONING, CABLE TV, AND AN XBOX: WHAT IS POVERTY IN THE UNITED STATES TODAY? 2–3 (2011), *available at* http://thf_media.s3.amazonaws.com/2011/pdf/bg2575.pdf; W. MICHAEL COX & RICHARD ALM, MYTHS OF RICH & POOR: WHY WE'RE BETTER OFF THAN WE THINK (1999). Each of these texts in various ways retails the myriad and manifold ways in which the poor live vastly better lives than did even the wealthy of earlier generations, from material comforts to quality and quantity of life to access to information and healthcare to entertainment and education options and beyond.

63. *See, e.g.*, Hahn & Sunstein, *supra* note 1, at 1491–93.

64. *See, e.g.*, Carol E. Lee & Damian Paletta, *New Obama Deficit Plan; Nearly Half of $3 Trillion Proposed to Come From Taxes; GOP Opposes Fresh Levies,* WALL ST. J., Sept. 19, 2011 (President Obama calling for increased taxes and sacrifice); Paul Kane & Lori Montgomery, *Obama, Boehner Press Debt-Limit Arguments in National Addresses: President Obama, House Speaker Boehner Present Dueling Debt-Limit Plans to Nation*, WASH. POST, July 26, 2011, at A1

this new austerity.[65] Moreover, the very extent of regulation creates its own need for mechanisms of constraint. Convention shows us that a few dozen pages of regulation will likely impact few people regardless of whether those regulations are the most efficient or objectively worth regulating. The case is obviously reversed when the regulation books run to the hundreds of thousands of pages,[66] and compliance levies a perhaps multi-trillion dollar annual cost.[67] Even if an economy manages to lumber forward under such a burden, society must create mechanisms to constrain and constrict that burden.

B. An Absence of Mandatory Structural Incentives to Improve Regulatory Efficiency

The modern regulatory state has failed to rein in its regulatory impulses. Many of the incentives regulators face push them consistently to increase regulatory burdens.[68] While regulators also face some countervailing incentives to shirk[69] and arguably some related incentives to oppose certain specific regulations that would particularly disfavor established regulated entities,[70] they face essentially no mandatory structural obligations to police, much less ensure, regulatory efficiency. The effect of this lopsided incentive structure is demonstrated by the consistent expansion of regulatory obligations over time, largely unaccompanied by efficiency-minded revision or repeal of regulatory burdens.[71]

It is not surprising that regulatory agencies are teleologically "authority-enhancing," meaning that they are geared to multiply, rather than to pare, regulatory burdens. Proliferation of regulation permits agencies to be

(considering Obama's call for "shared sacrifice" in dealing with the national debt in the form of "deep cuts in federal spending to be coupled with higher taxes on the wealthy and on large corporations").

65. As will be discussed below, executive agencies (but not independent agencies) have been formally obliged to undertake CBA for big-ticket regulatory programs since 1981. *See infra* notes 100–107 and accompanying text.

66. *See* OFFICE OF THE FED. REG., FED. REG. PAGES PUBLISHED (1936–2012), at 2, *available at* https://www.federalregister.gov/uploads/2013/05/FR-Pages-published.pdf [hereinafter CFR Page Count]; Melany C. Birdsong, *Reforming Regulation: No Time Like the Present*, 32 HAMLINE J. PUB. L. & POL'Y 371, 380–81 n.20 (2011); Ruhl & Salzman, *supra* note 11, at 775.

67. *See infra* notes 119–127 and accompanying text (considering a range of incomplete estimates that suggest a floor of approximately one trillion dollars per year, and a ceiling that could reach several times that).

68. *See infra* notes 72–76 and accompanying text.

69. *See infra* Part III.

70. *See id.*

71. *See infra* Part I.C (reviewing empirical evidence).

productive, and to demonstrate their productivity,[72] while at the same time giving themselves additional tasks, such as enforcing their new regulations. These new responsibilities necessarily increase their job security (and perhaps their pay and benefits), while also increasing their own power over others, their prestige, and—if they dislike the entities they are regulating or have made regulation their career in furtherance of a personal cause—their self-worth.[73] Additionally, given the extent of the revolving door between regulatory agency and regulated entity,[74] the proliferation of regulation

72. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 787 (noting that deregulatory efforts are difficult and offer little benefit) (citing EUGENE BARDACH & ROBERT KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 186 (1982); *cf.* Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 772–73 (1977); Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 22 TEL AVIV U. STUD. L. 9, 20 (1992); SUNSTEIN, *supra* note 1, at 100 (reviewing agency incentive to over- rather than to under-regulate).

73. *See, e.g.*, SUNSTEIN, *supra* note 1, at 99 ("The incentives to bureaucrats include the aggrandizement of bureaucratic self-interest and the preservation of individual agency autonomy."); Zywicki, *supra* note 52, at 890–93 (recounting motivations of regulators); JAMES Q. WILSON, BUREAUCRACY: WHAT AGENCIES DO AND WHY THEY DO IT xviii (1989) (explaining that William Niskanen, who led the public choice analysis of agencies, had concluded that, "The utility of a business person is assumed to be profits; that of a bureaucrat is assumed to be something akin to profits: salary, rank, or power."); Elie Appelbaum & Eliakim Katz, *Seeking Rents by Setting Rents: The Political Economy of Rent Seeking*, 97 ECON. J. 685, 685 (1987) ("However, following the work by Downs (1957), Buchanan and Tullock (1962), Stigler (1971), Peltzman (1976) and much of the public choice literature, regulators are not necessarily altruistic and may be expected to set rents at levels which are determined by their own interests. Thus, since regulators may also be expected to be rent seekers, the determination of the rent itself should be endogenised to reflect the fact that the rent setters are, themselves, rent seekers.").

Others have analyzed the complexity of career incentives for post-agency employment that face most top agency executives and argued that industry may hire pro- or anti-industry regulators in different circumstances for different reasons. Regulated entities may prefer strident regulators who understand well the complexities of regulation, or former regulators with whom they have enjoyed friendly relations, and who are more likely to be more suitable industry employees. Regulators respond rationally (self-interestedly) to those signals. To the extent that the latter are preferred, those who remain in regulatory agencies will be, proportionally, increasingly anti-industry. *See* PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 164–74, 192 (1981); *see generally* WILSON, *supra*, at 51, 88; WILLIAM NISKANEN, JR., BUREAUCRACY AND PUBLIC ECONOMICS (1994); WILLIAM NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

74. The "revolving door" describes "the movement from private employment to the government and back." United States v. Medico Indus., Inc., 784 F.2d 840, 843 (7th Cir. 1986). In the United States, that door is well oiled. *See generally* Brook Masters, *Enter the Revolving Regulators*, FIN. TIMES, Apr. 23, 2012, http://www.ft.com/cms/s/0/2f5790fa-8d50-11e1-9798-00144feab49a.html#ixzz1szrA5xi0 ("in the US . . . changing sides is part and parcel of the way both the government and industry do business"); Robert Pack, *The Revolving Door*, WASH. LAW., Oct. 2001, at 22–27.

while one serves as a regulator proportionally increases one's value when the time comes for the next door to revolve.[75]

There is no suggestion here that regulators must or necessarily do behave unethically, improperly, incompetently, or even self-consciously with regard to these incentives in order for the incentives to result in an ever-increasing regulatory burden with little effort to repeal or streamline extant regulations. Regulators are people, and necessarily consider issues of personal and family material self-interest.[76] Such considerations are

75. This is not to suggest that most, or even very many, regulators who leave government for industry are corrupt. *See, e.g.*, James S. Roberts, Jr., *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343, 343 (1991); Masters, *supra* note 74; Stuart B. Nibley, *Jamming the Revolving Door, Making it More Efficient, or Simply Making it Spin Faster*, PROCUREMENT LAW., Summer 2006 at 1, 15–17 (recounting cases of revolving-door corruption and appearance-of-impropriety situations). But there need not be either corruption or even favor- or access-seeking impropriety, as these things are normally considered, for the effect alluded to above to occur. A recent newspaper article cited "advocates of a free flow between government and industry" as explaining that "the exchange benefits both sides. Regulators who understand the sector . . . are better positioned to draft sensible regulations and catch those who seek to evade them." Masters, *supra* note 74. But conversely, regulated entities are analogously well-served to hire ex-regulators who can help them to navigate through the "sensible" regulations that the regulators have helped to write—and the more complicated the regulations, the more necessary the guide through those "sensible" shoals. *See, e.g.*, *id.* ("Sarah Clarke . . . who returned to private practice . . . after five years at the [British financial regulator] says that . . . 'being able to advise a private client from the perspective of having worked on similar cases on the other side is invaluable in terms of knowledge, expertise and judgment.'"); Pack, *supra* note 74, at 22 ("*Common Cause* . . . defines the revolving door as the practice of government officials cashing in on their public service by leaving public office and going to work for the same special interests who were seeking favors from them while they were in office.") (internal quotations omitted). Only if the regulatory agencies have developed a complicated and porous regulatory structure, though, would such favors either be possible or necessary, and only under complex regulation would inside-the-agency expertise be something that has an outside-the-agency cash value. *Id.*, at 22.

76. The public choice school first systematically expressed the central insight that regulators are influenced by considerations of material self-interest. *See, e.g.*, Zywicki *supra* note 52. While debate rages in the academy about how much effect material self-interest considerations play, and about whether concerns such as caring for one's family and promoting one's own particular vision of the public good should count as self-interest, even rejectionist critics of public choice theory accept the central proposition that material self-interest plays *some* role in regulator behavior, while a more widely defined self-interest plays a wider role. *See, e.g.*, Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 323, 326, 333–34, 340–41 (2002) (recognizing that various public choice theorists define self-interest differently, but that even theories expressly opposed to public choice recognize that sometimes regulators "maximize their material well-being; more often, however [they] maximize the material well-being of themselves and their children. In other situations, what is most meaningful is to serve God, to serve one's country, to become famous, to experience

natural, and could only be considered venality if regulators were expressly deciding in favor of their personal self-interest at the expense of doing their jobs as well as they define that term.

Yet regulators seldom find themselves confronted by the internal challenge of such venality. Rather, the structural nature of their positions as regulators causes regulators to conclude that the things that they should do as regulators coincide with the things that will provide them job security, promotion, and other personal advantages.[77] There are no doubt a few libertarians who go to work for a government agency with the express purpose of minimizing government's reach, but not many.[78] Rather, people who go into the "business" of regulation will generally think that more regulation is just the right thing to do, so that adding to regulatory directives represents their honest pursuit of the good.[79] Additionally, these regulators will most often focus on the advantages that arise from what they do, rather than on the advantages that arise from what regulated entities do

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adventure, to prove one's masculinity" or to serve other purposes).

77. *Cf.* Rubin, *supra* note 76, at 326 (considering the same issue in the context of public-choice review of judicial motivation).

78. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 119 (2000) ("That agencies are systematically more loyal to their basic mission seems persuasive, even obvious. People who are sympathetic to that mission *are* more likely to be attracted to work at the agency."); André Blais, Donald E. Blake, & Stéphane Dion, *The Voting Behavior of Bureaucrats, in* BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE 205 (1991) (suggesting that agency employees are more likely to support a significant role for government than the average voter); RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 47 (2d ed. 1996) ("Because the lifeblood of bureaucratic entities is administrative programs, bureaucrats enhance their position by helping to develop new programs and protect their current position by opposing the destruction of existing programs."). This is not to say that the vagaries of politics do not sometimes sweep into power parties or administrations dedicated to the proposition of reining in regulation and drawing in the reach of government. Surely some of President Reagan's political appointees at various agencies, for instance, very much wished to do exactly that. But the average civil service bureaucrat in the trenches is an unlikely enemy of the expanding regulatory state. *See also* Peter Staler & Gary Lee, *Land Sale of the Century*, TIME, Aug. 23, 1982, at 18 (describing the cabinet career of James Watt, President Reagan's Interior Secretary).

79. *See, e.g.*, Rubin, *supra* note 76, at 345–48 ("The ordinary people who staff the modern state as administrators share these attitudes. They believe that government should 'do something' about the flood, or discrimination, or consumer abuse, and they believe that they themselves are doing it when they perform their regulatory roles. These culturally embedded attitudes are reinforced by their personal preferences. Like everyone else, they want to act in accordance with their beliefs in order to give their lives meaning."); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 267–74 (2008) (recounting instances of regulators acting in what they understood to be the public interest); sources cited *supra* note 78.

or on the burdens that their regulations create for regulated entities and the negative consequences flowing from those burdens.[80] Similarly, they will simply understand the benefits better than the accompanying burdens.[81] After all, their expertise is in, and their focus is on, creating those benefits by the process of regulation. Regulators are more likely to see the burdens of their regulations merely as byproducts of the beneficial regulations and thus effectively not to see them as "real" burdens at all. Given that regulators attend more to the benefits to be reaped from their additional regulations than to the burdens to be created by compliance with those regulations,[82] it is easy to see why wholly honest, competent regulators, acting in good faith, would naturally tend to increase regulation and regulatory burden rather than repeal or streamline inefficient, ineffective, or antiquated regulation.[83] All of this explains the need for structural incentives and obligations to force regulators and regulatory agencies to focus on, and minimize, the regulatory-compliance burdens that they create.[84]

This conclusion should seem familiar and uncontroversial because it is,

80. *See, e.g.*, Rubin, *supra* note 76, at 345–48; CROLEY, *supra* note 79, at 267–74.

81. *See, e.g.*, Rubin, *supra* note 76, at 345–48; CROLEY, *supra* note 79, at 267–74.

82. *See, e.g.*, Rubin*, supra* note 76, at 347–48 ("Like everyone else, [regulators] want to act in accordance with their beliefs in order to give their lives meaning. This will lead them to act in a manner congruent with their beliefs about the purpose of government when carrying out their assigned roles. *It will also lead individuals to alter their beliefs to fit their assigned roles.*") (emphasis added); *see also* Catriona Mackenzie & Jacqui Poltera, *Narrative Integration, Fragmented Selves, and Autonomy*, HYPATIA Winter 2010, at 32 (arguing that people "constitute (and reconstitute) our self-identities through an ongoing and dynamic process of narrative self-interpretation that brings coherence and psychological intelligibility to the fragmentary nature of lived experience"); Adam Blatner, *Perspectives of Wisdom-ing*, REVISION, Summer 2005, at 31 (highlighting the human capacity for self-deception in defense of ordering narratives).

83. *See, e.g.*, SUNSTEIN, *supra* note 1, at 94–96, 98 ("There is evidence as well that administrators take insufficient account of the systemic effects of regulatory controls, and the absence of coordination of the regulatory process has produced striking anomalies. Finally, once sensible regulatory strategies become obsolete over time."); Rob Frieden, *The Rise of Quasi-Common Carriers and Conduit Convergence*, 9 ISJLP 471, 472–78 (2014) (illustrating the antiquated nature and needless cost generation and innovation inhibition of regulations and regulatory schemes designed in the infancy of the modern telecommunications age); Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 110–12 (same).

