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Agenda-Setting in the Regulatory State: Theory and Evidence

Cary Coglianese
University of Pennsylvania Law School

Daniel E. Walters
University of Pennsylvania

AGENDA-SETTING IN THE REGULATORY STATE: THEORY AND EVIDENCE

CARY COGLIANESE* & DANIEL E. WALTERS**

During the Obama Administration, the U.S. Environmental Protection Agency (EPA) took notable steps to address climate change by issuing a variety of significant new rules under the Clean Air Act. What led this agency to the front lines of such major and controversial policy actions? The EPA moved forward not only because of the priorities of its leaders but also because of a variety of outside pressures, including interest group lobbying, the filing of a formal petition for rulemaking,[1] a major Supreme Court decision clarifying the agency's authority under the Clean Air Act,[2] various legislative proposals and numerous committee hearings on Capitol Hill,[3] and ultimately a major climate initiative announced by President Obama.[4] All of these factors shaped the EPA's policy agenda and in

* Edward B. Shils Professor of Law, Professor of Political Science, and Director of the Penn Program on Regulation, University of Pennsylvania Law School. We gratefully acknowledge support from the University of Pennsylvania Law School and from Allen J. Model and the Leo Model Foundation. We also greatly appreciate helpful comments on an earlier draft of this Essay from John Kingdon, Connor Raso, Jeffrey Rosen, and Glen Stazsewski, as well as input from all the participants at the workshop organized by the Penn Program on Regulation in November 2014, whose names are listed in the Appendix. This Essay represents the authors' efforts to summarize and synthesize the perspectives expressed at that workshop. The views expressed do not necessarily reflect those of the authors, the Penn Program on Regulation, or any of those providing support for this project. Furthermore, although this Essay synthesizes the workshop dialogue, it does not necessarily represent the views of all the participants nor should it be construed to represent a consensus statement or a shared set of recommendations.

** Regulation Fellow, 2013–2015, Penn Program on Regulation, University of Pennsylvania Law School.

1. *See* Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA*: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1029–30, 1040, 1042–43, 1045 (2008).

2. Massachusetts v. Environmental Protection Agency (EPA), 549 U.S. 497, 533 (2007).

3. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R43230, CLIMATE CHANGE LEGISLATION IN THE 113TH CONGRESS 1 (2014).

4. *See generally* EXEC. OFF. OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION

varying ways contributed to the agency's decision to target the issue of climate change through rulemaking. Action that was largely unthinkable not that long before—namely, the idea of regulating climate change without the passage of new legislation—eventually became a reality. But it was never destined so, nor was it an easy or straightforward path that led the Obama Administration's EPA to take a bold position of leadership in climate-related regulation.

Reflecting on the winding path that led the EPA to regulate climate change under forty-year-old legislation calls attention to a vital but seldom studied part of the rulemaking process: the agenda-setting stage. Other stages of the regulatory process—rule promulgation and enforcement, for example—have been quite visible and more widely studied by regulatory scholars.[5] But the stage preceding both of these is one where some of the most critical decisions are made to define what issues will eventually make it to the important later stages of promulgation and implementation. In short, early agenda-setting decisions affect and structure all that comes afterwards. With finite resources and a greater number of problems to deal with than those resources could possibly support, all agencies' choices at the agenda-setting stage can have a major impact on the agencies' ultimate regulatory performance. Agencies, like anyone, face opportunity costs; a decision to address one problem through rulemaking necessarily crowds out attention to other problems.

For these reasons, regulatory agenda-setting merits careful analysis and systemic study. And yet both real and perceived difficulties in carrying out empirical research have generally kept researchers interested in regulation and administrative law from explicitly studying agenda-setting dynamics. This research deficit has undoubtedly led to missed opportunities to understand how to make the entire regulatory process more coherent, systemic, responsive, and efficient. Despite consistent calls for reform of the regulatory process along a variety of dimensions—whether by improving the rigor of regulatory analysis or expanding the participation of the public—it is possible, if not likely, that none of these ideas will fully cure whatever ails the regulatory process if the agenda-setting stage remains ignored. All truly comprehensive efforts to improve the regulatory system in the United States will need to be grounded on empirical research that illuminates the workings of—as well as dysfunctions of—the entire

PLAN (2013), https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

5. *See, e.g.*, EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK ix–x (2002) (discussing enforcement and implementation); CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING xi–xii, 2 (4th ed. 2011) (discussing rulemaking).

regulatory process, from start to finish.

This Essay makes a step forward in advancing the study of the agenda-setting process in the regulatory state. It synthesizes an in-depth set of discussions that occurred at a workshop organized under the auspices of the Penn Program on Regulation in Washington, D.C. in late 2014. We brought together more than two dozen leading scholars, practitioners, and government officials to discuss agenda-setting in the regulatory process.[6] Included in the workshop were the handful of social scientists who have attempted some of the few empirical studies on regulatory agenda-setting, as well as the comparably small number of legal scholars who have considered various legal and normative issues surrounding agenda-setting. Many other workshop participants brought government experience to the table as well, with an intentionally broad range of government perches: some had served at older agencies (e.g., the Department of Transportation), while others had worked at newer agencies (e.g., the Consumer Financial Protection Bureau); some came from agencies engaged in social regulation (e.g., the Environmental Protection Agency), while others worked at financial regulatory agencies (e.g., the Securities and Exchange Commission); and some worked on Capitol Hill and others in the White House. A few had government experience across all three branches of government. This highly diverse group of participants gathered for a full day to discuss, for the first time as far as we are aware, the hidden world of regulatory agenda-setting. This Essay details what their discussion revealed about what scholars and practitioners know—or, at least, what they think they know—about the much too-hidden realm of regulatory agenda-setting. By synthesizing our workshop dialogue in this Essay, we provide insights about the direction future research should take, as well as establish a foundation upon which more research may be built, thereby increasing the knowledge upon which future efforts to reform the regulatory agenda-setting process may be based.

I. THE CONCEPT OF AGENDA-SETTING

The concept of agenda-setting can be construed narrowly or broadly. In the narrowest sense, an agency's regulatory agenda can be taken to mean, quite literally, the listings it provides in its semi-annual *Unified Agenda of Regulatory and De-Regulatory Actions* (*Unified Agenda*) or its annual *Regulatory*

6. A list of participants appears in the Appendix to this Essay. The dialogue was conducted on a not-for-attribution basis in accordance with the Chatham House rule. As a result, ideas expressed in this synthesis essay should be ascribed neither to any particular individual nor to any organization with which any participant is affiliated.