84. Ruhl and Salzman have catalogued some additional structural reasons why regulation grows, rather than modulating or shrinking. These include the general growth in the size of government, jurisdictional overlap, competition between agencies and regulated entities (with the agencies trying to limit the free scope of action, and regulated entities looking for ways to follow regulations while still doing as they wish). *See* Ruhl & Salzman, *supra* note 11, at 783–85.

among other things, the justification for imposing emissions-cap regimes. There is no claim, at least outside of the most strident margins of the environmental movement,[85] that energy producers or other regulated entities actively desire to pollute the environment with their emissions. Rather, the central insight of emissions-cap programs is that regulated entities are naturally more focused on the good they purposefully produce than on byproducts that they incidentally generate and for which they bear no direct costs. Likewise, the central insight of the CCC program is that regulatory agencies (and their agents) must be required to attend to the externalized costs created by their production of the positive goods flowing from their regulations.[86]

Contrary accounts of agency and regulator motivation such as agency capture do not negate the CCC as a solution. While some scholars embrace the vision of agencies and regulators as authority-enhancing actors sketched above,[87] another strain of thought recognizes that administrators will face countervailing incentives. These will include incentives to make the least effort consistent with career retention and advancement, which would not (at least from the initial position of no regulation) result in extensive regulation.[88] Similarly, extensive literature suggests that regulators are subject to industry capture and create regulations under the influence of excessive coziness with regulated entities, not with the public interest.[89]

85. *See, e.g.,* Martha F. Lee, *Violence and the Environment: The Case of "Earth First!", in* MILLENNIALISM AND VIOLENCE 113 (Michael Barkun ed., 1996) (describing Earth First's aggressive beliefs).

86. This point is extrapolated below in Part III. Explicitly included in that discussion are considerations of whether, and to what extent, it matters that the goods produced by regulated entities are generally considered "private" goods, while the goods produced by regulating agencies are generally considered "public goods."

87. *See supra* note 73 and accompanying text.

88. *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE III 373–84 (2003) (concluding that "state-owned companies were found to be significantly less efficient than privately owned firms supplying the same good or service"); Rubin, *supra* note 76, at 333 ("While instrumental rationality is a general orientation toward life, it exists within individual experience. That experience also includes emotion, fatigue, inattentiveness, laziness, and other nonrational features that can impair or redirect instrumental decisionmaking."). *See generally* FROM BUREAUCRACY TO BUSINESS ENTERPRISE: LEGAL AND POLICY ISSUES IN THE TRANSFORMATION OF GOVERNMENT SERVICES (Michael J. Whincop ed., 2003).

89. *See, e.g., infra* notes 92–93 and accompanying text (considering capture and its establishment of barriers to entry); George J. Stigler, *The Theory of Economic Regulation*, BELL J. ECON. & MGMT. SCI., Spring, 1971, at 5 (as this dean of the regulatory-capture theory explained, "we propose the general hypothesis: every industry or occupation that has enough political power to utilize the state will seek to control entry. In addition, the regulatory policy will often be so fashioned as to retard the rate of growth of new firms.").

While these countervailing accounts do partly detract from the preceding regulatory proliferation story of agency action, they do not ultimately weaken the argument in favor of CCC. The question is not whether agencies and regulators face any incentives other than those of regulation maximization. Clearly, they do. The question is whether any of those countervailing incentives move administrative actors in the direction of maximizing compliance-cost efficiency. Just as clearly, these incentives do not.

Consider first the ancient trope[90] of the lazy government functionary, determined to do as little work as possible, and thus uninterested in multiplying the breadth and depth of regulation. Were this trope a faithful representation of reality in the first instance, it would predict the rise of inert regulatory agencies that did not regulate much of anything. It is worth considering that this prediction strays rather far from reality. Even if the prediction were accurate, however, it would not predict that in a world of heavy regulation regulators would make any effort to streamline regulation or try to make it compliance-cost efficient. Rather, it would suggest regulators face strong incentives to make no efficiency-increasing efforts.[91]

Similarly, to the extent that agency capture occurs, it surely alters the content of regulation; otherwise the concept would not have much meaning.[92] Its likeliest effect, though, is not generation of no or most cost conscious regulation, but rather of regulation favoring established regulated entities.[93] The capturing industry, recognizing that the costs imposed by

90. *See, e.g.*, Marc Abrahams, *Lazy Bureaucrats, Burden or Blessing?*, THE GUARDIAN, (Feb. 8, 2010), http://www.theguardian.com/education/2010/feb/09/improbable-research-lazy-bureaucrats. A related critique suggests that regulators are interested in regulating their conduct to minimize the amount of congressional oversight to which they are subject, so as to enjoy their fiefdoms relatively undisturbed. *See generally* WILSON, *supra* note 73.

91. *See, e.g.*, SUNSTEIN, *supra* note 1, at 99 ("Administrative officials are often resistant to change as well, tending to resolve conflicts among competing groups not necessarily in favor of those with the best arguments, but instead those whose demands require the least drastic departures from established responses.").

92. *See, e.g.*, Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1599–1601 (2006) (noting that, "as is well known in the public choice literature, regulation is often a way of allocating rents among competitors: a key industry (or segment) might demand regulation because even if it costs them a good bit, it costs competitors or potential competitors more." The article then considers competing accounts of how capture may play itself out to regulated entities advantage on Wall Street.); Susan P. Crawford, *The Ambulance, the Squad Car, & the Internet*, 21 BERKELEY TECH. L.J. 873, 875 (2006) (describing regulatory capture in the telecommunications industry).

93. *See, e.g.*, CROLEY, *supra* note 79, at 15–22 (summarizing capture theory and noting opportunities for creating barriers to entry); Robert C. Ellickson, *Taming Leviathan: Will the*

some regulations fall comparatively more heavily on smaller competitors or on would-be market entrants, embrace regulation.[94] The captured agency then implements these extant market leader favoring regulations, which fulfills its purpose of actually promulgating regulation, while at the same time enacting its "capture."[95] Needless to say, this is nothing like not regulating.

In short, while there are natural incentives tempering the constant expansion of regulation, these incentives will not lead regulators to attend to compliance-cost externalities. Moreover, to the extent that government considers these countervailing incentives problematic, it has imposed mandatory structures to mitigate the incentives.[96] Work rules and supervision require and encourage productive effort by employees—requirements and encouragement that, unlike CBA or other cost-restraint efforts, often bare teeth. Meanwhile, vast amounts of legislation and regulation exist to regulate the revolving door and to combat (however effectively) the specter of agency capture by regulated entities.[97]

Because no natural incentives exist to push regulators toward minimizing compliance-cost externalities, structural obligations favoring that result must be created. In fact, attempts at such structures have already been made. Most notably, administrations since the early 1980s have established various programs designed to improve the quality of regulation, slow the growth of compliance costs, or both.[98] These programs, though, have

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Centralizing Tide of the Twentieth Century Continue into the Twenty-First?, 74 S. CAL. L. REV. 101, 114 (2000) (noting that agency capture can lead to agencies and industry effectively colluding to raise barriers to entry by new competitors); Ruhl & Salzman, *supra* note 11, at 785–87.

94. *See, e.g.*, Stigler, *supra* note 89, at 5.

95. *See id.*

96. *See* 5 U.S.C. § 7513(a) (2012) ("[A]n agency may take an action . . . against an employee only for such case as will promote the efficiency of the service."); 5 CFR § 2635.705 (2013) ("[A]n employee shall use official time in an honest effort to perform official duties . . . [and] has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.") *See generally* 5 U.S.C. §§ 7101–9001 (statutes covering Labor-Management & Employee Relations). It could be argued that these regulations are overly cumbersome and result in too little incentive to create efficient performance, but this would be an argument for strengthening management authority to require efficiency, not an argument against establishing a meaningful method of restraining regulatory-compliance costs.

97. *See* U.S. OFFICE OF GOV'T ETHICS, STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH 39–46 (June 2009). *See generally supra* note 74.

98. *See, e.g.*, Coglianese, *supra* note 9, at 1120 (arguing that the CBA requirement was designed "to increase the cost-effectiveness and efficiency of federal regulation by compelling agencies to assess benefits and costs and to search for the lowest cost strategies"); Bronsteen et al., *supra* note 9, at 1612 (same); Exec. Order No. 13,563, 3 CFR 215 (2011) ("[E]ach

failed to stem the tide[99]—for entirely explicable reasons. Consider the obligation that agencies undertake CBA of major regulation.[100] The requirement is, as a practical matter, toothless.[101] Many agencies simply promulgate rules without undertaking appropriate CBA at all.[102] Others avoid CBA by providing guidance outside of the normal rulemaking channels.[103] Even when an agency *does* perform CBA, it sets the parameters of its analysis,[104] which is not subject to judicial or other review[105] and is thus free to ignore whatever results it might generate.[106] In

agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify) . . . [and] select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity) . . . ."); Ruhl & Salzman, *supra* note 11 (reviewing other related initiatives).

99. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 765, 776–82 (noting that "direct initiatives to cull regulations have been abject failures" and recounting the failed initiatives); *infra* Part I.C. (discussing metrics indicating increased regulation and increased cost of regulation).

100. *See, e.g.*, Bronsteen et al., *supra* note 9, at 1605–06 nn.4–8 (listing executive orders that have mandated CBA since 1981); Coglianese, *supra* note 9, at 1120 (analysis required for "any proposed regulation that would impose annual costs of more than $100 million on the economy"); Unfunded Mandates Reform Act, 2 U.S.C. §§ 1501–71 (2012) (codifying the CBA requirement).

101. *See, e.g.*, Hahn & Sunstein, *supra* note 1, at 1490 ("Notwithstanding this public commitment [to CBA], national regulation has hardly come into compliance with" its principles).

102. *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) (noting that "agencies only quantified net benefits . . . for 29 percent of the forty-eight rules" studied, even though effective CBA centrally requires such quantification).

103. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 781 ("With increasing ossification of notice-and-comment rulemaking, scholars have clearly documented the increasing reliance of agencies on non-legislative rules, such as guidance documents and interpretive rules.") (citing, *inter alia*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020–23 (D.C. Cir. 2000)) ("Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.").

104. The Office of Management and Budget (OMB) has repeatedly set out guidelines for agencies to follow, but, as seen above, these are rarely followed with any rigor. *See, e.g.*, Memorandum from Jacob J. Lew, Director of the Office of Mgmt. & Budget for the Heads of Departments and Agencies, (Mar. 22 2000), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m00-08.pdf [hereinafter 2000 OMB GUIDELINES]; Circular from the Office of Mgmt. & Budget to The Heads of Exec. Agencies and Establishments (Sept. 17, 2003), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf [hereinafter 2003 OMB GUIDELINES]; Hahn et al., *supra* note 102, at 871 (noting that the majority of rulemakings in the study are made without undertaking calculations basic to CBA).

105. *See* Exec. Order No. 13,563 § 7(d), 3 CFR §§ 215, 218 (2011); Hahn & Sunstein,

consideration of the natural inclinations of regulators detailed above, it is not surprising that agencies produce few regulation-constraining results.[107] Imagine that instead of the emissions-cap requirements considered below, regulated agencies instead were tasked with writing reports in which they were required to consider whether their good-production was worth the externalities it produced, and to proceed accordingly. Of course those regulated entities would have a natural tendency to overvalue the goods they produce, undervalue the externalities, and find ways to get where they want to go[108]—all of this in the best of good faith.[109] This is exactly why Congress selects emissions caps (or other methods with objective standards, mandates, and consequences) rather than self-study reviews. And it is exactly why equivalent, mandatory caps must be applied to agencies.[110]

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supra note 1, at 1537; Coglianese, *supra* note 9, at 1124–25.

106. *See, e.g.*, Coglianese, *supra* note 9, at 1122 (citing ROBERT W. HAHN, REVIVING REGULATORY REFORM 57 (2001)); Hahn & Sunstein, *supra* note 1, at 1537.

107. *See, e.g.*, Coglianese, *supra* note 9, at 1123 (reviewing research suggesting that CBA and related review might "eliminat[e] or prevent[] regulations that were extremely inefficient outliers," but not much more); Hahn & Sunstein, *supra* note 1, at 1490–93, 1497, 1537–38 (recognizing problem, calling for judicial review of CBA determinations).

108. Hahn et al., *supra* note 102, at 866–70; Coglianese, *supra* note 9, at 1124.

109. *Accord* Coglianese, *supra* note 9, at 1124. Despite the in-built pro-regulation inclinations of agencies considered above, many scholars worry that CBA (at least in theory, and if it were actually performed) would prove too anti-regulatory. *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008). Some of these critics argue for the abandonment of CBA altogether. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 210 (2004). Others argue that CBA is necessary, and should be saved, but that its fundamental assumptions should be realigned to render it more friendly to regulation. *See* REVESZ & LIVERMORE, *supra*; *see also* James K. Hammitt, *Are the Costs of Proposed Environmental Regulations Overestimated? Evidence from the CFC Phaseout*, 16 ENVTL. & RES. ECON. 281 (2000) (arguing from the example of chloroflurocarbon limitations that costs in CBA are overestimated).

110. Even the most thorough critics of CBA agree that the regulatory state cannot function without some sort of method of determining whether a given piece of regulation (or a regulatory structure generally) is worth doing, which of course requires some sort of objective mechanism. *See* ACKERMAN & HEINZERLING, *supra* note 109, at 211–16 (recognizing that "analysis of costs and benefits, in lowercase letters, is an essential part of any systematic thought about public policy, and has always been involved in government decision making," and describing their "holistic" approach); Bronsteen et al., *supra* note 9, at 1606–07 (identifying Ackerman and Heinzerling as among "the broadest critics of" CBA and recognizing need to measure costs of regulation). One author argued that

> [cost–benefit] analysis is necessary to allow the agency to understand, to the greatest extent possible, the consequences of its action and to make the basis for its decision known to the public. To act without such knowledge would bring into question the legitimacy of executive actions and be the definition of an "arbitrary

Finally, as will be demonstrated in the next section, neither the natural incentives working against the multiplication of regulations and compliance costs, nor the structural efforts to encourage compliance-cost control and efficiency-maximization have proven effective.

C. Failure to Stem the Tide of Regulatory-Compliance Costs or to Systematically Review and Revise Underperforming Regulations

Regulators, then, are no more angels than we other mortals,[111] and are not naturally inclined to curb or reverse regulation. This point might be debatable as theory, but it is practically incontestable that regulators simply do not curb, reverse, or rationalize regulation very often, while they continue to produce more at a significant volume.

Interestingly, the federal government does not keep a discrete and complete list of the regulations it imposes, much less integrate them into some coherent, user-friendly whole. Further, it does not keep a compilation of comprehensive estimates of the costs of complying with its multitudinous orders.[112] It is therefore somewhat difficult to identify a single, uncontroversial metric by which to quantify the growth of the regulatory burden.[113] Nevertheless, there are many that point toward some uncontroversial (though deeply troubling) conclusions: the federal regulatory burden is very large and growing steadily. One commonly used

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or capricious" rulemaking.

Daniel Cohen, *S. 981, The Regulatory Improvement Act of 1998: The Most Recent Attempt to Develop a Solution in Search of a Problem,* 50 ADMIN. L. REV. 699, 716–17 (1998); *see* REVESZ & LIVERMORE, *supra* note 109, at 12–13 (same).

111. "If men were angels, no government would be necessary." THE FEDERALIST NO. 51 (James Madison).

112. Imagine the tort suits that would flow against any manufacturer that organized its user's manual in the manner of the CFR, even if no civil or criminal liability could arise as the result of misuse of the manufacturer's product. The CFR does record most of the federal government's regulations, but it is not organized by what regulations might apply to any given activity of daily or economic life. *See, e.g.*, Ruhl & Salzman, *supra* note 11, at 770–71 ("The number of discrete compliance requirements in [the] highly regulated industry has not been quantified. If, as with solidified lava flows, one could freeze the accumulation of rules that the administrative state produced at any instant in the past twenty years, the absolute number of discrete compliance requirements would probably be quite large by any standard. However, we know of no attempt actually to count them."); JAMES L. GATTUSO & DIANE KATZ, HERITAGE FOUND., PAPER NO. 2663, RED TAPE RISING: OBAMA-ERA REGULATION AT THE THREE-YEAR MARK 2, (2012), *available at* https://thf_media.s3.amazonaws.com/2012/pdf/bg2663.pdf.

113. Ruhl & Salzman, *supra* note 11, at 769–75 (describing various possible metrics for measuring the growth of the regulatory burden).

measure of the scope of regulation has been the page count of the CFR,[114] which reached 174,545 pages in 2012—nearly three times its length in 1970.[115]

Of course, the page count of the CFR can only serve as a broad (though still valuable) proxy for the scope, intrusiveness, and cost of even federal regulation.[116] By another measure, the government estimates that, "On average, Federal agencies and departments issue nearly 8,000 regulations per year,"[117] a rate that nearly doubled from 1976 to 1996.[118]

The really relevant metric is how much it costs regulated entities of all types to comply with federal regulation. Not surprisingly, that number is contested—and, at its further reaches, necessarily imprecise.[119] Economist Mark Crain argues that the costs of compliance reached $1.75 trillion in 2008 (in 2009 dollars),[120] up from $843 billion in 2000 (in 1999 dollars),[121]

114. *See* Birdsong, *supra* note 66, at 380 n.20 (noting page count); Ruhl & Salzman, *supra* note 11, at 774 (same); Coglianese, *supra* note 9, at 1127–28 (same).

115. *See* CFR Page Count, *supra* note 66; Birdsong, *supra* note 66, at 380 n.20; Ruhl & Salzman, *supra* note 11, at 774.

116. *See* JAMES L. GATTUSO, HERITAGE FOUND., BACKGROUNDER NO. 1801, REINING IN THE REGULATORS: HOW DOES PRESIDENT BUSH MEASURE UP? 8–11 (2004), *available at* www.heritage.org/research/regulation/bg1801.cfm (noting that measures like CFR pages and total regulations promulgated are fairly crude measures of regulatory activity; one flaw is that they do not distinguish between small and "major" rulemakings, and do not distinguish between regulatory and deregulatory rulemakings). The growth of the CFR can also only be an approximate proxy because a profoundly deregulatory measure would still be, at least in part, enacted through the promulgation of regulation, which would add to the number of pages in the CFR.

117. REGULATIONS.GOV SITE DATA, http://www.regulations.gov/#!siteData (last visited May 8, 2014).

118. *See* Coglianese, *supra* note 9, at 1127.

119. The full, indirect costs of regulation can never be calculated because "for many economic regulations, the major cost may not be any direct burden placed on consumers or businesses, but constraints on innovation. Assessing such losses is impossible because inventions that never existed cannot be measured." GATTUSO, *supra* note 116, at 3. *See also* GATTUSO & KATZ, *supra* note 112, at 4–5 (describing how agencies understate costs).

120. NICOLE V. CRAIN & W. MARK CRAIN, U.S. SMALL BUS. ADMIN., THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS 6 (2010), *available at* http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf [hereinafter CRAIN 2010].

121. W. MARK CRAIN & THOMAS D. HOPKINS, U.S. SMALL BUS. ADMIN., THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS: A REPORT FOR THE OFFICE OF ADVOCACY (2000), *available at* www.sbaonline.sba.gov/advo/research/rs207tot.pdf [hereinafter CRAIN 2000]. An interim 2005 report put the figure at $1.26 trillion in 2009 dollars. Note that some of the increase between 2005 and 2009 arises because Professor Crain updated his methodology. *See* CRAIN 2010, *supra* note 120, at 6–7. If the new methodology had been used in 2005, regulatory-compliance costs would have totaled $1.7 trillion in 2005, for an increase of $43 billion (or three percent of national income) over the period. *See id.* at 7.

and has steadily risen since.[122] Others claim that this figure is far too high.[123] The government's own figures can be understood to suggest that a partial estimation of compliance costs reveals that those costs rose from \$584 billion in 1999–2000, to somewhere in a range of approximately \$625–\$650 billion in 2008–2009.[124] This measure, though, by its own terms does not attempt to capture anything like the full compliance costs of all extant federal regulation,[125] and represents a cobbling together of disparate figures,[126] because the federal government makes no effort to calculate the total costs of federal regulatory compliance. It is clear that, however measured, the costs imposed by regulations are large and steadily growing.[127] Moreover, despite a few relative periods of deregulatory

122. Put another way, regulatory-compliance costs by these estimates consumed fourteen percent of the national income in 2008, up from eleven percent in 2004 and eight percent in 2000. *See* CRAIN 2010, *supra* note 120, at 6–7; CRAIN 2000, *supra* note 121, at 7. *See generally* GATTUSO & KATZ, *supra* note 112.

123. *See, e.g.*, Sidney Shapiro, *Do Regulations Cost \$1.75 Trillion? Not Exactly*, HUFFINGTON POST, (Feb. 9, 2011), http://www.huffingtonpost.com/sidney-shapiro/do-regulations-cost-175-t_b_820311.html.

124. The \$625–\$650 billion figure is computed together in the following manner. The OMB estimated for Congress in 2000 that in the previous year ending March 31, 2000, "the total cost of regulation is nearly equal to the \$584 billion Congress appropriated for all discretionary programs in FY 2000." OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2001). In subsequent years, the OMB appears to have stopped making summative estimates, and instead has estimated how much cost has been generated by the regulations passed during the previous ten years. In 2010 OMB estimated that "the estimated annual costs [of major Federal regulations reviewed by OMB from October 1, 1999 to September 30, 2009] are in the aggregate between \$43 billion and \$55 billion." OMB 2010, *supra* note 1, at 3. Putting these figures together results in a figure broadly in the \$625–\$650 billion range, though note in the following footnote the incomplete nature of that estimate.

125. As noted, these figures do not count important compliance-cost centers. OMB counts only what is reported to it from various executive agencies but such reports are materially incomplete. *Compare, e.g.*, OMB 2010, *supra* note 1, at 3, *with* GATTUSO, *supra* note 116. The OMB does not count any costs arising from independent agencies, or costs from agencies that do not report costs. *See, e.g.*, OMB 2010, *supra* note 1, at 3–4. And it does not include the costs of regulations deemed to be "non-major," i.e., to be estimated by their enacting agencies to generate less than \$100 million in costs. *Id.*

126. *See supra* note 124.

127. Environmental regulation compliance costs, for instance, rose (in real terms) from \$33 billion in 1972 to \$141 billion in 1992. Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?,* 33 J. ECON. LITERATURE 132, 140 (1995). It rose by \$20 billion more in the following decade. *See* OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL & TRIBAL ENTITIES (2007).

activity in a few regulatory agencies in past years, such agencies seldom review, revise, and retire inefficient or outdated regulations in the manner advocated in this Article.[128]

Now, again, if regulators *were* particularly detail-obsessed angels, they would unerringly craft perfect, least-cost, best-effect regulations the first time, every time, and ensure—with no outside obligations required—that they had not duplicated or contravened any other regulatory schemes. But government recruiting amongst the Choir Invisible has been no better in recent years than that of the private sector. Hence, the CCC program.

II. EMISSIONS CAPS SUMMARIZED

Carbon-cap regimes are designed to create a carbon budget for the economy and for society.[129] The impetus for such regimes arose from the

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Taxes arising from healthcare regulation will also increase. *See* CURTIS S. DUBAY, HERITAGE FOUND., BACKGROUNDER NO. 2402, OBAMACARE: IMPACT ON TAXPAYERS (2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/bg_2402.pdf (estimating the total tax increase under the Affordable Care Act at $503 billion); Scott E. Harrington, *The Continuing Debate on Health Insurance Reform,* NETWORKS FIN. INST. (Oct. 20, 2011), http://dx.doi.org/10.2139/ssrn.1947021 (noting that the Centers for Medicare and Medicaid Services estimate a $311 billion increase in health care costs during 2010–2019 but recognizing that that number might not be high enough because "in general, expenditures that increase health care costs and premiums can be counted; many expenditures that help control costs and premiums cannot, [which raises the] concern that the regulations will put upward pressure on costs and premiums").

Finally, new Wall Street regulation will also increase regulatory costs. *See* DOUGLAS W. ELMENDORF, CONGRESSIONAL BUDGET OFFICE, REV. OF CBO'S COST EST. OF DODD-FRANK WALL ST. REFORM CONSUMER PROT. ACT 7 (2011) (estimating the budget deficit increase caused by the Dodd Frank Act over a ten-year period at $6.3 billion).

128. Gattuso highlights a relatively aggressive period of regulatory revision, but notes that even during that period, only about a quarter of significant regulatory actions were deregulatory in nature, and most of these were led by the Federal Communications Commission and the Securities and Exchange Commission—independent agencies. GATTUSO, *supra* note 116, at 9. In more recent years, virtually no cumulative inefficiency reduction has occurred. *See, e.g.*, GATTUSO & KATZ, *supra* note 112, at 2, 6. Similarly, Wilson pointed to the self-deregulation by the Civil Aeronautics Board, as an inexplicable exception that proves the otherwise solid rule. *See* WILSON, *supra* note 73, at 87–88 (citing MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 74–85 (1985)).

129. *See, e.g.*, Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 300–03, 305, 309–13 (2008) (touting an economy-wide cap-and-trade program and reviewing more narrowly targeted programs). Other emissions-cap programs work along broadly similar lines. *See, e.g.*, U.S. ENVTL. PROT. AGENCY, CAP AND TRADE PROGRAMS, http://www.epa.gov/capandtrade/programs.
html#s5 (last visited May 8, 2014), (listing various federal and state emissions-cap programs, including programs capping sulfur dioxide (SO_2) and nitrogen oxides (NO_x) as well as carbon dioxide (CO_2)).

recognition that carbon dioxide is a greenhouse gas that is released in great quantities by the modern economy and that society would benefit by reducing carbon emissions.[130]

In broad terms, carbon-cap regimes work thus. Regulators determine how much carbon may be emitted into the atmosphere by regulated entities.[131] Regulated entities then determine how much carbon they will emit and either buy or are granted carbon permits from the government that will allow them to emit carbon dioxide at a certain capped level.[132] This cap is then lowered over time, either by the retirement of some permits, by shrinking the amount of carbon emission that is authorized by each permit, or by other means.[133] In the cap-and-trade model, an additional means of reducing the total carbon budget is to reduce the amount of carbon authorized by each carbon permit each time a trade of such permits occurs, or by retiring some fraction of the total carbon permits exchanged in any given trade.[134] Given the nature of regulation and regulatory bodies, any potential trading component in CCC might prove far more awkward than valuable. Thus the CCC program does not rely on, and considers only peripherally, a trading component. It does, however, include a component that incorporates some of the efficiencies achieved by trading, by permitting agencies to work together to eliminate duplicative regulatory-compliance obligations and to split the compliance-cost savings engendered by their mutual efforts, and by allowing agencies to bank excess regulatory-cost reductions.[135]

130. *See, e.g.*, Rychlak & Case, *supra* note 2, at 151–53 (summarizing the position that greenhouse gas emissions by industry and human society have led and will lead to further climate change); FRIEDRICH SOLTAU, FAIRNESS IN INTERNATIONAL CLIMATE CHANGE LAW & POLICY 21–49 (same, summarizing the position of the U.N.'s Intergovernmental Panel on Climate Change); Stavins, *supra* note 129, at 293–99 (same, and to note that carbon-cap programs represent a response to these considerations).

131. *See, e.g.*, Bruce R. Huber, *How Did RGGI Do it? Political Economy & Emissions Auctions*, 40 ECOLOGY L.Q. 59, 62 nn.12, 14 (2012), *available at* http://ssrn.com/abstract=2018329 (describing the mechanism proposed for Regional Greenhouse Gas Initiative (RGGI)); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1144 (2009) (describing mechanism employed in the Acid Rain Program).

132. Most emissions-cap programs give the permits to already extant producers as a means of buying those producers' support for the emissions-cap program. *See, e.g.*, Huber, *supra* note 131, at 4–5, 9–22. In fact, this gift of initial permits can make existing producers firm supporters of the cap programs, because the programs become an effective barrier to the entry of new competitors into the regulated entity's market. *See id.*

133. *See, e.g.*, Huber *supra* note 131, at 5 nn.12, 14; Carlson, *supra* note 131, at 1144. Many carbon-cap regimes include a permit trading component, and have thus been labeled "cap-and-trade" regimes. *See, e.g.*, Stavins, *supra* note 129, at 298–99.

134. *See, e.g.*, Stavins, *supra* note 129, at 307 (discussing different cap-tightening methods).

135. *See infra* Part IV.

Each year, then, the total amount of emissions released by regulated entities—the total amount of externalized cost generated in order to achieve the benefits created by the regulated entities—decreases, until some baseline is reached.[136] Each year, the challenge for the regulated entities will be to figure out how to continue to create the same amount of benefit (saleable product, be it petrocarbons, produced energy, products or services sold to consumers) while generating less of the accompanying dead-weight cost of emitted carbon (or, in a cap-and trade system, trade for or purchase more permits).[137] If regulated entities cannot find these efficiencies, then they must reduce the total amount of benefits that they produce.[138] The effect of the carbon-cap regime, then, is essentially to determine that the dead-weight costs of creating those lost benefits is just too high.

III. REGULATED ENTITIES AND REGULATORY AGENCIES COMPARED

Regulatory agencies are in a position markedly similar to that of industries regulated under emissions caps. Industries regulated under emissions caps create an undesirable cost in order to achieve a benefit. Regulatory agencies likewise create undesirable costs, such as an increase in the cost of doing business,[139] in order to achieve a benefit.

In the absence of an emissions-cap scheme,[140] regulated industries are able to externalize their costs. It is not the individual polluters alone who suffer the detriments arising from their emissions, but society generally.[141] True, the owners and employees of regulated industries will suffer along with all other citizens if emissions cause severe economic and social loss. But some of the gains that arise from creating energy are direct, and flow primarily to regulated entities, while the suffering will be diffuse—spread out across all members of society.[142] The case is the same with regulatory agencies. In the absence of the CCC program proposed here (or some other equally effective construct), regulatory agencies are able to externalize

136. *See, e.g.*, Huber, *supra* note 131, at 5 nn.12, 14; Carlson, *supra* note 131, at 1144. The baseline established in the Kyoto Treaty, for instance, was 1990 levels of carbon emissions. *See infra* note 161.

137. *See, e.g.*, Carlson, *supra* note 131, at 1144; Huber, *supra* note 131, at 12.

138. *See, e.g.*, Carlson, *supra* note 131, at 1144.

139. *See supra* Part I.A., I.C. (cataloguing costs of regulatory compliance and effects of those costs).

140. *See, e.g.*, Stavins, *supra* note 129, at 348–53 (carbon tax discussed, compared with cap-and-trade regime).

141. *See, e.g.*, *id.* at 298 (tradable emissions allowances "create a price signal for emissions . . . [which] provides firms with an incentive to reduce emissions that influences their production and investment decisions"); THOMAS H. TIETENBERG, EMISSIONS TRADING: PRINCIPLES AND PRACTICE 1 (2d ed. 2006).