Plan—documents the agency is required to produce under the Regulatory Flexibility Act and Executive Order 12,866.[7] This narrow understanding of an agency agenda has certain advantages, particularly in terms of establishing a baseline agreement on key concepts, definitions, and metrics that are generally relevant to evaluating agenda-setting. For instance, the *Unified Agenda* has built-in classifications for the significance of a rulemaking action,[8] and the *Regulatory Plan* by definition is supposed to identify only the agency's highest priorities.[9]

But there are also disadvantages of such a narrow focus, as the *Unified Agenda* misses much of the work of a regulatory agency. After all, agencies also undertake enforcement actions, other adjudicatory actions made in field offices around the country, and even decisions *not* to act—none of which will be included within the scope of the *Unified Agenda* or the *Regulatory Plan* but which still can have important implications for the public. Moreover, even with respect to rulemaking, what gets logged in official lists and plans does not include everything; an agency's agenda "on the books" does not necessarily mirror its agenda "in action." While it can be tempting to reach for a conceptualization of agenda-setting that allows one to say definitively that an item is "on" or "off" the agenda, agenda-setting in reality is more like a continuum, with items rising or falling on the agenda as circumstances change.[10] Thus, despite all that can be gained

7. Regulatory Flexibility Act, 5 U.S.C. § 602 (2012); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,739 (Oct. 4, 1993); *see also* CURTIS W. COPELAND, ADMIN. CONFERENCE OF THE UNITED STATES (ACUS), THE UNIFIED AGENDA: PROPOSALS FOR REFORM (2015), https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Report%20031015.pdf. For direct online access to the latest *Unified Agenda of Regulatory and De-Regulatory Actions* (*Unified Agenda* or *Regulatory Plan*) (as well as historical entries), see *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, OFF. OF INFO. AND REGULATORY AFFAIRS (OIRA), http://www.reginfo.gov/public/do/eAgendaMain (last visited Feb. 1, 2016).

8. *See, e.g.*, *How to Read the Unified Agenda*, CTR. FOR EFFECTIVE GOV'T, http://www.foreffectivegov.org/node/4062 (last visited Jan. 7, 2016) (discussing the information available in *Unified Agenda* entries, including the "priority level," which varies from "Economically Significant"—those having an annual effect of at least $100 million—to "Substantive/Nonsignificant" and "Routine and Frequent").

9. *Id.*

> The [Regulatory] Plan is more focused than the Unified Agenda. Whereas the Unified Agenda is to include 'all regulations under development or review,' the Plan includes only 'significant' regulations. Significant regulations are pared even further so that only the most important are included in the Plan. Additional requirements associated with each rule in the Plan include a statement of need and may include a summary of legal basis, alternatives to the proposed regulation, anticipated costs and benefits, and risks.

Id.

10. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984). John

with simple, consistent conventions for tracking an agency's agenda via the *Unified Agenda* or *Regulatory Plan*, much can also be missed, especially if the goal is to understand when and why agendas change.

For these reasons, instead of limiting the workshop discussion exclusively to agencies' formal *Unified Agenda*, we invited participants to offer their own conceptions of what constitutes a regulatory agenda. Especially given the paucity of research on regulatory agenda-setting, fuller consideration of the concept of an "agenda" in the regulatory setting can itself help advance future research. Our workshop's starting point, then, was to treat agenda-setting in a relatively open-ended, broad fashion so as to include all the choices and opportunities that both agency officials and other participants in the regulatory process have about what problems agencies emphasize and what alternatives they consider.

Outside of the context of administrative agencies, of course, political scientists have studied the nature of public policy agenda-setting for years.[11] They have been motivated to explain why, at any given time in Washington, D.C., some issues occupy the attention of political elites but not others. For example, why did welfare reform rise to the foreground of attention in the 1990s but not Social Security reform? Why did health care policy occupy so much attention in the first decade of the 2000s but not transportation policy? Political scientist John Kingdon has famously developed a theory of agenda-setting based on policy "streams"—streams of "problem recognition," "formation and refining of policy proposals," and "politics"—each of which must join together for an issue to find its way onto the general policy agenda.[12] When these three streams unite because of a focusing event or a crisis, a "policy window" opens—another innovation integral to Kingdon's scholarship—and a policy issue ultimately finds its way onto the governmental agenda.[13]

Kingdon's pioneering study of agenda-setting across the government should be credited with having worked through this idea and helpfully confronted many other conceptual difficulties in the study of policy agenda-setting more generally.

11. *See, e.g.*, ELAINE C. KAMARCK, HOW CHANGE HAPPENS—OR DOESN'T ix–x, 135 (2013); KINGDON, *supra* note 10; Lawrence J. O'Toole, *The Public Administrator's Role in Setting the Policy Agenda*, *in* HANDBOOK OF PUBLIC ADMINISTRATION 225, 225 (James L. Perry ed., 1989); NELSON W. POLSBY, POLITICAL INNOVATION IN AMERICA 1, 5–6, 173 (1984).

12. KINGDON, *supra* note 10, at 92.

13. Kingdon's framework of confluent streams is similar to Cohen, March, and Olsen's "garbage can model" of decisionmaking, in which solutions go looking for problems with which to link. Michael D. Cohen, James G. March & Johan P. Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1, 1 (1972). Sometimes solutions percolate but lie dormant for years until a problem stream emerges to which they can be linked. The broadest conception of agenda-setting would include consideration of the source of ideas for different solutions. ROBERT B. REICH, THE POWER OF PUBLIC IDEAS 3–7 (1988). For

Generations of political scientists since Kingdon have largely affirmed his dynamic account of agenda-setting, although they have also further developed the mechanisms of agenda change with models of, among other things, punctuated equilibrium and path-dependence.[14] Kingdon's "streams-and-windows" conception of policy agendas seemed also to accord well with our workshop participants' general intuitions about regulatory agenda-setting. The regulatory agenda-setting process, they agreed, is relatively fluid and subject to a variety of pushes and pulls. However, despite its messiness, regulatory agenda-setting is not pure chaos. Perhaps it might best be considered a kind of "controlled chaos."

Participants seemed to agree that learning how to measure and understand the flow of policy streams could help in understanding better why some issues are more likely to make it onto the real agendas of regulatory agencies. Just as with governmental agendas more generally, policy entrepreneurs interested in regulatory issues search for opportunities to link problems, policies, and politics by trying to take advantage of focusing events to make some issues more of a priority for a regulatory agency. Yet regulatory agenda-setting might also exhibit certain regularities not necessarily present with more general policy agendas. "Stream flows" might, for example, show certain seasonal patterns, with agencies' agendas varying across different stages of a presidential administration. Agenda-setting early in the first term of an administration, as new appointees are being selected, may well differ from agenda-setting nearer to a re-election campaign, which may differ in turn from agenda-setting during an incumbent's second term.[15]

The flip side of the processes by which certain agency actions rise to the top of an agency's agenda are the processes by which other actions do not rise. The patterns and dynamics surrounding what keeps an item from

example, in the regulatory context, the well-known EPA air pollution "averaging" regulation at issue in the Supreme Court's *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*) case stemmed from a "bubble concept" developed by academic economists. *See* 467 U.S. 837, 840–42, 864 (1984); Thomas M. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 402–03 (Peter L. Strauss ed., 2006).