142. *See* Stavins, *supra* note 129, at 298.

their costs: it is not the regulators who will entirely or even primarily suffer the detriments arising from the regulatory burdens that they create, but regulated entities and society generally.[143] Regulators may suffer proportionally if their regulations cause significant economic sclerosis, but they get some direct gains from having regulated, while the suffering the regulations create will be diffuse, spread out across all members of the society.[144]

One objection to equating the externalities of regulated entities to the externalities of the regulations themselves is that it fails because the benefits and detriments produced by regulated entities are "private"[145] while the benefits and detriments produced by regulatory agencies are "public" (or, if you prefer, "social").[146] Hence, the motivations of the agents of regulated entities are fundamentally different than those of the agents of regulatory agencies, such that negative-externality caps that will usefully constrain regulated entities will not work effectively when applied to regulatory agencies.[147] As the following paragraphs illustrate, however, the differences between the regulators and the regulated, and between the benefits and burdens they produce, are just not as broad or as material as is generally maintained. As a result, while the analogy between regulated entities and regulatory agencies is not exact, it is real, and is sufficient to allow negative-externality-containment caps devised for regulated entities to be applied comfortably, albeit with some modifications, to regulatory agencies.

The primary critique, however, undervalues the social effects of private actions and the private ramifications of public acts; the difference is more

143. *See, e.g.,* Zywicki, *supra* note 52, at 849–50, 893.

144. *See, e.g.*, *id.*; *supra* Part I.B.

145. *See, e.g.*, Gerald D. Keim, *Corporate Social Responsibility: An Assessment of the Enlightened Self-Interest Model,* 3 ACAD. MGMT. REV. 32, 33 (1978) (stating that a pure private good is characterized by excludability and congestion, such that one's consumption of the good wholly excludes others from the benefits of consumption of that good. "A hamburger at McDonald's approximates a pure private good. One can be excluded from consuming a particular hamburger unless the acquisition price is paid, and if one consumes a specific hamburger, no one else may consume it (in its entirety); thus, there is no joint consumption."); David D. Haddock, *When Are Environmental Amenities Policy-Relevant?*, 44 NAT. RES. J. 383, 400–402 (2004) (similar definition). *But see, e.g.*, Walter Block, *Public Goods and Externalities: The Case of Roads*, J. LIBERTARIAN STUDIES 1, 1–2 (1983) (arguing that in reality there are no purely private goods).

146. *See* Keim, *supra* note 145, at 33 ("Unlike a private good, a public good, can be consumed or enjoyed by a number of individuals without regard to cost sharing . . . [excludability, and] [o]ne individual's consumption of a public good has no effect on others' abilities to consume the good. This is referred to as . . . joint-consumption or non-congestion."); *see also* MUELLER, *supra* note 88, at 11 (similar definition); Haddock, *supra* note 145, at 400–02 (same).

147. *See, e.g.*, Haddock, *supra* note 145 (difference between public and private goods).

illusory than real, especially in the present context.[148] Most goods are neither pure public nor pure private goods, most acts neither fully self-absorbed or outward bound, but are instead mixed goods that present characteristics of both a public and a private nature.[149]

Energy generation, for instance, is generally thought of as provision of a private good—and in part it is. Energy companies charge consumers for the energy they produce, and use the fees to fund their operations and pay their staffs and their investors. The unique volts that are used by one consumer cannot also be used by another consumer. To this extent, energy is a private good. To a much larger extent, though, energy exhibits characteristics of a public good. The benefits flowing from energy provision and consumption are manifold and vast. If no energy providers existed, modern civilization could not proceed. But for energy suppliers, almost the whole of modern economic activity would collapse. Yet those energy suppliers do not receive as payment essentially the whole of global GDP. This difference—between the value that energy provision adds to the modern economy and what the energy companies actually recoup for providing energy—represents the positive-externality, public-good portion of energy provision. Energy provision, then, bears characteristics both of private- and public-good provision, with the latter arguably swamping the former.

Inversely, regulation is generally considered to produce public goods (sub-benefits if you prefer)—and it does, in part. If a regulation successfully reduces pollution, then all citizens who breathe the clean air will receive the health benefits, and it would prove difficult to exclude those who were uninterested in paying for the cleaner air on the private market. On the

148. The recognition that there are few purely public or purely private goods is not new. Paul Samuelson, one of the key protagonists of the public-goods literature, himself recognized that "the careful empiricist will recognize that many—though not all—of the realistic cases of government activity can be fruitfully analyzed as some kind of a blend of these two extreme polar cases," (i.e., of pure public goods and pure private goods). Paul A. Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, REV. OF ECON. & STAT. 350, 350 (1955). He nevertheless thought the distinctions broadly useful enough to justify significant public action. Later critics of Samuelson's work found his distinctions more materially flawed. *See, e.g.*, S.E. Holtermann, *Externalities and Public Goods*, 39 ECONOMICA 78, 81 (1972) ("Samuelson's formulation of a public good has been criticized . . . on the ground that defence [sic] is about the only commodity which strictly fits his definition."); Denise Réaume, *Individuals, Groups, and Rights to Public Goods,* 38 U. TORONTO L.J. 1, 6 (1988) ("Not all public goods require either the imposition of duties on large numbers of people or peculiarly onerous duties . . . . Conversely, there are instances of private goods that require either onerous undertakings of others or the participation of many."); Keim, *supra* note 145, at 33 (same); Matthew J. Kotchen, *Green Markets and Private Provision of Public Goods,* 114 J. POL. ECON. 816, 817 (2006) ("green electricity" as an example of a mixed good).

149. *See* Keim, *supra* note 145, at 33.

other hand, other benefits of causing cleaner air *by the route of regulation* are not equally shared by all parties; some of those benefits flow uniquely back to the agency and to the regulators who promulgated the specific regulation. The very act of creating, reviewing, and then implementing the regulations creates work for the employees of the agency and increases their authority, prestige, self-worth and "value" in society.[150] Once the regulations are implemented, the regulated entities will have to make various demonstrations of compliance, or submit to various types of inspection, all of which will create additional and continuing work for the employees of the regulatory agencies.[151] The regulations may permit opportunities for regulated entities to seek waivers or other special exceptions, which will create more work, authority, and prestige for the regulators.[152] Finally, regulators are by nature likely to think that goods achieved by regulation—especially goods achieved by *their* regulation—are particularly worthy. All of these are private characteristics of regulation, in that these benefits of regulation are not shared equally among all members of society, but flow particularly back to the agency and regulators who promulgated the regulation and reward them specifically for the production of the regulation-generated benefits.

Given that the goods, benefits, and burdens produced by regulators and regulated entities are far more similar than usually thought, it should not surprise that the agents of the regulators and the regulated entities are too in similar positions. Of course, the similarity is not complete; the mechanism by which the regulated entities benefit from their efforts is somewhat more direct than that for regulatory agencies because successful regulated entities capture the private-good portion of their production in the form of profits. The mechanism for regulatory agencies—which must, for instance, independently negotiate bigger budgets even if they prove highly productive—is more indirect. This is a meaningful difference that must be accommodated in the CCC plan: it would be incoherent to require agencies to pay for the privilege of "emitting" the externality of regulatory-compliance costs, since those payments would ultimately and entirely be borne by taxpayers, but would also be paid back *to* taxpayers.

Yet the position of the agents of the regulated entities and the regulators are even less dissimilar. Because the profits of a regulated entity run generally to the shareholders, rather than to the employees, regulated entities face agency problems[153] right along with regulatory agencies.

150. *See supra* Part I.B.
151. *See id.*
152. *See id.*
153. An agency problem arises whenever one person, the *principal*, engages another person, the *agent*, to undertake imperfectly observable discretionary actions that affect

Employees of both types of entities will be motivated by the desire to do their jobs effectively and efficiently, to please their employers, and so to be rewarded for it. They will wish to be proud of themselves for having done a good job, given their talents, their objectives, and their constraints. Some of them will wish to do as little as is consistent with either securing the next promotion, or just not getting fired. Some of them will be tempted to "go native," whether that means regulators becoming captured by industry or industry employees adopting regulatory goals for the industry at the cost of undermining their fidelity to their principals, the shareholders. The principals in both are faced with the agency dilemma, and obliged in various ways to establish structural constraints that align the interests of their agents as closely as possible with their own. That the structures necessary in the somewhat different contexts of agency and regulated entity are thus somewhat different can hardly be surprising. But they are essentially the same problems because of the fundamental similarity between the goods produced by both types of entities and the agents with which they have to work.

The regulators and the regulated produce similar negative externalities, respond similarly to those externalities, and therefore must reasonably face similar constraining structures to require them to attend to and minimize those externalities. As has been discussed, regulated entities create negative externalities in the form of emissions; emissions caps programs are designed to minimize those externalities, to force increased efficiencies of the goods produced in terms of the emissions expelled.[154] Likewise, regulation inflicts compliance costs directly onto industry (while other costs are borne by the taxpayer in the form of the expanded budget of the regulatory agency required by all of the new duties that the agency has). The regulated entities will pass some of that cost of compliance on to consumers either in the form of higher rates or due to less competition after firms exit the market.[155] Some would-be entrants into the field may find the regulatory burden so heavy that they do not enter to create any energy, thus reducing the number of producers, and raising prices further.[156]

> the wealth of the principal. The concern is that in exercising this unobservable discretionary authority, the agent will favor the agent's interests when the agent's interests diverge from those of the principal. Agency problems are common because no one has the time and skills necessary to do everything for himself.

Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1040–42 (2011) (internal citations omitted); *see* MUELLER, *supra* note 88, at 362 (positing that agents of government seek security and power rather than pure profit).

154. *See supra* Part II.

155. *See, e.g.*, Zywicki, *supra* note 52, at 854.

156. *See, e.g.*, Stigler, *supra* note 89, at 5.

Regulators are, like all other citizens, both taxpayers and energy buyers, and so will suffer the increased tax burden and the increased energy prices along with the rest of the public. These, however, are diluted costs; they will pay only a little more in taxes and rates *in comparison* to the concentrated advantages that flow directly to them from increasing their regulatory authority, and therefore their job security, their authority, their prestige, and related goods.[157] As a result—and for all the reasons natural to people in their position, as considered above[158]—they will tend to discount or ignore the costs created by their regulations, while focusing on the benefits of new regulation, just as (so the logic of emissions caps concludes) regulated entities will tend to discount or ignore the costs created by emissions, while focusing on the benefits of new energy production, unless otherwise obliged.[159]

IV. THE COMPLIANCE-COST CAP PROPOSAL: OVERVIEW

Here, then, is a broad sketch of how CCC would work. Any CCC plan would require implementing legislation, just as adoption of a carbon-cap plan would require legislation.[160] Each regulatory agency would be required to calculate the total cost of the regulatory-compliance burden inflicted upon industry and society by its regulations as of some date certain in the recent past, a date before the introduction of the legislation.[161] A date in the recent past, rather than a date in the future, would have to be selected to ensure against regulatory agencies forcing through additional regulations with high compliance costs in order to increase their initial budgets.[162] This total cost would constitute the agency's regulatory-cost cap, or its maximum cost-of-compliance budget. Thereafter, the agency

157. *See id.*

158. *See supra* Part I.B.

159. *See, e.g.*, TIETENBERG, *supra* note 141, at 1.

160. *But see, e.g.*, Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration,* 34 HARV. J.L. & PUB. POL'Y 421 (2011) (recounting efforts of the EPA under the Obama Administration to cap greenhouse gas emissions despite the Administration's inability to pass cap-and-trade or other related legislation).

161. The Kyoto Protocol, for instance, which was agreed to in 1997 (though never ratified in the United States), used 1990 emissions as the basal year. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3.1, Dec. 10, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf; *see also* TIETENBERG, *supra* note 141, at 1 (same for U.S ozone protection and acid rain regulation).

162. *See* Michael Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, 55 UCLA L. REV. 1759, 1787 (2008) (discussing industry ramping up production more than anticipated when future base year selected, thus increasing their emissions caps).

would be limited by that cap and that budget.[163] In no future year could its total regulatory-compliance burden exceed the budget (at least until the compliance-cost cap began a controlled reflation after the initial deflation period.[164] If the agency wished to implement new regulations that bore compliance costs, it would be obliged, to create room in its budget, to repeal outdated or ineffective regulation, or improve and streamline inefficient regulations.[165]

Then, as with carbon-cap regimes, the regulatory-burden caps would begin to fall, thus requiring regulatory agencies to improve regulatory efficiency and reduce the compliance-cost burdens they have imposed. There are a few different ways to achieve this result. One would be to establish a nominal cap, and adjust that cap upward for inflation each year (rendering it a real-dollar cap), and then subtract from that new total some percentage value (say, one percent) of the adjusted previous year total, thus effecting a real-dollar one percent decrease from the previous year. Note that the proposal is for a one percent decrease of the previous year's total adjusted cap, not one percent of the initial cap, whether adjusted or not. This distinction means that the regulatory agency's budget would not "zero out" after one hundred years because the total reduction in the cap would only ever be one percent (or another deflator) of the previous year's total budget.[166]

A third option would be to set the cap—and thus the compliance-cost budget—not in real-dollars, but as a fixed percentage of overall national income.[167] This could be accomplished by establishing the basel-year cap as the share of national income spent on compliance with an agency's total regulatory burden in that year. Then the cap could be adjusted in

163. *Compare* citations *supra* note 161 (system employed in these emissions-cap systems, except that where trading is permitted in these systems, individual actors can trade for varying specific emissions limits under a fixed program-wide cap), *with* TIETENBERG, *supra* note 141, at 1. *See also supra* notes 132–134 (considering trading analogues in the CCC program); *infra* notes 173–75 (same).

164. *See infra* notes 168–71 and accompanying text.

165. *See id*.

166. Such a constant one percent reduction *would* however, if unchanged, eventually result in a very small budget indeed. Methods of tempering this result are considered below. *See infra* notes 184–185 and accompanying text.

167. This system would bear some resemblance to the Taxpayer Bill of Rights (TABOR), a tax-and-expenditure limitation structure adopted in Colorado. TABOR "limits annual revenue the state government can retain from all sources except federal funds to the previous year's *allowed* collections (not necessarily actual collections) plus a percentage adjustment equal to the percentage growth in population plus the inflation rate." Bert Waisanen, *State Tax and Expenditure Limits – 2008*, NAT'L CONF. OF ST. LEGISLATURES, *available at* http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx.

nominal-dollar terms each year so that it remains at the same share of national income (measured by GDP or some other method)—less the built-in deflator. Under this system, the regulatory agency's cost-of-compliance budget would, pre-deflator, grow along with the national economy. This method might require using a larger inflator than would otherwise be employed, but the advantages of the method would be significant. In years of GDP growth, the compliance-cost budget would (before deflation) grow as well. This accommodation would be sensible because it seems broadly reasonable to expect that during years of economic growth, the number of entities affected by any given regulation will grow as well or, at least, the firms affected by the regulation will grow in productivity and output. This growth will or may have the natural effect of increasing the net costs of complying with an agency's regulations, even if those regulations have in no way changed. A best-fit CCC system will account for such "natural" changes in compliance costs.

Similarly, use of this method would also result in caps that fall at an accelerated rate during recessions. This too makes sense, for the inverse of the reasons considered above. Caps that fall particularly speedily during economic contractions would have another advantage: regulatory burdens would diminish during recessions as a means of spurring recovery and agencies would be required to lighten the regulatory load just when such lightening would be most needed. This would be a good result if agencies found themselves able to, for instance, suspend their relatively least-efficient regulations for the duration of the downturn. On the other hand, if such temporary suspensions proved unreasonably difficult or counterproductive, or if they simply failed to reduce compliance costs very much, or if agencies otherwise found themselves unable to adjust their compliance-cost budgets in sync with the vagaries of the business cycle, then the real-dollar value plus deflator method might prove preferable.