14. Christopher M. Weible, *Introducing the Scope and Focus of Public Policy Process Research and Theory*, *in* THEORIES OF THE POLICY PROCESS 3, 10, 12 (Paul A. Sabatier & Christopher M. Weible eds., 2014); Christopher M. Weible, *Advancing Policy Process Research*, in *id.* 391, 392, 395, 400; Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000).

15. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 892 (2008); *see also* PAUL C. LIGHT, THE PRESIDENT'S AGENDA (3d ed. 1999) (showing that presidents are able to affect the agenda more in the first year of each term before the election cycle impedes).

rising on the agenda may turn out to be different from, but as important as, what leads an item to rise on the agenda. Indeed, some scholars have contended that well-funded, entrenched interests often succeed in strategically blocking potential agenda items that threaten their existing advantages.[16] After all, concentrated interests that stand to lose from new regulatory policies that would deliver diffuse benefits will be easier to mobilize to resist those policies.

Applying Agenda-Setting Concepts to the Regulatory Process

Empirical research presented and discussed at our workshop on agenda-setting suggested that, when it comes to rulemaking activity specifically, many agency rules get started because of informal interactions between regulators and regulated entities.[17] In these interactions, agency officials and business representatives share information about amendments to existing regulatory schemes that are needed to reflect changes on the ground in the regulated industry. These kinds of workaday "amendment" rulemakings, the kinds of maintenance rules needed to keep regulatory systems up to date, account for eighty-five to ninety percent of all rulemaking, according to research presented at our workshop.[18] Moreover, some participants noted that agencies often share information with one another about new problems; sometimes agencies that are limited by their statutory authority will persuade other agencies to conduct a rulemaking under their authority that will address a broader problem. This appears to have been what happened, for example, when banking regulators put new rules on the agenda of the new Consumer Financial Protection Bureau. Overall, the bulk of discretionary rulemaking activity at the federal level seems to stem from the subtle interaction of a variety of interested actors

16. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962). For recent empirical studies of this blocking dynamic, see Susan Webb Yackee, *The Politics of* Ex Parte *Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373, 373–74 (2012); Keith Naughton et al., *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 259, 259 (2009).

17. William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 495–96 (2013). This research study followed the only previous empirical study on regulatory agenda-setting in its reliance on interviews with rule writers. *See* Marissa Martino Golden, Who Controls the Bureaucracy?: The Case of Agenda Setting 2, 24 (Oct. 9, 2003) (unpublished manuscript) (on file with authors). Golden's study differed by systematically sampling rules from the *Unified Agenda* and using interviews to trace the sample rules to their origin. Overall, West & Raso sampled 276 rules from over thirty agencies from the Spring 2007 *Unified Agenda*. West & Raso, *supra* note 17, at 495.

18. West & Raso, *supra* note 17, at 506 n.20.

and institutions working to connect different sub-policy streams.

Some workshop participants suggested that research on interest group involvement in regulatory agenda-setting raises questions about the limited role of the broader public in rulemaking. If most rules derive from interactions between agency officials and representatives from regulated businesses or even an elite cadre of policy experts, this raises the specter of regulatory capture.[19] Moreover, some participants speculated that the apparent workaday incrementalism of most rulemaking activity might be connected with a larger phenomenon of regulatory ossification: as agencies become beleaguered and overwhelmed by a variety of pressures and constraints in their day-to-day work, they are unable to initiate many major new rulemakings. When they do initiate major rulemakings in response to a policy crisis or another opening in the policy window, it takes the agency so long to get a rule completed that, by the time it is finished, the crisis has already passed and the rule is no longer as needed as it once seemed. As a result, the major task for the agency often becomes one of modifying the rule through incremental revisions to fit the changed circumstances—or perhaps to erode the rule's impact after the public attention to the underlying issue has faded. Agencies, all the while, remain basically fixed in a permanently reactive mode.[20]

Not all participants agreed with this "erosion" hypothesis. Even if it were the case that many rules amend prior rules after the policy spotlights are turned off, some participants disagreed that this necessarily would be a problem. Rules adopted in the heat of a crisis may well be ill-considered or poorly designed, perhaps especially if they are mainly serving as symbolic responses. Most participants applauded those agencies that change their rules when business conditions change or new technological developments emerge, rather than keeping obsolete or unduly burdensome rules on the books. Yet many agreed that it would also be helpful to develop ways to make it easier for agencies to pursue important new initiatives as well as to update existing rules.

19. The term "regulatory capture" has long been employed to describe situations when a regulated industry achieves disproportionate influence over a regulator's decisionmaking and moves regulatory policy away from the broader public interest and toward its own private interests. *See, e.g.*, PREVENTING REGULATORY CAPTURE 1, 5 (Daniel Carpenter & David A. Moss eds., 2014); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3, 5, 10, 12 (1971).

20. For one perspective on the seemingly permanent reactive posture of agencies and the erosion of public interest legislation (and an argument that it is in part attributable to a conscious effort by de-regulatory interests to limit the effectiveness of agencies), see THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 6–7 (2013).

In contrast with the general policy agenda in Washington, D.C., agencies' rulemaking agendas are not entirely discretionary. According to research presented at our workshop, around thirty-seven percent of all agency rules are legally required—that is, they are initiated in response to either legislative mandates (about thirty-four percent of agency rules can be traced to specific statutory commands) or court orders imposed on agencies without a clear underlying statutory source (the remaining three percent).[21] Within this class of mandatory rules, the vast majority stem from efforts by Congress to control the output and timing of rulemaking, whether through commands to regulate or statutory deadlines.[22] Of course, this does not mean that these mandatory rules are exempt from the dynamics of agenda-setting; after all, agencies do not always implement rules when required. Whether mandatory or discretionary, different rules (as with other administrative actions) compete for limited agency time and attention—and both arise in an often conflictual policymaking environment populated by a variety of actors and interests, including advocacy groups, regulated industry, Congress, the White House, and the courts. However, the mandatory nature of some rules will mean they are subject to somewhat different agenda-setting dynamics than exist for discretionary rules. It is even possible, some participants suggested, that mandatory rules extract a disproportionate amount of agency staff attention, crowding out other potentially more important discretionary rules that might have otherwise made it onto an agency agenda. In this way, the legalism enveloping so many mandatory rules might stifle agency flexibility and responsiveness, contributing to much decried political decay.[23]

If agenda-setting differs between mandatory and discretionary rules, then agenda-setting surely also differs for highly salient rules, whether they are mandatory or not. One workshop participant usefully distinguished an agency rulemaking Agenda (with a capital *A*) from an agency rulemaking

21. West & Raso, *supra* note 17, at 504 tbl.1. For significant rules, the number goes to 45.8% (counting, again, rules that were required by Congress or court order, respectively). *Id.* at 505 tbl.2. While she does not quantify the amount of the agenda set by Congress, the courts, and interest groups, Marissa Golden found in the five agencies she studied in depth that "if you want to know why an agency is undertaking a rulemaking, the first place to look is Congress and the next places to look are the courts and interest groups." *See* Golden, *supra* note 17, at 19–21.