As described so far, the CCC program deals effectively with agencies that exist at the program's commencement. Its features can be expanded, however, to deal with new agencies (and regulatory remits) as well. One simple solution would be for Congress to establish an additional regulatory budget (and first-year regulatory cap) each time it authorizes a new agency. This solution, however, would undermine a central purpose of the CCC program, which is to constrain the total burden of regulatory compliance. Even under this least-restrictive system, though, the CCC program would still serve two important purposes. First, it would oblige Congress explicitly to establish the new agency's compliance-cost budget in the agency's establishing legislation, thus rendering Congress at least that much more transparently responsible for those costs of regulatory compliance. Second, the CCC program would begin, in the agency's second year of regulation, to reduce that agency's total compliance burden along with continuing to chasten the spending of other regulatory agencies.

Nevertheless, a better solution, one more consistent with the fundamental insights and purposes of the CCC program, would be one under which Congress, in authorizing a new agency, establishes an initial cost-of-compliance budget and cap for the new agency, but does not make that budget supplemental to the already extant cumulative regulatory-compliance burden. This system could be achieved by including in the program a global, government-wide regulatory-compliance-cost cap in addition to the agency-specific caps. Such a global cap would be established at the commencement of the CCC program simply by adding together all of the agency-specific caps. The global cap would then adjust, in future years in which no new agencies were authorized, in the same manner—as the summation of the caps of existing agencies.

Each time a new agency began issuing regulations, however, space under the global cap, and within the global budget, would have to be made for this new agency and its new regulatory budget. Imagine, for example, that the CCC program were to go into effect in 2015, with a global regulatory-compliance-cost cap of $1.05 trillion, in real 2015 dollars. By 2020, by the workings of the deflator adjustments, the global cap would have fallen to $1 trillion (held in real 2015 terms for the sake of simplicity). In that same year, a new congressionally authorized agency were to come on line, one whose congressional remit grants it the authority to generate regulatory-compliance costs of $50 billion a year. Fifty billion dollars is five percent of $1 trillion. In order to accommodate the new agency under the existing global cap, all other agencies would then be obliged to cut five percent more from their regulatory-compliance-cost budgets than they would have had to cut that year under the normal deflator.[168]

This latter method would have two distinct advantages over the former. First, it would maintain the initial global cap, thus preventing Congress from the expedient of undermining the CCC program simply by creating new agencies or granting new remits every time a new regulatory program arises. Second, it would force existing regulatory agencies to be sensitive to the creation of new agencies and new remits, because such regulatory expansion would come at the direct expense of their own authority, threaten their own positions, and at the very least make more work for them in the form of forcing them to find additional compliance-cost-cutting measures or more redundant, obsolete, or inefficient regulations to repeal.

168. Of course, if it would be prohibitive to ask agencies for, per this example, a six percent savings in a single year, the program could be made supple enough that the new agency accommodation cuts could be amortized over a certain number of years.

At present, this dynamic is entirely absent: existing regulatory agencies have no reason whatsoever to look askance at the creation of new regulatory agencies or remits, and every natural inclination to support each new extension of their sphere of the regulatory state.[169]

Eventually, of course, the period of automatic cost-cap deflation would have to end. As noted above, any system that reduced the caps by some fixed percentage of the previous year's caps (however adjusted) would never technically zero out. On the other hand, the deflator will eventually have significant bite: a one percent annual deflator would cut the cap in half after approximately seventy years and would eventually—if left unchanged—result in a cap just a small fraction of its initial size.

This fact raises the questions of how long the deflator should be employed, and what should come afterward. Different plausible answers can certainly arise to the first question. While no one may seriously argue that regulatory regimes currently present optimum efficiency, people of goodwill may surely differ about how much additional efficiency can reasonably be achieved, and therefore about how long the deflator should be employed.

There are fairly simple safety features that could be written into the CCC legislation from the beginning that should assuage fears about troubling out-year effects. First, the factor of deflation should decrease over time. Thus, for example, the deflator might be set at one percent per year for the first ten years of application (to any given regulatory regime), then reduced to three-quarters of a percent for another decade, and further reduced in later years. This shrinking deflator would be consistent with both good economic theory and common sense.

It will be highly likely—well-nigh certain, in fact—that in the early years, regulatory agencies will have significant amounts of outdated, counter-productive, ill-considered, underperforming, inefficient, or otherwise suboptimal regulation to revise or repeal. As the years pass, though, this task should be expected to grow more difficult, the additional efficiency gains relatively smaller.[170] Hence, the deflating deflator makes sense, and

169. A thing that their representatives, for instance, do in the form of public employee union agitation for constant growth of the regulatory state. *See, e.g.*, Clyde Weiss, *U.S. Supreme Court: Obamacare is Constitutional*, AFSCME BLOG (June 28, 2012), http://www.afscme.org/blog/us-supreme-court-obamacare-is-constitutional ("AFSCME [the public-employees' union] was a leader in championing the health care law. AFSCME members generated hundreds of thousands of phone calls, e-mails and letters to Congress and went door-to-door in nine key states to build a critical mass of public support."); Michael L. Marlow, *Public Sector Unions and Government Size*, 20 APPLIED ECON. LETTERS 466, 469 (2013) (study finding significant empirical relationship between public-sector unionization and the size and cost of state government).

170. As with the initial regulation, the first deregulations will go after the low hanging

should allay concerns about the effect of CCC in the out years. Then, eventually, either by initial construction of the CCC program or upon an act of Congress, the deflator might be eliminated altogether. What would happen after this period of deflation would depend upon how the program had been constructed in the first place. If the method of adjustment of base for GDP change[171] has been employed, then after reasonable deflation has occurred, the compliance-cost caps will adjust each year so that aggregate regulation takes up no more of the national wealth than it had in the last year in which the deflator was applied. In years of GDP growth, the individual and global caps would grow as well, to account for that GDP expansion. If GDP were to fall, so would caps for the following year. Meanwhile, though, reasonable efficiencies having been wrung, agencies would no longer be obliged to find additional efficiencies in their programs unless either (1) the agencies themselves embarked upon new fields of regulation, and so needed to create additional space under their compliance-cost caps; or (2) Congress created new agencies with new regulatory missions, for which all other agencies would be obliged to create space under the global cap. This GDP-tethered cap growth would allow agencies to begin expanding compliance costs in a controlled and limited way that would continue to provide structural obligations for agencies actively to ward against inefficiently constructed, duplicative, or low benefit yield regulations.

A pair of additional issues arise. First, agencies should be explicitly encouraged to work together to achieve regulatory-compliance-cost savings. Many of the most egregious examples of inefficient and inexcusable compliance costs arise when multiple agencies undertake duplicative regulation, creating additional expense.[172] Even worse cases arise when

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fruit. *See supra* note 6 and accompanying text.

171. *See supra* notes 167–168 and accompanying text.

172. *See, e.g.*, Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals,* 45 WM. & MARY L. REV. 2167, 2230–42 (2004) (reviewing instances of "gaps in regulation or regulatory authority; overlaps in regulation or regulatory authority; inconsistencies among agencies in their regulation of similarly situated or identical products; and instances of agencies acting outside of their areas of expertise"); Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 35 (1993) (same); *see also* Mark Sherman, Comment, *Wave New World: Promoting Ocean Wave Energy Development Through Federal-State Coordination and Streamlined Licensing*, 39 ENVTL. L. 1161, 1193–95 (2009) (further example); Kam C. Wong, *Implementing the USA PATRIOT Act: A Case Study of the Student and Exchange Visitor Information System (SEVIS)*, 2006 BYU EDUC. & L.J. 379, 444 (2006) (same); *cf.* SUNSTEIN, *supra* note 1, at 98 (noting failure of regulators to consider systemic effects of regulations); Fontaine, *supra*, at 33–34 ("There is a growing understanding within the environmental community and the EPA that the past and present regulatory efforts to

agencies—who have read their remits so that their authority overlaps with that of another agency—establish contradictory or conflicting regulatory obligations with which they demand citizen compliance.[173] Agencies should be permitted to work together to eliminate both of these types of problematic regulation,[174] by permitting them to divide between themselves the compliance-cost savings achieved by such coordination.[175] Where regulations are conflicting, the benefits of achieving coherence will be obvious. Where regulatory claims overlap, no agency presently wishes to cede turf to any other; overlap continues. Under the CCC program, however, each agency would benefit from ceding the territory to a sister agency.

Somewhat related, agencies should also enjoy the option, in fulfilling their CCC efficiencies, to make savings that are larger than necessary to

control pollutants in one environmental medium often merely transfer them to other environmental media.").

173. *See, e.g.,* Mandel, *supra* note 172, at 2230–42; Fontaine, *supra* note 172, at 35; Sherman, *supra* note 172, at 1193–96; Wong, *supra* note 172, at 444.

174. *See* Ruhl & Salzman, *supra* note 11, at 797 (arguing that "attaining compliance ought to be reasonably within the grasp of regulated entities that strive to be among the" compliers); *id.* at 834 ("After all, if the rule of law means anything, it should mean predictability (that is, perfect compliance should be achievable).").

175. Contradictory regulations in a sense "break" the logic of the Compliance-Cost Cap (CCC) program because they in effect create infinite compliance costs (i.e., a regulated entity simply cannot comply with two contradictory commands at the same time). For that reason they also break any notion of fundamental justice: it is plainly unjust to require regulated entities to do X and not X at the same time, and to punish failures to follow such contradictory dictates. Conflicting regulations, which arise when regulations are not flatly contradictory but simply cannot in reality all be accommodated by the same regulated entity at the same time, present less obvious but perhaps more pernicious problems. *See* Ruhl & Salzman, *supra* note 11, at 803–12 (hypothesizing that adding valid regulation will change the compliance potential of regulated parties regardless of effort and quality of information available). A well-designed CCC program should help to reveal these contradictions and conflicts in the process of "costing" initial and ongoing regulatory burdens, and should include provisions requiring agencies that promulgate contradictory regulations (whether intra-agency or inter-agency) to resolve the contradiction within a very short period of time. The impetuses for speedy compliance with this obligation should be these: *all* contradictory regulations are suspended from the time the contradiction is noted until it is satisfactorily resolved, and after the standard period for contradiction rectification elapses, all agencies involved in creating the contradiction should face substantial (and growing) penalty deflations of their overall compliance-cost caps. These provisions would go some way to making the CCC program an at least partial force for the resolution of the *systemic* problems of pervasive regulation uncovered by Professors Ruhl and Salzman. *See* Ruhl & Salzman, *supra* note 11. Moreover, the constant quest for increasingly efficient (i.e., less compliance-cost generating) regulation engendered by the CCC program should create incentives for agencies to work with other agencies to identify and eliminate systemic problems that generate avoidable compliance costs.

fulfill their annual obligation, and then to allocate those savings into future years. Say, for instance, the deflator has been set at one percent. An agency, in finally conducting compliance-cost savings review under the new program, recognizes that a significantly costly regulatory obligation turns out either not to be worth enforcing or amendable to result in much lower compliance costs. In fact, the savings would constitute, say, fully five percent of the agency's whole compliance-cost obligation. Under these circumstances, a well-designed CCC program must permit the agency to make the change by either withdrawing or revising the regulatory obligation, and then to amortize the compliance-cost savings over future years until such savings are "used up," before having to make additional savings (though, of course, the agency would be free to make additional savings during those intervening years and to "bank" those savings as well). Any other rule would discourage agencies from making the biggest and most important withdrawals or revisions because little of the advantage accruing from such big-ticket changes would flow to them, while all of the drawbacks from a significant curtailment of their authority would remain.

V. DEFINING AND CALCULATING REGULATORY-COMPLIANCE COSTS

The broad overview of the CCC program provided in Part IV leaves a set of issues unsettled. As has been discussed, one of the great virtues of the CCC program is that it will require all agencies to undertake a full accounting of the costs that their regulations impose upon all entities, whether directly or indirectly regulated by agencies.[176] In order for this accounting to occur, however, a definitive determination must be made with regard to which costs qualify as regulatory-compliance costs and which do not. Accordingly, Part V.A. distinguishes between regulatory-compliance costs and, respectively, taxes, judicial awards, and costs of service provision.[177] These discussions will reveal another fundamental virtue of the CCC program. The program will increase the transparency of government and voters' ability to monitor and respond to the direction of government by giving Congress a choice: impose costs directly and transparently in the form of taxation or "self-executing" legislation or subject the costs to the CCC program.

Having established the boundaries of regulatory-compliance costs, the discussion proceeds in Part V.B.1 with an extended consideration of how these regulatory costs are to be calculated. The cost-calculation methods endorsed by the Office of Management and Budget for use in CBA could

176. *Cf. supra* note 112 and accompanying text (noting that agencies currently do not calculate the burdens of their regulations).

177. *See infra* Part V.A.

serve as a useful starting point.[178] Because agencies have shown themselves less than fully dedicated to complete application of such analysis, though, and because the agencies will in effect be the party against whom the compliance-cost caps will apply, the agencies can hardly also be the ultimate arbiters setting, adjusting or calculating the caps; this would thoroughly undermine the program.[179] Rather, the task of establishing neutral rules of cost-calculation, and of establishing agencies' compliance-cost caps and their compliance with the caps, should be assigned to an independent review board, or possibly to courts of special jurisdiction attached, perhaps, to the District of Columbia or Federal Circuits.[180] These boards or courts should make their determinations upon evidence submitted by agencies and all interested regulated entities or other interested parties.[181]

As Part V.B.1 reveals, the CCC mechanism provides unique advantages over CBA regimes that have come before. First, the program will be mandatory, and enforced by an independent arbiter. Just as important, though, it matters far less for the CCC program than for CBA exactly how the cost caps are established. This is true both because the initial cap will be a reflection of an amount of actual current spending, rather than a projection of likely future costs and benefits, and because future

178. *See supra* notes 9–15 and accompanying text; *see also infra* notes 243–47 and accompanying text. For example, the 2000 and 2003 OMB guidelines suggest that cost is measured by the, "opportunity cost," which includes, "private-sector compliance costs [and] government administrative costs," as well as, "losses in consumers' or producers' surpluses; discomfort or inconvenience; and loss of time." 2000 OMB GUIDELINES, *supra* note 104; 2003 OMB GUIDELINES, *supra* note 104.

179. *See supra* notes 72–84; *see also infra* notes 243–47 and accompanying text.

180. *See infra* notes 224–26 and accompanying text.

181. Creating an independent review board to fulfill this function should not, nearly a century into development of the Fourth Branch, *see infra* note 198, raise any independent constitutional concerns. For good or ill, separation of powers doctrine has long bent before the felt necessities of the regulatory state. *Id.* Constituting a court to undertake CCC review might initially seem to pose greater concern, if only from the novelty of the formulation—with tri-partite power formally coalesced within the judicial, rather than the executive or legislative branches. The objection, and even the novelty, though, would likely recede. The U.S. Court of Federal Claims is itself an Article I court. *See, e.g.*, Philip G. Peters, Jr. *Health Courts?*, 88 B.U. L. REV. 227, 260–61 (2008) (describing Article I courts). Therefore, handing initial review authority to that body would present no separation of powers concerns. Similarly, while the District Courts for the District of Columbia are fully constituted Article III courts, the D.C. Circuit has long served as the special circuit for administrative agency review, which of course would be exactly the purpose of a CCC review court. Remaining concerns could be assuaged, if necessary, by the assignment of initial review responsibilities not to the D.C. District Courts directly, but to Article I tribunals attached to the D.C. Circuit, as bankruptcy courts are attached to all Article III district courts.

diminutions of the cap are to take the form of percentages of the original cap. So long as the caps are calculated and adjusted using the same objective inputs each time adjustments are necessary, the program should function smoothly.[182]

Part V.B.2 will also explain in detail why the compliance-cost caps are established and adjusted without regard to the benefits created by agency regulation. In this, the CCC program follows the example, and the insights, of other externality-internalizing emissions-cap programs.[183]

A. The Composition of "Regulations" and Compliance Costs

Modern American government—at federal, state, and local levels—is awash in agencies. These agencies take many forms whether as direct extensions of executive authority or as "fourth branch" amalgams of executive, legislative, and judicial power.[184] For the CCC program to work, it will have to coherently and reliably identify, activities that qualify as regulation and costs that count toward compliance with regulation.[185] Other contrasting costs that might arise from government action could include payment of taxes and "judicially" adjudicated fines, penalties or other awards, and direct agency spending on service provision or other nonregulatory spending. Each is considered and distinguished from regulatory-compliance costs below.