22. West & Raso, *supra* note 17, at 504–06.

23. *See* FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY 7 (2014). Of course, the causes of decay are debated and highly normatively charged. Certainly, one strategic tool for those who have an interest in decay (whether pro-government or anti-government) is thought to be distraction and obfuscation, which some have argued is facilitated by over-legalization. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

agenda (with a lower case *a*). According to this view, agenda-setting for brand new rulemakings differs from agenda-setting for workaday revisions to existing rules, and agenda-setting for high-impact or politically contentious rulemakings differs from that of more "ordinary" new rules. Researchers studying agenda-setting might wish to distinguish, for example, between economically significant rules—those with an annual economic impact of $100 million or more—and other significant or non-significant rules.[24] Combined across all federal agencies, economically significant rules number less than one hundred in any given year, compared with total annual rulemaking output in the thousands of rules. Many participants seemed to agree that it was likely that agenda-setting differed for this small subset of rules (and perhaps other subsets). If so, to ignore these differences would lead to distortions in both the positive and normative analyses of agenda-setting. It might, for instance, be normatively more tolerable that "small *a*" agenda items are largely worked out behind closed doors, while the same practices could offend democratic principles with respect to "capital *A*" agenda items.

Scholars must take care to define clearly the scope of any empirical inquiry into or normative evaluation of agency agenda-setting. Workshop participants stressed that the differences between types of rules as well as the diversity of regulatory agencies in Washington, D.C.—from executive branch social regulatory agencies to so-called independent financial regulatory agencies—means that no single "regulatory agenda" exists. Instead of *an* agenda, there are actually many different regulatory agendas; these regulatory agendas may also at times interact with, or get affected by, the broader and more general policy agenda.

Ultimately, agenda-setting is a continuous dynamic at work within each agency and with respect to different types of rules. It makes sense, then, to try to break the problem into pieces. One natural starting point is to focus on the outside institutions and actors that seek to change the agenda. This was, for instance, the approach employed by Kingdon, who focused his interviews on broad cross-sections of relevant policy communities, from civil servants to high-level political appointees and government officials, and from interest groups to influential researchers and think tanks.[25]

24. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Executive Order 12,866 provides for regulatory review of rules that are at least "significant," meaning that they are likely to create policy inconsistencies, affect budgets and entitlements, or raise novel or legal issues. In addition, if a rule is likely to have an annual effect of $100 million on the economy, it is designated an "economically significant" rule and must be accompanied by a benefit-cost analysis. 58 Fed. Reg. at 51,738.

25. KINGDON, *supra* note 10, at vii.

Perhaps generalizable patterns of agenda change can be found in the patterns of behavior demonstrated by these other actors as they compete to wield influence over agencies. It is to some of those major outside institutions that we now turn.[26]

II. OUTSIDE INSTITUTIONS

Although agencies' agendas will no doubt be affected to some degree by the preferences and priorities of the leaders within each agency, many workshop participants seemed to agree that, especially with respect to highly salient rules, regulatory agenda-setting is often heavily influenced by the work of actors or institutions external to agencies. But exactly who are these outside influences on agenda-setting in the regulatory process and how do they affect agency decisions?

We have already indicated that many workaday rules seem to be prompted by suggestions from regulated industry. In addition to business influence, agencies are subjected to pressures from across the three branches of government. We focus here on each of those three branches and discuss how they frequently influence the content and pace of agencies' agendas—and especially how the interaction of interest groups with these other governmental institutions can affect agenda-setting.

A. Congress

Participants agreed that Congress plays a major role in regulatory agenda-setting. According to one study discussed at the workshop, an estimated thirty-four percent of all rules can be traced directly to specific congressional demands to regulate.[27] These demands vary; some impose deadlines, while some send soft demands stating that the agency "shall" regulate on a particular issue. Even with respect to specific statutory deadlines, these provisions can vary; some require agencies to issue rules by certain dates with no consequences except a judicially enforceable legal deadline, while others have a built-in draconian default rule that would take effect if the deadline is missed (sometimes called "hammers"). Other

26. We do not here discuss some of the more diffuse outside institutions that Kingdon found relevant to broader policy agenda-setting dynamics, such as the media or public opinion. *See id*. By ignoring these institutions, we hardly mean to suggest that they are unimportant in the regulatory context. *See* Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, 3 HARV. INT'L J. PRESS/POL., Summer 1998, at 39, 39. But just as scholars have tended to neglect regulatory agenda-setting, they have perhaps equally neglected the study of the role of the media and public opinion on the behavior of regulatory agencies.

27. West & Raso, *supra* note 17, at 504 tbl.1.

statutes give greater discretion to agencies to pace their progress in implementing bundles of rules by simply requiring the agency to finish all of its rulemaking responsibilities by a certain date.[28] The result of this diversity of statutory commands is that there may be some slippage between the congressional demand for rules and an agency's supply of them, as participants at the workshop suggested. Even so, Congress appears generally very active in trying to shape agency agendas through statutory deadlines.

In addition, statutes sometimes include requirements that agencies revisit their rules at periodic intervals. For example, even though the Clean Water Act has not been amended since 1972, the EPA has revisited certain of its clean water rules on a regular basis due to statutory requirements for periodic review. These requirements for periodic review in accordance with specified statutory deadlines appear to have constituted a significant force in structuring regulatory workflow at the EPA's water office.

Congress has also sought to control agencies' work through appropriation riders—provisions added to pressing omnibus spending bills that then require agencies to promulgate or cease promulgating rules at the risk of losing funding.[29] If Congress also ties specific agency actions to agency funding, this presumably has a considerable impact in getting those actions onto agencies' agendas.

Finally, Congress can shape agency agendas by creating administrative procedures that channel and structure private input in the agenda-setting stage. For instance, Congress has created statutory rights to petition agencies for rulemaking.[30] According to some statutes, petitions filed by outside groups must be answered by agencies within a reasonable time (or even by certain deadlines) and can be denied only for good reason.[31]

To say that Congress influences regulatory agendas through

28. KERWIN & FURLONG, *supra* note 5, at 75.

29. Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 766 (2010).

30. *See, e.g.*, Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 323 (2010); JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITIONS FOR RULEMAKING: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 21–24 (2014), https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%255B11-5-14%255D.pdf.

31. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553(e) (2012) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); 21 U.S.C. § 348(b) (2012) (outlining the enhanced procedures and timing for a response associated with petitions to the U.S. Food and Drug Administration concerning the use of food additives); 42 U.S.C. 7412(b)(3)(A) (2012) (prohibiting the EPA from denying petitions related to hazardous air pollutants for only resource limitation reasons).

administrative procedures, statutory deadlines, appropriation riders, and regulatory authorizations is not to say that members of Congress seek to drive agencies entirely on their own accord. On the contrary, interest groups frequently prompt and work closely with Congress to insert provisions in legislation, which in effect empowers these groups to monitor agencies' agendas. It is also conceivable that party politics matter and the ways that Congress seeks to shape regulatory agendas during times of divided government (vis-à-vis the White House) are different than when governmental power is not divided. Congressional influence might also vary as the length of time increases from the passage of legislation, with the impact in the immediate aftermath of new legislation possibly differing from congressional impact with respect to rules issued under older statutes. To date, empirical research on agency rulemaking agendas has been limited to fairly specific years, rather than an expanded period that would reveal these possible longitudinal effects.

Of course, even when legislation makes certain actions mandatory, this does not necessarily translate into actual control of what agencies do. Agencies find ways to shirk mandatory duties. As some workshop participants observed, if everything has a deadline, in practice it can effectively become that nothing has a deadline, as agencies deluged with often unrealistic deadlines then simply need to exercise discretion in deciding what to do. It is well known that agencies regularly miss their statutory deadlines and are only really affected by them if interest groups sue them to enforce the deadlines. Because such suits can only be filed after a deadline has not been met, the remedy in these cases is for the court—or the agency and the litigant in a settlement agreement—to come up with a new deadline, which is effectively an extension of the original statutory deadline. Of course, a deadline may well still influence the timing of agency action, but it neither necessarily determines the timing nor ultimately the substance of the action. Nor does it preclude subsequent action by an agency to amend or rescind a rule adopted just for the purpose of meeting a deadline.

In short, the work that Congress does (often with prompting of interest group representatives) to make more agencies' agendas mandatory does not necessarily translate into complete control; however, according to many of our workshop participants, it does clearly distinguish Congress as a highly influential institution affecting administrative agenda-setting.[32]

32. *See* Golden, *supra* note 17, at 19 (noting that empirics strongly support a "congressional dominance hypothesis"); West & Raso, *supra* note 17, at 502, 504–505 (finding that Congress was the most powerful institution in influencing the non-discretionary agenda).

B. Courts

Courts play a role in shaping agency agendas, too—but their impact is ultimately derivative of whatever deadlines and other requirements Congress has inserted into statutes. At least when statutory language is clear about an agency's duties to follow through on a particular substantive obligation, courts have little discretion to depart from congressional priorities. Hence, upon the proper petition by outside entities, they will routinely enforce statutory deadlines that agencies have failed to meet. Even if by necessity this involves setting new deadlines through their equitable powers, courts will back up Congress by threatening possible contempt of court citations for officials who fail to act in a timely fashion.[33] In other cases, where statutory language is not clear, courts tend to be highly deferential to agency choices. As a result, it is not surprising that research presented at the workshop shows that, once rules that are initiated solely at the behest of courts are separately accounted for, they amount to only three percent of all rules (3.3% of significant rules).[34]

A foundation for this deferential posture is the Supreme Court's decision in *Heckler v. Chaney*,[35] which established a presumption of nonreviewability of agency decisions not to take enforcement action.[36] Although courts will review concrete agency decisions to deny petitions for rulemaking from the public,[37] and will likewise be able to review agencies' failures to comply with statutory deadlines,[38] the Supreme Court's 2004 decision in *Norton v. Southern Utah Wilderness Alliance*[39] foreclosed most litigation challenging agency inaction where there is lack of a mandatory duty or deadline.[40] Even after the Court in *Massachusetts v. EPA*[41] signaled a potentially much greater role for the judiciary in reviewing agency denials of petitions for rulemaking, most participants in the workshop still seemed to agree that courts tend to be quite deferential in reviewing petition cases, even allowing

33. *See, e.g.*, Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 964–66 (2008) (collecting cases where courts used their equitable powers to impose and enforce deadlines).

34. West & Raso, *supra* note 17, at 504–05 tbls. 1–2.

35. 470 U.S. 821 (1985).

36. *Id.* at 837–38 ("We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under 5 U.S.C. § 701(a)(2) is not overcome by the enforcement provisions of the FDCA.").

37. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007).

38. Gersen & O'Connell, *supra* note 33, at 929.

39. 542 U.S. 55 (2004).

40. *See id.*

41. 549 U.S. 497.

agencies to cite a lack of resources as a sufficient reason to deny petitions.[42] Empirical research presented at the workshop confirms that courts have forced agencies into action in very few cases.[43]

As legal scholars have long noted, courts lack the resources or expertise to wade into policy and management questions that have implications for budgetary resource allocation, and deferential standards of judicial review in agenda disputes likely reflect courts' awareness of their limitations.[44] It remains an open and, judging by views expressed at the workshop, contentious question whether courts ought to exercise more review authority in cases of agency inaction, particularly in cases demonstrating persistent agency capture or abdication. Still, at present, the existing empirical evidence suggests that courts are at most a relatively minor player in agency agenda-setting.[45]

C. White House

The White House would seem to have a much greater potential for shaping agencies' agendas on an ongoing basis.[46] The available evidence, though, suggests that it does not exert that much relative influence over the initiation of most agency rules.

Executive Order 12,866, which governs the White House regulatory review process, contains a section on regulatory planning that requires

42. *See* Schwartz & Revesz, *supra* note 30, at 21–24 (discussing case law interpreting the Supreme Court's decision in *Massachusetts v. EPA* and coming to different conclusions about the sufficiency of resource allocation reasons offered in support of petition denials).

43. West & Raso, *supra* note 17, at 504–05 tbls.1–2, 512. Again, it is worth noting that the line between court-initiated agency action and Congress-initiated action is often blurry. Raso and West attribute the impact of deadline suits to Congress rather than the courts, but if courts are instead viewed as having initiated the actions associated with judicial deadlines, then courts would by definition play a much larger role than is suggested here. Participants in the workshop noted that at certain agencies, such as the EPA, deadline suits and consent decrees are a primary influence on the agenda—a pattern noted in the research literature as well. *See* Golden, *supra* note 17, at 9–10.

44. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 1 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658–59 (2004).

45. West & Raso, *supra* note 17, at 504–05 tbls.1–2, 512.

46. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2249 (2001) (discussing the "methods of presidential supervision" employed during the Clinton administration and their potential to serve "as part of a distinctly activist and pro-regulatory governing agenda"). *But see* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49–51 (2006) (suggesting that empirical studies of the White House's control over the administrative state in fact overstate presidential influence, as agencies often experience far less coherent direction from above).

annual agency priority-setting meetings, institutes a regulatory working group for planning purposes, and institutionalizes a biannual process by which agencies submit information to the *Unified Agenda* and *Regulatory Plan*, which are published in the *Federal Register*.[47] And yet, these several planning mechanisms appear to have been implemented too often in a rote fashion, with some evidence suggesting that the *Unified Agenda*, while a useful tool for tracking agency behavior, is too often incomplete or inaccurate.[48] More fundamentally, it is clear that the *Unified Agenda* is itself not the locus of the most important decisionmaking within agencies and reflects only a partial snapshot of the totality of agencies' "real" regulatory agenda-setting. Participants noted that presidents appear to have some political stake in the picture of regulatory policymaking that the *Unified Agenda* creates, both in terms of the numbers of rules that are reported and in terms of the timing of their release. White House involvement with the *Unified Agenda* in practice seems to be mainly devoted to ad hoc efforts to respond to how the agenda will make the administration look to the public and concerned interest groups, rather than to develop a systematic method of monitoring and controlling agenda-setting in the agencies.

Nor do presidents appear to have any sustained involvement in agenda-setting outside of the planning processes articulated in Executive Order 12,866. In the first term of the George W. Bush administration, the White House Office of Information and Regulatory Affairs (OIRA) did experiment with the issuance of "prompt letters" calling for agencies to consider initiating rulemakings on particular issues.[49] Yet this mechanism was sparingly used and has not been continued. Despite the potential for the White House to use mechanisms like this in order to affect regulatory agenda-setting, empirical research suggests that the White House makes little difference in shaping agencies' agendas, at most prompting the promulgation of very few rules and, at that, ones that tend to be related to agency management more than substantive policy issues.[50]

47. Executive Order 12,866, 58 Fed. Reg. 51,735, 51,739–742 (Oct. 4, 1993). For direct online access to the latest *Unified Agenda* and *Regulatory Plan*, see OIRA, *supra* note 7.

48. *See Recommendation 2015-1: Promoting Accuracy and Transparency in the Unified Agenda*, ACUS (2015), https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Recommendation%20FINAL.pdf (discussing some of the problems in current practices under the *Unified Agenda* and providing several recommendations that could help improve the process, including developing real-time updates for progress on rules).

49. William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76, 82–83 (2005).

50. West & Raso, *supra* note 17, at 510. West and Raso do note that their sample was "taken at a single point in time during a single administration" and that their findings might not even be entirely inconsistent with the idea that "presidents have the ability to shape agency agendas when they so choose." *Id.* at 510–11. Nevertheless, they conclude that the

Some workshop participants were surprised to learn that empirical research finds so little presidential influence over agency agendas, given the incentives presidents have to coordinate regulatory policy. But others suggested that research findings may mainly just reflect the White House's lack of interest in the workaday rules that make up most of agencies' published regulatory agendas. Some participants stressed that the White House will have much greater influence over a small number of rules that administration officials consider to be the most significant ones. Other participants suggested that a conclusion that the president exerts only the most limited influence over agency agenda-setting is consistent with the White House's persistent informational asymmetry vis-à-vis agencies. It was also noted that new administrations often start out with constraints imposed by the regulatory agendas of the previous administration, particularly when there has been a rash of so-called midnight rulemakings.[51] White House leaders may, therefore, be expected to spend a considerable portion of their limited time and institutional capital trying to redirect existing regulatory initiatives, rather than instituting a comprehensive and affirmative regulatory agenda of their own.[52]

On the other hand, it is also possible that the White House may have more influence than academic observers have so far been able to document. For one thing, it can be difficult to isolate and identify presidential influence. It may be that White House influence comes more in the form of gate-keeping; that is, White House influence to keep rulemakings off of specific agencies' agendas may be stronger than any influence prompting agencies to add specific rulemakings to their agendas.[53] Negative agenda control of this sort is still a form of agenda-setting, although it can be more difficult to observe or measure. Empirical research that attributes agenda items to agencies themselves might also be missing the important informal lines of communication from

presidency "does not appear to be an important or at least a systematic means of shaping policy" at the regulatory level. *Id.* at 511.

51. On the phenomenon known as midnight rulemaking, see Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011); JACK M. BEERMANN, MIDNIGHT RULES: A REFORM AGENDA 3 (2012), https://www.acus.gov/sites/default/files/documents/FINAL%20Midnight%20Rules%20Report%20%5B5-14-12%5D.pdf; Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update* (Mercatus Ctr., Geo. Mason U., Working Paper No. 08–06, 2008), http://mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf.

52. *See also* William F. West, *The Administrative Presidency as Reactive Oversight: Implications for Positive and Normative Theory*, 75 PUB. ADMIN. REV. 523, 523–24 (2015).

53. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1391 (2013) (noting that OIRA review currently focuses "nearly exclusively on agency action").

the White House to presidentially-appointed agency leaders. Although an agency might take credit for having initiated a rulemaking, it is possible that some of the credit (or blame) belongs to the president or to White House staff who might have informally encouraged or prodded an agency to take the lead. Researchers' rather exclusive focus on the review process carried out by OIRA could well miss the other avenues of influence the president or White House has, especially the tools that the president can use at the earliest stages of agenda-setting, including speeches, appointments of agency heads, designation of White House aides as "czars" over specific policy issues, and informal pressure applied by the president's domestic policy staff.[54] In the end, it seems at a minimum premature at this time to conclude definitively that the presidency does not exert significant influence over agency agenda-setting.

D. Outside Influences and Research Challenges

Participants saw great need for research on the relative influence of outside institutions and to continue to seek still greater rigor, particularly because existing studies have yet been able sufficiently to overcome certain challenges inherent in the study of agenda-setting processes. One major challenge derives from the lack of clear counterfactuals, or what agencies' agendas would have looked like in the absence of one or more of those outside institutions. For instance, even though statutory deadlines may be routinely missed, many participants still hypothesize that they make a difference compared to what would have happened without these deadlines having been in place. Even when not fully complied with, deadlines can indicate that certain projects are priorities for Congress, and they force agencies to negotiate in court at times over revised timelines and may sometimes compel agencies to provide a reason for delays. The end result may be that agencies' priorities shift palpably, even if not dramatically, from what they would otherwise have been in the absence of the deadlines.