1. Regulations Versus Taxes

The question of whether a government imposition qualifies as a tax has become a matter of central national importance and confusion in recent years.[186] Fortunately, a coherent distinction can be drawn between a regulation and a tax for CCC purposes without wading too deeply into these controversy-fraught waters. This is true as an initial matter because

182. *See infra* text following note 226.

183. *See id.*

184. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 950–56 (2000) (quoting Justice Jackson's dissent in FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) ("[A]dministrative bodies . . . have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.")).

185. *Accord* Hahn & Sunstein, *supra* note 1, at 1496, 1531–37 (advocating incorporating independent agencies into CBA requirements).

186. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–96 (2012) (analyzing whether the "shared-responsibility payment" in the Affordable Care Act is a tax); *see also* United States v. Kahriger, 345 U.S. 22 (1953); Sonzinsky v. United States, 300 U.S. 506, 514 (1937); United States v. Doremus, 249 U.S. 86, 93–94 (1919).

the distinction drawn between taxes and regulations for CCC purposes need not be consistent with the *National Federation of Independent Businesses v. Sebelius* decision or the precedent on which it is based.[187] In those cases, the federal government was recognized by the courts as lacking the power to impose the cost being imposed unless authority for the levy arose under the taxing power; in other words, if the charge were not found to be a tax, the federal action was unconstitutional. Because such a constitutional dimension does not arise when considering the CCC program (because potential challenges to the CCC do not include a challenge to the government's *imposition* of a fee under the Taxing and Spending Clause) the CCC could be designed to differentiate between taxes and regulations differently than these cases have. As it happens, however, the broad distinctions drawn in these cases provide solid ground upon which to draw the line between taxes and regulatory charges for CCC purposes. For the purposes of the CCC program, the following distinction should be made. A tax:

(1) raises revenue for the government that levies it; and

(2) is initiated explicitly by the legislative power of the government that levies it.

A regulation, on the other hand,

(1) either does not raise any money at all, or

(2) raises money only incidentally as a penalty for failure to comply with agency-directed mandates and as a result of agency-driven, rather than legislatively-driven, decisionmaking.

Consider first, the requirement of raising revenue. If Congress, for instance, requires businesses to pay a special excise to Washington for every smokestack they raise, this constitutes a tax, despite the fact that the requirement will in practical effect cause at least some businesses to raise fewer smokestacks. If, on the other hand, the government, through an executive or independent agency authorized to act, orders relevant regulated entities to double the length of their smokestacks, or to add scrubbers to them, this order—because it will generate no revenue for government—constitutes a regulation, and the costs of compliance with this order will count toward the regulating agency's compliance-cost budget cap.

This tax versus regulation distinction does not require that revenue raised by any given command of government that goes into the general coffers of government be considered a tax, but it does require that there be

187. *See Sebelius*, 132 S. Ct. at 2594–96.

revenue that actually flows to the government, rather than to some third party. If the order requires the regulated entity to pay funds to a third party rather than to the government, then what has occurred is regulation, not taxation. So, for instance, imagine that the government levies a special Social Security tax on employers, the revenue from which actually goes into a special Social Security trust fund (rather than the situation today, in which Social Security taxes go into the general till, leaving a "trust fund" not of assets, but of IOUs).[188] This levy would qualify as a tax because it produces revenue for government, regardless of the fact that it is earmarked for some specific purpose. If, on the other hand, some agency of government were instead to order regulated entities to pay the same amount of money directly to their employees or to hold the money and themselves to administer a retirement program for their employees, then those expenses would qualify as regulatory-compliance costs and would count accordingly.

Assume, though, that an order by a regulatory agency *would* bring some money to the government under whose authority the agency acts. The second rule above dictates that, for CCC purposes, the order only be considered to establish a tax—and thus the effects of following the order excluded from the CCC—if the agency's order merely enacts a statutory command to pay money explicitly issued by the legislative body. The power to tax lies with the legislative body, not with agencies. Even the Internal Revenue Service (IRS) merely enforces the tax code established by Congress; it does not set any taxes. Because the power to interpret and apply the tax code lies with the IRS,[189] a good rule of thumb is that if the IRS is not involved, then the agency action in question generates either regulatory-compliance costs or adjudication costs—but not taxes.[190]

This distinction should be fairly easy to apply and difficult to evade. Should Congress declare that all businesses that raise smokestacks will pay $100,000 per year for the privilege, it has (for purposes of the CCC distinction) established a tax, even if one of the purposes of the levy is to discourage smokestacks, and even if, for some reason, Congress were to specify that the Environmental Protection Agency (EPA) rather than the IRS should collect the levy. Should, on the other hand, Congress direct the EPA to regulate the emission of pollutants, then whatever commands the EPA gives pursuant to that authority qualify as regulations rather than as

188. *See, e.g.*, Allan Sloan, *No Trust for Social Security*, CNNMONEY, (Dec. 21, 2010), http://finance.fortune.cnn.com/2010/12/21/dont-trust-social-securitys-fund/ (noting that the Social Security trust "fund is merely an accounting fiction that has no economic value when it comes to protecting Social Security beneficiaries").

189. *See* 26 U.S.C. § 7805(a) (2012).

190. *See infra* Part V.B. (distinguishing between compliance costs and adjudication costs).

taxes, even if the commands might resemble taxes. So, for instance, were the EPA to levy a $100,000 per year fee for the raising of smokestacks, pursuant to its regulatory mandate rather than to a command from Congress to collect a specific levy, the costs of complying with that command would qualify as compliance costs subject to the agency's compliance-cost cap.

It may be argued that this distinction is arbitrary. It is not. It is consistent with long-standing case law as well as with the recent *Sebelius* decision.[191] Writing for the majority in the *Sebelius*, Chief Justice Roberts declared that the levy written into the Affordable Care Act—to be charged against some citizens who fail to purchase government-approved healthcare insurance—qualified as a tax.[192] He wrote:

> The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. . . . The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: it produces at least some revenue for the Government.
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> The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty. . . . [T]he individual mandate contains no scienter requirement . . . . [T]he payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.[193]

In other words, the levy in the Affordable Care Act qualified as a tax because, *inter alia*, it was designed to generate revenue, was explicitly

191. 132 S. Ct. at 2566.
192. *Id.* (despite having been called a "penalty" in the Act).
193. *Id.* at 2594–96 (emphasis is original).

authorized by and established in the act itself, and was to be administered by the IRS under normal taxing procedures. These distinctions track the working definition of "tax" relied on in *Drexel Furniture*, cited by the Court, and other previous cases.[194]

Drawing the taxation versus regulation divide this way not only serves the fundamental purposes of the CCC program and the core values of representative democracy, but it bows to practical necessity as well. The central purpose of the CCC program is to import the mechanism of internalizing externalities to a field where externalities abound and internalization mechanisms are lacking. Thus, the CCC program limits its reach to such areas by disclaiming any application to revenue-generating legislation undertaken by Congress directly. The people appear to be fairly well attuned to the tax laws; a vast proportion of our politics is consumed by the question of who should be taxed, in what manner, at what rates, and for what purposes.[195] Additionally, as a practical matter, there could be no point in trying to apply the CCC program to statutory tax enactments. By definition, these statutory provisions will have come from Congress directly, and will represent Congress explicitly doing something that it knows carries a high likelihood of political ramifications. As has been considered above, the CCC program can have no restraining power on direct congressional action. If Congress is willing to apply an explicit tax, it will surely also be willing to include in the taxing legislation a clause indicating that "the revenue generated by this tax will not qualify as a cost of regulatory compliance under the relevant CCC legislation.

In comparison to the relatively clean and easy-to-monitor category of congressionally directed revenue generation (e.g., taxation), regulation

194. In the 1953 case of *United States v. Kahriger*, 345 U.S. 22 (1953), Congress had directly imposed a special excise upon businesses that took wagers. *See id.* at 25–26. The defendant, who had not paid, argued, *inter alia*, that this levy did not constitute a constitutional tax because "the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure," whereas such regulation would have been beyond the federal power as a police regulation if undertaken directly. *See id*. at 28. The Supreme Court disagreed, explaining that "regardless of its regulatory effect, the wagering tax produces revenue." *Id.* Other cases come to similar results. In each, the courts held that tax must raise revenue, and must be levied by Congress expressly, not by a regulatory agency as an optional means of achieving some regulatory goal. *See, e.g.*, Sonzinsky v. United States, 300 U.S. 506, 514 (1937) (a levy counts as a tax if it "is productive of some revenue" and "operates as a tax"); United States v. Doremus, 249 U.S. 86, 93–94 (1919) (taxes must bear "some reasonable relation" to "raising . . . revenue").

195. *See, e.g.*, Neil H. Buchanan, *Why We Should Never Pay Down the National Debt*, 50 U. LOUISVILLE L. REV. 683, 683–87 (2012) (reviewing tax, spending, and borrowing debates of recent years); Neil H. Buchanan, *Good Deficits: Protecting the Public Interest From Deficit Hysteria*, 31 VA. TAX REV. 75, 77 (2011) (same, with relevant quotes from central figures in the debate).

provides significant challenges to public oversight.[196] The public cannot effectively monitor, nor coherently vote on the basis of, thousands of pages of rulemakings annually.[197] The agency rulemaking process is far removed from the halls of Congress.[198] Agency budgets are far more opaque than the headline budget, revenue, taxation, and deficit figures, and, noted above, there are as of yet no good, current tallies of the total costs of regulatory compliance.[199] Meanwhile, regulations that require some citizens to pay benefits for the benefit of other citizens are designed to provide the latter with a good that elected representatives want that latter group to have, without requiring the elected officials to take responsibility for taxing and spending to provide it.[200] In these instances, the public can do little by way of externality internalization. It is here that the CCC program will do such valuable work. The tax versus regulation distinction established above is consistent with long-standing non-delegation doctrine. The non-delegation doctrine recognizes that:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[201]

The taxing power is a, perhaps the, core legislative power, and hence is

196. *See, e.g.*, SUNSTEIN, *supra* note 1, at 101.

197. *See id.*; CROLEY, *supra* note 79, at 134–55 (reviewing the relatively attenuated, and therefore concomitantly unconstrained by voter oversight, nature of agency decisionmaking); REVESZ & LIVERMORE, *supra* note 109, at 13 (noting the same assertion).

198. *See, e.g.*, CROLEY, *supra* note 79, at 241–49 (noting how little power the elected branch has over agency action, once set in train: "even strong congressional criticism and disapproval did not discipline the administrators or their agencies very effectively. In each of the studied cases, the agencies undertook their regulatory initiatives largely uninhibited by adverse congressional reaction."); *see also id.* at 274–83 (further reviewing agency insulation from voter response); Coglianese, *supra* note 9, at 1114–15.

199. *See supra* note 116 and accompanying text.

200. *See, e.g.*, Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1363 (1993) (unfunded mandates permit the federal government to require that certain services be provided, while requiring others to pay for those services (citing JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 550 (1986))).

201. Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 472 (2001) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (internal citations omitted).

vested undelegatably in Congress' hands.[202] The non-delegation doctrine recognizes this. Cases in which Congress delegates any power to raise revenue have required that the power granted be explicit and constrained. In *Federal Energy Administration v. Algonquin SNG, Inc.*,[203] the Court held that Congress' grant of discretion to the Secretary of Treasury to place a levy on imports did not violate the nondelegation doctrine because the power was expressly granted, and could only be invoked when an "article [wa]s being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," and when, upon the application of an explicit set of standards, "he deems [it] necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security."[204]

2. *Regulations Versus Adjudications*

The next distinction arises at the boundary between regulation and adjudication. For constitutional due process purposes, courts distinguish between regulations that elaborate the burdens and benefits of broad classes of parties, and adjudications that resolve questions for individual parties on individualized grounds.[205] The Administrative Procedure Act (APA) makes a similar distinction.[206]

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202. *See id.*; U.S. CONST. art. I, §§ 7–8.

203. 426 U.S. 548, 558–59 (1976).

204. *Id.*; *accord* Pittston Co. v. United States, Civ.A. 01CV2732002, U.S. Dist. Ct. LEXIS 18654, at *22 (E.D. Va. Aug., 20, 2002) (finding the non-delegation doctrine not violated where Congress grants a private entity the power to collect a levy recognized as a tax because "Congress established a specific formula dictating how annual premia paid by assigned operators to the Combined Fund are to be calculated[,]" and thus "Pittston's position that the Trustees and the Combined Fund have some sort of unfettered power to assess taxes is disingenuous[,]" because "the statute clearly establishes a methodology for determining who is taxed and how that tax is determined"); *cf.* Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 618 N.E.2d 127 (N.Y. 1993) (finding the delegation of taxing *power*—rather than merely the authority to collect a tax fixed by the legislature—to an administrative agency unconstitutional under the New York State Constitution).

205. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.2, at 737–44 (5th Ed. 2010) (arguing that the adjudicatory process applies to a government decision that affects an individual "upon individual grounds;" contrasted with the political process, which applies to a government decision that affects "more than a few people" on grounds unrelated to an individual. (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908)).

206. The Administrative Procedure Act (APA) defines an "adjudication" as an "agency process for the formulation of an order." 5 U.S.C. § 551(7) (2012). It in turn defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* at § 551(6). It defines a rule (the result of a rulemaking), on the other hand, as

For the purpose of the CCC program, the focus shifts slightly. Here the key distinction is whether an agency is enforcing its own regulations or is instead either applying rules established by others or applying penalties for noncompliance with rules it has established. Most of the time the difference is obvious: a regulatory agency promulgating and enforcing rules is clearly acting in its regulatory capacity, and the costs generated by compliance with its rules fall under the cost cap. At other times, though, the difference is less clear because the agency is acting through adversarial proceedings that resemble genuine adjudications, and sometimes, some agencies *do* conduct genuine adjudications.

When an agency acts through adjudications, the central issues are those of rule-initiating authority and deference. If an agency is functioning as a court (and thus conducting adjudication for CCC purposes), it will determine the case or controversy before it with regard to some outside body of law established by others.[207] The parties before it will have access to appellate review by Article III courts[208] without needing permission of the agency.[209] And those higher courts will pay no deference to any rules,

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4); *see, e.g.*, Sugar Cane Growers Coop. v. Veneman*,* 289 F.3d 89, 96 (D.C. Cir. 2001) (an agency determination was "a rule 'by any other name'" because it "set forth the bid submission procedures which all applicants must follow, the payment limitations of the program, and the sanctions that will be imposed on participants if they plant more in *future* years than in 2001") (emphasis in original).

207. *See, e.g.*, Peters, *supra* note 181, at 260–61 (describing Article I courts).

208. *See* U.S. CONST. art. III, §§ 1–2; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.23 (1982) (Congress cannot "'withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at common law, or in equity, or admiralty'") (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856) (emphasis added to *Murray's Lessee* in original *Pipeline* opinion)); *id*. at 70 n.23 ("Moreover, when Congress assigns [even] matters [falling within the ambit of the public-rights doctrine] to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review." (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 455 n.13 (1972))).

209. *See* U.S. CONST. art. III, §§ 1–2*;* Sackett v. Envtl. Prot. Agency, 132 S. Ct. 1367 (2012). In *Sackett*, which the Supreme Court decided 9-0 against the Environmental Protection Agency (EPA), the Sacketts owned a small residential plot a few lots away from a lake in Idaho. *Sackett,* 132 S. Ct. at 1370. Wishing to build a house, they leveled the lot, filling part of it with dirt and rock. *Id.* A few months later, they were ordered by the EPA to

assertions or conclusions of law or policy reached by the agency.[210] Additionally, as will soon be considered, when agencies levy automatically reviewable fines for noncompliance, rather than issuing regulations with which regulated entities must comply, they generate adjudicative rather than regulatory costs.

On the other hand, the mere occurrence of an adjudication (or an adjudication-resembling procedure does not preclude the possibility of regulation resulting from the proceeding.[211] If adjudication serves merely or additionally to its service as a proper rights-determining adjudication[212]

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remove the fill (and therefore to lose the value of their property) because, claimed the agency, this non-riparian plot constituted wetlands that were part of the "waters of the United States" under the Clean Water Act. *Id.* at 1371. The EPA began fining the Sacketts $37,500 per day until they complied. *Id.* at 1370. The Sacketts, who disagreed with the EPA's conclusion that their land constituted part of the waters of the United States, sought a hearing with the EPA, but were denied. *Id.* at 1371. They then sought review in U.S. district court—an act of defiance (from the EPA's point of view) that subjected them to a doubled daily fine, and to which they were not entitled. *Id.* at 1373. The EPA's position would effectively have insulated its decision from judicial review, and entirely denied the Sacketts due process of law. *Id.* at 1371, 1373. As the unanimous Court declared, "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Id*. at 1374.

Nor, it appears, was the *Sackett* case an isolated oversight, but rather a demonstration of the explicit mentality of a least some significant portion of EPA officials. *See* John M. Broder, *E.P.A. Official in Texas Quits Over 'Crucify' Video*, N.Y. TIMES,May 1, 2012, http://www.nytimes.com/2012/05/01/us/politics/epa-official-in-texas-resigns-over-crucify-comments.html?smid=pl-share (quoting EPA's Region VI Administrator Al Armendariz, who explained that EPA's philosophy of enforcement is "kind of like how the Romans used to conquer villages in the Mediterranean—they'd go into a little Turkish town somewhere and they'd find the first five guys they saw and they'd crucify them").

210. While Article III appellate courts review conclusions of law from lower courts de novo, for example, McGee v. Arkel Int'l., LLC, 671 F.3d 539, 542 (2012), such courts do pay deference to agency decisions when the agencies make policy determinations within the agencies' regulatory remit. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 258 (2006); Chevron, U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984); Am. Raisin Packers, Inc. v. U.S. Dep't of Agric., 221 F. Supp. 2d 1209, 1214–15 (E.D. Cal. 2002).

211. *See* Qwest Servs. Corp. v. Fed. Commc'n Comm'n, 509 F.3d 531, 536 (D.C. Cir. 2007) ("There is no such general principle [that rules of general application can come *only* from rulemakings rather than adjudications]. Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking.") (internal citations omitted).

212. *Accord id.* (noting that a single process can split into part rulemaking, part adjudication, unless "a party adversely affected by the adjudication [demonstrated] that the

as the forum in which agency-initiated orders are given to one party or the other, then regulatory-compliance costs are generated as a result of the order granted. Here again, the determining factor is whether the agency is functioning merely as a magistrate judge's court, or if instead its legal and policy conclusions are granted deference by higher courts and whether the agency has any power to interfere with such review. If deference is granted, then the agency has acted in a regulatory, rather than a judicial, capacity, and the costs of compliance with its orders are regulatory costs.

Thus, for instance, return again to our hypothetical considering the EPA's regulation of smokestacks. Imagine that the EPA has some leeway in how to undertake its considerations: it could accept comments from all comers, or it could hold a hearing, with proponents of a proposed regulation taking an adversarial position against opponents. The fact of an adversarial forum will not change the result: when the EPA demands additional investment in what it deems to be safer smokestacks, regulation will have occurred. Regardless of the forum, the reviewing courts will defer to this determination.[213] Similarly, though the National Labor Relations Board (the Board) sits to hear cases brought by adversarial labor and management parties, the National Labor Relations Act (NLRA) grants to the board the power "to develop and apply fundamental national labor policy,"[214] which a reviewing Article III court will uphold so long as it is "rational and consistent with the [NLRA] even if [the Court] would have formulated a different rule had [it] sat on the Board."[215] The compliance costs created by these policy decisions will be regulated under a CCC for the Board. In contrast, the benefits and costs created by the Family and Medical Leave Act (FMLA)[216] are essentially unmediated by the policy decisions of a regulatory agency. Rather, the benefits conveyed expressly in the statute (and no more) are vindicated in federal court directly by affected parties, though the Secretary of Labor is permitted to bring the action on the employee's behalf where considered appropriate.[217] The FMLA does create compliance costs and transfers benefits directly from employers to

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switch deprived it of any right to which it would be entitled in an adjudication").

213. *See, e.g.*, *supra* notes 206–209 and accompanying text.

214. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500 (1978).

215. NLRB v. Curtin Matheson Scientific, Inc. 494 U.S. 775, 787 (1990) (internal citations omitted). *See generally* Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LABOR & EMP. L.F. 67 (2011) (summarizing the National Labor Relations Board's form and function).

216. Family and Med. Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601–54 (2012).

217. *See, e.g.*, Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) (the FMLA establishes benefits which may not be modified by the Department of Labor, because the Act is clear with regard to benefits and enforcement); 29 U.S.C. § 2617(b) (2012).

employees, but the benefits would otherwise either not issue or would be paid for by government. Since these costs and benefits are created entirely and expressly by Congress—and adjudicated by federal courts entirely without independent regulatory agency input—no regulatory-compliance costs are generated. The case would be the same even if the Act set up an Article I court to hear initial FMLA complaints, but gave that Article I court no independent policymaking authority.[218]

The primary practical effects of this distinction are the same as that of the taxation versus regulation distinction. First, the distinction brings under the CCC program acts that are not clearly ascribable to Congress by the public, and thus amenable to voter objection. If Congress changes the law to shift legal obligations between private parties in a way that is self-executing from the vantage point of regulatory agencies—meaning that affected individuals can vindicate their rights directly in court without agency intermediation, or with an agency acting purely as a magistrate court—then Congress has legislated and is acting at maximum transparency and with maximum responsibility potential. Second, this distinction captures under the CCC program all acts, which have the *effect* of regulation, rather than focusing on forms, and thus forecloses the opportunity for agencies to undermine the compliance-cost caps by changing the manner in which they issue regulations.

It is for the latter reason that a regulatory agency cannot avoid counting toward its cap the costs of complying with its regulations merely because a court lawfully has forced its regulatory hand. Imagine, for instance, that the EPA is considering two different versions of a regulation. Version A would cost regulated entities $10 million to comply. Version B would cost regulated entities $100 million to comply. The EPA decides to employ version A. An independent environmental group sues, seeking to force the EPA to apply version B and is successful.[219] Here, the EPA must count the whole $100 million cost of compliance with version B in its compliance-cost cap. After all, those costs are real. To decide otherwise would be to create

218. Note that this order from Congress that employers add to employee benefits would not qualify as a tax under the last definition, because it does not enrich any entity of government. It is, nevertheless, not a regulation because the transfer of interests that occurs arises at the direct order of Congress, without any agency having been granted any discretion.

219. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). In this case, the EPA set a "national performance standard" to reduce mortality for water animals by 80%–95% from the calculated baseline. *Id.* at 213, 215. Environmental groups and some states sued, demanding that EPA mandate a single specific method that might have saved the creatures up to 98% of the time, but which would have cost nine times more. *Id.* at 216. The Second Circuit agreed with the environmental groups, but the Supreme Court reversed and remanded. *Id.* at 217, 226–27.

opportunities for collusive, or at least opportunistic, behavior by agencies.[220]

A further issue is that of penalties or other levies arising from a failure by regulated entities to follow valid regulations. If all such levies counted as part of the regulatory-compliance-cost budget, agencies could find their budgets—and their ability to regulate expansively—effectively decreased in proportion to the recalcitrance of the entities they regulate. On the other hand, the recent *Sackett v. EPA* decision, heard by the Supreme Court in 2012, demonstrated the shocking disregard with which at least one regulatory agency has treated the due process rights of regulated entities, in an effort to hold such entities hostage to agency mandates without an opportunity for judicial review.[221] Regulatory agencies would be usefully chastened were all such attempts at due process denial counted against the agencies' cost-of-compliance caps.

Thus, any costs that arise from an entity's actual compliance with a regulation must count toward the regulating agency's compliance-cost cap. On the other hand, any *noncompliance* fines or penalties assessed against the regulated entity would not count against the compliance-cost cap, but would instead be treated as the fruits of adjudication, even if no Article III court review actually occurred.[222] Where an agency attempts to thwart due process while continuing to levy fines, as in *Sackett*, or otherwise to deny the rule of law to regulated entities, all assessments made during the period after review is requested must count against the regulating agency's

220. There is some evidence to suggest that this sort of collusion already occurs to "force" various agencies to issue regulations more aggressive than the law requires, and more aggressive than the agencies' political officers would otherwise permit. *See, e.g.*, MARKUS LEHMANN, GRANTING DISCRETION TO COLLUSIVE AGENCIES: THE ROLE OF THE "STANDING" DOCTRINE 3 (1999), *available at* https://www.coll.mpg.de/pdf_dat/1999_10online.pdf (recognizing that threats of litigation by environmental groups cause regulators to regulate more strictly then the law requires and suggesting that legislatures should lower the standing doctrine); *Regulate Us, Please*, THE ECONOMIST, Jan. 8, 1994, at 67 (considering established industry seeking stricter regulation to create barriers to entry and expansion by newcomers and smaller firms); *cf.* Zywicki, *supra* note 52, at 849, 892–93. The converse, would of course, also be true. Were the EPA here to decide to go with version B, the regulated entities sue, and the courts order the EPA to adopt version A instead, the EPA could count these compliance-cost savings, however forced, in their next CCC annual budget.

221. *See supra* note 208 and accompanying text.

222. This would be the case only so long as regulated agencies were treated with respect, and their liberty and justice interests honored. Prosecutors are said to lose the quest for justice in the miasma of conviction rates. This is a profound injustice. Regulators protecting their decisions and their turf, and bullying the citizenry, by obstructing Article III review or meting out retaliatory penalties commit a less grave—but perhaps thereby even more venal—offense.

compliance-cost cap. This is true even if the regulated entity eventually prevails, and so does not have to pay those assessments because the agency's overaggressive behavior has required the regulated entity to proceed under the shadow of those assessments, a shadow flowing directly from the agency's inappropriate regulatory behavior.[223]

3. Regulations Versus Service Provision

The difference between regulation and service provision presents the most straightforward of these distinctions. The distinction between a regulation and a service is the difference between an order and an offer. If an agency requires a regulated entity to lengthen its smokestacks or to provide healthcare benefits that it would not otherwise have provided, then the entity has been ordered to bear some expense that generates no revenue for the regulating government's coffers, and thus does not constitute a tax; instead, a regulation and concomitant compliance costs have been imposed. If, on the other hand, a government provides some service such as park rangers, or healthcare benefits paid for out of public revenues, or highways, then those are services provided out of tax revenues, rather than costs of regulation.

Spelling out this distinction highlights an opportunity for the government: it may avoid accruing tallies under various regulatory-compliance-cost caps by paying for services directly out of tax revenues. This is of course true and quite revealing. Congress and the President—working together—may take direct responsibility for providing certain services and for levying the taxes to provide those services through legislation. However, no regulatory agencies can independently commandeer tax revenues to provide services that would otherwise be provided by regulation and thereby evade their compliance-cost caps. Thus the caps serve their fundamental purpose of forcing efficiency, caution, and constraint—of internalizing the externalities of regulatory-compliance costs—upon individual regulatory agencies. The caps are not designed to—and never could—constrain a general government bent on providing a service directly.[224] But the CCC program would enhance transparency by forcing general governments to be more transparent about how much they are actually taxing the people, and to what ends. As has been considered above, such transparency is absolutely critical to the project of representative government.

223. Similarly, all costs of adjudication should be charged both to the agency and against the agency's compliance-cost cap if the agency should attempt regulations or fines or other assessments the court eventually deems frivolous or arbitrary and capricious.

224. *See supra* note 168 and accompanying text.

B. Calculating Costs of Compliance and the Regulatory-Compliance Costs Budget

Part V.B.1 discusses how to calculate and adjust compliance costs and compliance-cost caps. Part V.B.2 explains why, under the CCC program, the benefits generated by the entity subject to the caps should not be considered in establishing and implementing the externality-internalizing caps.

1. Compliance-Cost Valuations

Effective deployment of CCC will require establishing the initial budgets and caps, calculating how much cost any new regulations will add to the total budget, and determining how much cost elimination or revision of extant regulations might subtract. In order for this process to unfold coherently, the CCC legislation will have to establish a neutral, objective valuation process that first calls on regulatory agencies to make estimates, then allows regulated entities (and other interested parties, including would-be market competitors) to submit counter figures, and finally adjudicates between the various valuations submitted. The agencies should not, of course, be judges in their own case, or receive deference to their valuations, any more than entities regulated under carbon-caps would be permitted to establish their own carbon emissions totals without review or oversight.[225] This would be to allow the fox very much to guard the henhouse.[226]

This recognition, though, leaves the fundamental problem of who should review both valuation methodology and its application in specific instances. One solution would be to establish—presumably in the CCC legislation—a review board specifically designed for the task. The advantages of this option would be that the board could be selected on the basis of expertise in the field of long-term cost appraisal and related disciplines, and that the board's review process could potentially permit the airing of more viewpoints than might otherwise be easily accommodated by a traditional court. The central disadvantage of employing such a board, however, would be that the board would, in the end, simply be another iteration of the regulatory state. Unless the composition, compensation, promotion, and other characteristics likely to influence the behaviors of the board were very carefully designed, the result might simply be to substitute a different fox to mind the hens.

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225. *Cf.* Hahn & Sunstein, *supra* note 1, at 1497, 1537–38 (calling for judicial review of CBA).

226. As we have seen in the non-binding context of CBA, the foxes have been, withal, as bad at henhouse guarding as might have been expected. *See supra* notes 9–15; *infra* notes 243–47 and accompanying text.

The other plausible option would be to assign the valuation review task to a federal magistrate judge of specialized competence. These judges could be attached to the District of Columbia or Federal Circuits[227] and charged to judge impartially and without special deference. The key disadvantage of putting a judge in the role is that the judge is unlikely to be an expert as this sort of valuation process, even given the heightened specializations that obtain to the District of Columbia and Federal Circuits. The key advantage is that of relative independence from the motivations and hesitancies that animate the bureaucracy.