Participants also noted the difficulty in discerning the impact of petitions for rulemaking. An outright denial of a petition does not necessarily mean that the agency did not alter its priorities at all. Likewise, the granting of a

54. Researchers' focus on OIRA is narrow in another sense. Influence on agenda-setting from within the executive branch might come from other departments and agencies, not merely from the White House or its regulatory review office. Some agencies, like the National Transportation Safety Board and the National Institute for Occupational Safety and Health, play a specific role in making recommendations that other agencies issue new rules, whereas other government bodies, like the Financial Stability Oversight Council, serve to bring the heads of different agencies together to coordinate on regulatory policy issues.

petition may not necessarily indicate anything more than an affirmation of plans an agency already had in place or perhaps merely a symbolic gesture that seeks to placate the petitioning party with a bare-minimum response. In a sense, these kinds of methodological challenges call for greater attention to questions of measurement, both of influence and of what it means for something to be "on" or "rising on" the agenda. Does an agency action have to be finished at some point or merely actively considered to be on an agenda? Should researchers try to distinguish between occasions when agency officials wholeheartedly embrace an action and occasions when they begrudgingly move forward? What is the relationship between agenda-setting and the length of time it takes to adopt a rule, which might vary depending on whether an agency views a rule as a priority or is simply dragging its feet?

Another major challenge discussed by participants derives from the opacity of agenda-setting. Presidential influence on agency agenda-setting, for example, may be particularly difficult to observe, but that does not mean it does not exist. Researchers have thus far focused mostly on the most visible arm of the White House's regulatory apparatus, namely OIRA.[55] Notwithstanding the empirical research indicating that completed rules seldom are initiated at the prompting of the White House, several participants provided a plausible basis to speculate that OIRA has been used to slow down or even effectively stop regulatory proposals that are inconsistent with administration priorities. As one participant noted, researchers should not discount the role that veto-points can play in agenda-setting, as until rules are finalized they remain subject to negative agenda control, even if that control may be very hard to observe.

III. REFORM

The insights from empirical research and decades of experience that participants brought to the table at the Penn Program on Regulation's workshop can help inform possible ways to improve agenda-setting in the regulatory system. Empirical analysis can help establish a baseline for a kind of "gap analysis," assessing where the regulatory agenda-setting process currently is and comparing it to a more normatively attractive vision of where it should be. Considering that research and serious

55. One recent example is an extensive study counting the length of regulatory reviews by OIRA conducted for ACUS. Curtis W. Copeland, *Length of Rule Reviews by the Office of Information and Regulatory Affairs* 4 (Dec. 2, 2013) (draft report prepared for consideration by ACUS), https://www.acus.gov/sites/default/files/documents/Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf.

thinking about agency agenda-setting remains in its infancy, at least compared with other aspects of the administrative process, definitive reform recommendations that could bridge the gap are difficult to make at this time. Workshop participants, however, identified and debated five potential directions for reform.

The first avenue for reform centered on the question of whether agency agendas currently strike the right balance between rules that are mandatory versus ones that are discretionary. For instance, some participants noted that if agencies face too many mandatory rules, such as those stemming from statutory deadlines or, if reinstated, White House prompt letters, this could crowd out other responsibilities to the detriment of an agency's overall mission. Neither Congress nor the White House has the same level of expertise as agencies, so too much influence by either of these institutions could mean that agency priorities respond more to short-term political concerns rather than a broader societal interest, such as the seriousness of risk facing the public. On the other hand, other participants worried that too much agency discretion over agendas might lead to other kinds of problems, such as priorities that depart from public preferences because of either expediency or undue influence by the regulated industry. The degree of discretion that agencies should be afforded is a longstanding tension in administrative law and public administration, but it has too seldom been considered with respect to agencies' agenda-setting.

A second reform idea is related to the first one. Regardless of the precise mix between mandatory rules and discretionary rules that merit attention from a public interest perspective, are agency agendas simply too full? In other words, do agencies have sufficient capacity to address all the issues that Congress, the president, or the public expects them to address? Several participants expressed clear concern about the government's capacity to assume responsibility for all that it should. One participant lamented that agency officials also have too little time for considering "big ideas" about how they can best deliver public value. Of course, Congress could increase agency budgets and thereby expand regulators' capacities, but short of that (unrealistic) prospect, participants suggested several other possible options for making the most of limited agency resources:

- Create commissions or external audit processes to focus specifically on agency priorities and issue recommendations about how to allocate scarce agency resources and attention.[56]

56. Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369 (2009); MICHAEL MANDEL & DIANA G. CAREW, REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM (2013), http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-

- Make changes in judicial doctrines about agency agenda-setting to allow for greater oversight by courts of the rationality of agency priorities.[57]
- Encourage or require agencies to conduct regulatory analyses of potential items to be added to their agenda, perhaps even subjecting agencies to a requirement that they seek to maximize net benefits when choosing what rulemakings to initiate.[58]

Institutional reforms such as these might not solve real problems of regulatory overload, but at least they might help agencies better rationalize the discretionary resources they have. Any such reforms would, of course, impose their own constraints and costs on agencies, again raising the question of how much discretion agencies should have over their agendas.

A third reform avenue concerns White House oversight. Many participants seemed to agree that presidents have been missing an opportunity to provide more proactive influence over agency agenda-setting. They thought that presidents have much to bring to the table because of the particular institutional capacities and features of the modern presidency. For example, the White House can play a coordinating role, helping to ensure that the collective regulatory agenda reflects the public's sense of priorities. Indeed, the president might well be the best situated institutional actor to promote greater congruence between agency priorities and public preferences because of his national constituency, thus better promoting democratic responsiveness in the regulatory process.[59] Not all agree that presidents act in this ideal fashion all of the time; indeed, some research suggests that White House officials may disproportionately listen to a rather select segment of the public during the course of their regulatory review process.[60] If that is true, this may not be inevitable but just a relic of an imperfect, backward-looking OIRA review process, and it need not deter scholars and policymakers from considering other ways that presidents could act as more proactive

Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf.

57. Bressman, *supra* note 44, at 1658–60.

58. It is worth mentioning that the Supreme Court's recent decision in *Michigan v. EPA* might have nudged agencies toward greater consideration of the costs and benefits of regulation at the agenda-setting stage of the regulatory process. In that case, the Supreme Court held that the EPA erred when it decided to begin a rulemaking addressing mercury emissions without considering the costs of regulatory action. Michigan v. EPA, No. 14-46, slip op. (U.S. June 29, 2015).

59. *See, e.g.*, Kagan, *supra* note 46.

60. Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 507 (2015).

agenda-setters.