Regardless of which valuation review process is deemed superior, there is a built-in reason why, so long as the arbiter in valuation proceedings is impartial and not bound by any inappropriate deference obligations, valuation methodology should prove immanently fair: both the regulatory agencies and the regulated entities will regularly find themselves on either side of the valuation issue. Agencies will have a built-in incentive to inflate their regulatory-burden costs initially, to give themselves the highest possible budgets and caps, while regulated entities will wish to minimize these figures. Roles will switch, however, when the time comes to place valuations on the burdens inflicted by new regulations: agencies will have an inherent incentive to lowball, and regulated entities to highball. The roles will switch yet again, though, when it comes time to determine how much the regulatory burden is being cut by revising or eliminating old regulations. All of this should create incentive for all parties to create and observe neutral and objective valuation standards, and for magistrate judges to administer them so.

Meanwhile, this valuation process may well prove fairly difficult. It will be no more difficult, though, than the CBA that agencies have been obliged to perform for more than thirty years now.[228] In fact, as considered more

227. Assignment to a court specially designated to deal with issues of compliance-cost budget setting would respond to complaints that judicial review generally unduly slows the regulatory process, while still avoiding the untenable situation of setting the agencies in charge of their own caps. *See* Coglianese, *supra* note 9, at 1125–26 (reviewing scholarship worried that a slow, inexpert, and unreliable judicial review process has "ossified" agency rulemaking).

228. While agencies have often ignored these obligations, the OMB has established thoughtful rules for the conduct of CBA, the cost determination portions of which could serve as a useful starting point model for the courts charged with determining appropriate costing methodologies. *See* 2000 OMB GUIDELINES, *supra* note 104; 2003 OMB GUIDELINES, *supra* note 104. Another useful model might be the way that the government calculates private-polluter damages in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cases. In such cases, the courts try to award damages to fully account for all costs of clean up and for all lasting damage to natural resources. *See, e.g.*, DAN B. DOBBS, LAW OF REMEDIES 724–30 (2d ed. 1993) (citing, *inter alia*,

fully below, the CCC valuation process will prove much less complex than standard CBA analysis. To the extent that regulatory agencies presently fulfill their duty to regulate competently and in the holistic public interest by conducting CBA,[229] the CCC program will require significantly fewer valuation determinations than does the present regime. A CBA requires agencies explicitly to measure the total cost of their regulations and the total benefits, and to compare the former to the latter.[230] The CCC will require an explicit calculation of the costs of agencies' regulations, but will rely on the inherent structural competencies of regulated agencies to permit them to determine the relative merits of their extant and prospective regulatory programs.[231] Moreover, an argument that it would be too difficult to determine the total regulatory burden inflicted upon the economy, regulated entities, and society generally by regulation would carry, embedded within it, an implicit admission that regulatory agencies cannot reasonably be asked even to determine how much their regulations cost. Such an admission, though, would counsel not for a CCC regime but for a moratorium on—or rollback of—regulation generally while regulatory agencies figure out how to behave as minimally competent social actors. After all, how might it ever be determined if any given regulation were "worth it" if regulators lack the ability to figure out the actual benefits and costs of the regulation?[232]

2. Ignoring Regulatory Benefits in Making Cost-Cap Determinations

It might seem odd to take no account of the benefits created by regulation in establishing or administering this CCC program, but in fact this too represents a straightforward application of emission-cap principles. In both cases, what is being capped are the unwanted externalities created in the process of making a good thing. Regulated entities do not get an offset from their carbon budgets because they are creating a good such as energy, rather, the whole point is to require the regulated entities to create the good while minimizing the negative-externality cost (i.e., the

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the CERCLA, 42 U.S.C. § 9601 *et seq.*). These damage measures represent an attempt to quantify all of the externalities that have arisen against all parties as a result of the pollution, and to charge those damages against the polluter (or the polluter's successor in interest). These could serve as at a least partial model by which to quantify all of the externalities that arise against all parties as a result of regulation, and to use them in establishing and then modifying the responsible agency's compliance-cost cap.

229. *See supra* notes 98–100 and accompanying text.

230. *See id.* (describing nature of CBA).

231. *See infra* note 241 and accompanying text.

232. *See supra* note 110.

emissions).[233] Similarly, regulatory agencies should not get an offset because they are creating a good such as a cleaner environment.

Much of the purpose of regulation is to internalize externalities created by regulated entities. Thus, some of the costs created by regulatory agencies are not bureaucratically created costs of compliance, but are rather attributable to the costs associated with internalizing externalities. Imagine, for instance, a scenario in which an electricity generation plant produced, as a byproduct, cakes of arsenic. It disposed of these cakes by traveling to the edge of its property and dumping the cakes into a nearby stream. The relevant regulator forbade this activity. Some of the costs that the power plant faced as a result of the regulation, such as paperwork, compliance, and inspections, would be directly and completely attributable as regulatory-compliance costs, and would vary greatly depending upon the regulatory regime that the regulatory agency imposed. *Some* part of the cost of doing something else with the arsenic, meanwhile, would at least partly represent a cost generated by internalizing an externality—but, vitally, not all of it. Rather, the "internalization of externalities" cost component would *also* vary greatly depending upon the content of the regulatory agency's preferred regulatory regime. In other words, a more efficient regulation, one that allowed regulated entities flexibility in how they externalized the externalities, for instance, would lower costs that could, if agencies were free to distinguish between "real" regulatory costs and "internalization" costs, be attributed to internalization costs, and thus removed from the constraints and the efficiency-creating pressures of the CCC program. This suggests that *all* costs of regulatory compliance should be included in the calculation of a regulatory agency's initial regulatory cap, not just those not attributed by the agency to internalization of externalities.

Were internalization costs immutable, it would not much matter whether those internalization costs were knocked off the CCC budget or not. If they were knocked off-budget, then the regulatory agency's total compliance-cost budget would be accordingly lower; if not, accordingly higher. But the same amount of non-internalizing costs would be included in the budget either way, and the regulators would have to constrain those. In such a world, there would be only one sense in which the issue of whether to count the internalization costs would matter: if agencies were required to comply with a cap that were annually, say, one percent lower than their previous year's total; then having the costs of internalizing externalities included in the total would, by inflating the base, also inflate the one percent reduction mandates, and thus make it harder to reach that one percent reduction through regulatory efficiencies. This might counsel for excluding such

233. *See supra* Part II (emissions-cap overview).

costs.

As already suggested, however, "internalization" compliance costs are not and cannot be made immutable; they are costs that must be subject to review and to the efficiency forcing mandate. First, deciding whether a regulation does in fact internalize an externality, or instead creates a non-internalizing cost of regulation, will far too often present a classic case of question begging. One only creates a negative externality (the only type appropriately the subject of regulation) if (1) one is actually responsible for producing the purportedly negative thing and (2) that thing is actually negative. Recall the energy producer contemplated above, for instance, who was producing cakes of pure arsenic, then "externalizing" those cakes into a stream. This is obviously an externalization of costs. Cases are seldom so clear. Usually, the question of whether the act being regulated represents a genuine negative externality properly attributable to the regulated entity is exactly the sort of question that the regulatory agency has already, to its own purposes, answered in the affirmative, whether that answer is the indisputably correct one. This effect will merely be exacerbated if the agency can take some significant portion of compliance costs "off-budget," and thereby exclude those costs from the salutary effects of the cap, simply by labeling those costs "externality internalizations." Significant dispute could arise with regard to whether vast swathes of modern regulation should be considered internalizations of externalities.[234] Regulations that require employers to provide healthcare benefits to spouses and dependents of employees, for instance, can only qualify as the internalization of externalities under a theory of society that renders employers comprehensively responsible for the lives and well-being of everyone they employ—a theory that would create deep controversy and strenuous disagreement in modern America. There can be no doubt, though, that agencies empowered to create and enforce dependent healthcare coverage regulation would seek to label the costs of compliance with such regulation "externality internalization" if such a label would increase their scope for additional regulation.

Additionally, even if a cost is recognized as a cost arising from internalizing an externality, this conclusion does not carry with it the corollary conclusion that the regulatory agency has imposed the most

234. *See, e.g.*, WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY 14–18 (2d ed. 1988) (providing extended definition of "externality," and considering some potential wrinkles); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347–50 (1967) (considering internalization of externalities as an attempt to force actors to recognize the full costs of their social interactions); Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (a seminal work on the subject).

efficient regulations with regard to how to internalize the externality. Should the agency require the arsenic-producing power plant to store the arsenic cakes in a lead-lined shelter? To revamp its production at great expense? To shut down entirely?[235] If the regulatory agency is not held to high structural standards of efficiency in these decisions as well—as they would not be if "internalization" costs were distinguished from "compliance" costs and excluded from the regulatory-burden caps—then much of the benefit to be derived from CCC would be lost. It is, in fact, one of the great strengths of emissions-cap regimes that they recognize and respond to this very fact. Under command-and-control style regulatory regimes, regulatory agencies order regulated entities to achieve regulatory purposes such as lower emissions in certain specific ways.[236] This sort of regulation tends to be inefficient, because the regulators are unlikely to know the highest value, least cost way to achieve their regulatory goals, and there will often not be a single best, one-size-fits-all method available.[237] In contrast, emissions-cap programs require regulated entities to cut their emissions, but leave it up to the entities to figure out how—thus harnessing the entities' inherent desire to find the most-efficient and least-cost means of cutting emissions while still maintaining high output.[238] The costs associated with command-and-control regulation could largely have been subsumed under the head of "internalization" costs, but if they were, they would improperly have been protected from the workings of the cap, as less controlling directives would have resulted in lower internalization costs.

Similarly, consider that regulations in effect before the CCC budget is established permit emission of some particulate at a level of two parts per billion. Should the regulation be tightened to permit only emissions of one part per billion? Assuming that there are any negative attributes of the particulate, then it could be argued that reducing the incidence of its emission will, at least to some minimal degree, "improve the environment." But that is not the right question to ask. The right question to ask is whether the notional ecological improvements are worth the increased regulatory burden.[239] Regulatory agencies will only properly face that question if they are obliged fully to consider the costs that their regulations

235. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 213–17 (2009) (describing a situation in which the EPA faced such a decision).

236. *See, e.g.*, Stavins, *supra* note 129, at 297, 344–48; Huber, *supra* note 131, at 60–61, 66–67; Carlson, *supra* note 131, at 1144–45.

237. *See, e.g.*, Stavins, *supra* note 129, at 297, 344–48; Huber, *supra* note 131, at 60–61, 66–67; Carlson, *supra* note 131, at 1144–45.

238. *See, e.g.*, Stavins, *supra* note 129, at 297–98; Huber, *supra* note, 131 at 60–61, 66–67; Carlson, *supra* note 131, at 1144–45.

239. *See supra* note 110 (recognizing the need to do comparative analysis).

impose, thereby implicitly considering the drag on economic development created by their regulations.[240] In the specific context of the CCC program, agencies will only face the structural constraints that will enable and require them to ask the right questions and regulate in the most efficient manner to the appropriate extent if all of the regulatory burdens they impose are included within their budget, subject to their cap. Then they can decide which regulations are "worth it," and will presumably select those that have a high payoff in genuine internalization of externalities for the costs imposed.[241]

The CCC program fundamentally leaves this last question (i.e., which regulations will be worth it, which not) in the hands of regulators, because it is a question structurally within the regulators' wheelhouse. The program places trust in agencies to effectively determine and rank benefits flowing from various regulatory measures—just as emissions-cap regimes rely on the natural inclinations and competencies of regulated entities to continue to maximize production of their social good so far as is possible given the constraints of the emissions cap.[242] As considered above, if regulators cannot be trusted to be motivated by good faith desire, twinned with competent ability, to act in the interest of the general public when faced with coherent incentives to do so, then the entire premise of the regulatory state is irreducibly flawed.[243]

Thus, the CCC program responds to some of the critiques of CBA and would deliver an improved product. The objections to CBA are quite substantial. Some have claimed that the analysis does not properly deal with the wealth effect, and that it does not account for the fact that people are bad at valuing low probability versus high consequence risks or future and hypothetical events.[244] Others have argued that the cost-benefit formulae used are biased against regulation.[245] At their most aggressive, critics entirely reject the notion that the values involved can meaningfully be translated into dollar figures.[246] The CCC program responds at least in

240. *See id.*

241. Also note that regulation does not supplant the common law of nuisance. If an industry is creating a nuisance by creating externalities that ought not to occur at all, then citizens may sue them in nuisance seeking either an injunction against further externalization, or, if doctrine directs, make whole damages.

242. This is an illustration of the ways in which the CCC program relies not on strict material self-interest calculations, but on the recognition that regulators are motivated by public spiritedness (as they define that term) as well as by private interests. *See supra* notes 77–90 and accompanying text.

243. *See supra* text following note 159.

244. *See, e.g.,* Bronsteen et al., *supra* note 9.

245. *See, e.g.,* REVESZ & LIVERMORE, *supra* note 109.

246. *See* ACKERMAN & HEINZERLING, *supra* note 109, at 9, 211–16.

part to all of these concerns. First, it requires an accounting only on the compliance-cost side, while allowing regulatory agencies to determine which benefits are most worth achieving, given the available budget and compliance-cost savings that are available. As Professor Sunstein has noted, calculation of benefits proves particularly difficult.[247] Second, under the CCC program, the compliance-cost figures established have value only comparatively: a compliance-cost baseline is established, and then reduced somewhat each year. Because the important consideration is really comparative cost, it matters much less what raw numbers are placed upon any speculative costs, such as units of life or economic opportunity lost to a regulation, so long as those speculative costs are always calculated the same way.[248]

There will, of course, be some irreducible costs of externality internalization. No matter what, doing something with that arsenic cake other than throwing it in the river will cost more (at least initially) than throwing it in the river, else the energy manufacturer would already have been doing that cheaper thing. But this fact is well accounted for in the internal mechanisms of the CCC program. The program is not designed to push compliance costs to zero (i.e., to leave no room for any genuine externality-internalization costs). Rather, it merely works during the deflator years to enforce some long-required economies, and then later to constrain compliance-cost growth to maintain equally long needed discipline to the enlargement of regulatory-compliance costs. These mechanisms account for the fact that externality internalization is genuinely not costless.

CONCLUSION

No party can be permitted, without effective check or hindrance, to impose negative externalities on the rest of society. The problem becomes more than academic when the externalities imposed are large and have significant negative effects. This is, ever increasingly, the case with the negative externality of compliance costs produced by regulatory agencies. While such agencies' regulations can do much good, the compliance-cost byproducts of that regulation do much harm. These costs must be

247. *See* SUNSTEIN, *supra* note 1, at 76.

248. For example, an agency could put a value of $14 trillion dollars on each hour of life or liberty lost due to regulatory compliance, if it wished, so long as it calculated all future adjustments to its cap and future "expenditures" of its budget in the same manner. In fact, there is no obvious reason why the accounting metric might not skip the monetization stage entirely, and simply keep a separate account of monetary compliance costs, worker hours required for compliance, and so forth, and make future adjustments in the same "currency."

contained and minimized.

The checks that have been attempted thus far have proven inadequate. Their exemplar, CBA, has no teeth, and is administered by the very parties it is meant to constrain. This is not a recipe for success. As it happens, though, a solution is at hand; it takes the form of emissions-cap programs. Emissions caps force goods producers to attend to the negative externalities they create and to become more efficient at creating the goods they produce, all while generating fewer externalities. This is a model tailor-made for the problem of out-of-control compliance costs, and inefficient regulations. The CCC program employs this model, and thus presents a mechanism to enforce real and effective efficiencies on regulatory agencies while preserving the efficient goods that such agencies produce.