The fourth potential reform avenue relates to the cumulative burdens of regulatory agendas. As many participants noted, new agency leaders are rarely able to start their tenure on a blank slate; instead, most leaders inherit an existing regulatory agenda, which may serve to reinforce bureaucratic sluggishness and unresponsiveness. This is especially worrisome if most of agencies' time is devoted to updating and modifying old rules that have become outmoded, rather than addressing new challenges. Some participants suggested reform ideas that might break through regulatory inertia, such as sunset provisions,[61] institutionalized mechanisms for retrospective review,[62] regulatory budgeting,[63] or the adoption of one-in-one-out rules which would require agencies to rescind one rule for every new rule they seek to promulgate.[64]

Finally, workshop participants discussed the possibility of enhancing public involvement in agenda-setting. Administrative agencies vary in terms of the degree of transparency and public participation in their agenda-setting processes. All agencies, though, have a variety of tools at their disposal for generating public feedback during the agenda-setting

61. *See, e.g.*, Roberta Romano, *Regulating in the Dark*, *in* REGULATORY BREAKDOWN 86, 86–117 (Cary Coglianese ed., 2012); Vern McKinley, *Sunrises without Sunsets: Can Sunset Laws Reduce Regulation?*, 18 REG., no. 4 1995, at 57 (providing examples of legal scholars who promote sunset laws).

62. *See, e.g.*, Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57 (2013); MICHAEL MANDEL & DIANA G. CAREW, *supra* note 56; JOSEPH E. ALDY, LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY (2014), https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf.

63. *See, e.g.*, Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835 (2014); Eric A. Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment*, 150 U. PA. L. REV. 1473 (2002); JOHN F. MORRALL III, CONTROLLING REGULATORY COSTS: THE USE OF REGULATORY BUDGETING, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD/GD (92)176 7 (1992) (advocating the use of regulatory budgeting); R.T. Meyers, *Regulatory Budgeting: A Bad Idea Whose Time Has Come?*, 31 POL'Y SCI. 371 (1998) (providing a less sanguine view of regulatory budgeting). For a regulatory budgeting proposal offered by a Republican candidate for U.S. President, see *Regulatory Reform: The Regulatory Crisis in Washington*, JEB! 2016 (Sept. 22, 2015), https://jeb2016.com/the-regulatory-crisis-in-washington/.

64. The United Kingdom and Canada have followed "one-in, one out" policies limiting the introduction of new regulations without corresponding repeals of existing regulations. *See, e.g.*, Red Tape Reduction Act, S.C. 2015, c L-12 (Can.); *ONE-IN, ONE-OUT: STATEMENT OF NEW REGULATION*, HMGOV'T (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31617/11-p96a-one-in-one-out-new-regulation.pdf. Such a requirement has also appeared in legislative proposals in the United States. *See, e.g.*, The RED (Regulations Endanger Democracy) Tape Act, S. 1944, 114th Cong. (2015).

phase. For instance, they could:

- Solicit early comments on proposed regulatory plans;
- Convene strategic planning advisory committees of diverse sets of interested parties; or
- Encourage outside groups to file more petitions for rulemaking.

Some agencies are already engaging in some of these practices. The Internal Revenue Service, for example, issues an annual notice in the Internal Revenue Bulletin and requests public comment on what its priority projects should be.[65] It might seem at first glance that all agencies should take greater steps to promote public participation and democratic responsiveness in their agenda-setting processes. However, as some participants noted, institutionalizing greater public participation in agenda-setting is not cost-free, and some such efforts might also carry with them some of their own risks. One participant, for example, argued that the Consumer Product Safety Commission's encouragement of citizen petitions may have distracted that agency from scanning for and addressing more pressing threats on its own. In addition, any agency mechanisms for public involvement must be carefully designed and monitored, so they do not simply serve as a vehicle for narrow interests to capture an agency's agenda and lead it astray from what the public values.

When it comes to reforms, most workshop participants seemed skeptical that any magic bullet could be found. With the complex influences at work in regulatory agenda-setting, any concrete reform effort aimed at altering the balance of power between various actors will be more likely to succeed, or at least to avoid unanticipated negative consequences, if it can be carefully designed with the benefit of rigorous research. That research, though, must be built on an awareness that agency agendas do vary. Reforms that may affect the workaday agenda for what are, numerically speaking, the bulk of agency rules may not work the same way for salient rules subjected to intense pushes and pulls of other governmental and nongovernmental actors. Potential variation in agenda-setting across different agencies will also likely mean that no one-size-fits-all reform can be found. Workshop participants agreed at the end of the day that scholars should devote greater attention to the study of agency agenda-setting and that practitioners and government officials should continue to explore ways to improve agenda-setting in socially beneficial ways.

65. *Public Comment Invited on Recommendations for 2015-2016 Priority Guidance Plan*, IRS, Notice 2015-27, http://www.irs.gov/pub/irs-utl/Notice_2015-27.pdf (last visited Feb. 1, 2016).

CONCLUSION

Why do agencies decide to work on some problems and issues but not others? This question, a variant on one that social scientists have considered more generally for government overall, has so far escaped much sustained attention among those who study administrative agencies and the regulatory process. To stimulate further attention to and research on agenda-setting, the Penn Program on Regulation brought a group of leading governmental and non-governmental practitioners together with the small number of key researchers who have already begun to study agency agenda-setting. This Essay has summarized the discussions that took place at the workshop, highlighting the conceptual frameworks participants offered, as well as their insights, from both research and practice, about how agencies' agendas are affected by Congress, the courts, and the White House. By putting a spotlight on a crucial part of the regulatory process that has remained relatively hidden, we hope not merely to advance future scholarship but also to inform governmental practice and reform. Further empirical research stemming from this dialogue can, we hope, inform sensible reforms that help bring governmental practices more into conformity with normative expectations about how a rational, well-functioning agenda-setting process should function in a democratic system. We encourage scholars to continue the discussion about regulatory agenda-setting started here.

APPENDIX: WORKSHOP PARTICIPANTS*

Steven J. Balla
Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs
Elliott School of International Affairs
George Washington University

Emily S. Bremer
Attorney Advisor
Administrative Conference of the United States

Lisa Schultz Bressman
David Daniels Allen Distinguished Chair of Law
Vanderbilt University Law School

Reeve T. Bull
Attorney Advisor
Administrative Conference of the United States

Chris Carrigan
Assistant Professor of Public Policy and Public Administration
Trachtenberg School of Public Policy & Public Administration
George Washington University

Cary Coglianese
Edward B. Shils Professor of Law and Professor of Political Science
Director, Penn Program on Regulation
University of Pennsylvania Law School

Curtis W. Copeland
Special Counsel
Administrative Conference of the United States

Bruno Quieroz Cunha
Visiting Scholar
University of Pennsylvania Law School

Bridget C.E. Dooling
Policy Analyst
Food, Health, and Labor Branch
Office of Management and Budget

Neil R. Eisner
Senior Fellow
Administrative Conference of the United States

Adam Finkel
Senior Fellow and Executive Director
Penn Program on Regulation
University of Pennsylvania law School

Dan Flores
Chief Counsel
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives

Marissa Golden
Professor of Political Science
Bryn Mawr College

* Titles and affiliations, current as of the date of the workshop, are for identification purposes only