Redefining Efficiency in the DOGE Era: The Value of Equitable Evidence-based Policymaking in Federal Agencies

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Abstract

In one of the first actions of his second term, President Donald Trump established the Department of Government Efficiency ("DOGE") and tasked it with the mission of "making government work for the people again." This basic theoretical goal is shared by a growing bipartisan group of policymakers and practitioners who have called for implementing evidence-based policymaking ("EBPM") in federal agencies as a means of creating regulations that are more effective at achieving their stated policy outcomes. By asking agency officials to proactively build and apply evidence throughout the policymaking process, EBPM goes above and beyond the basic administrative law requirement that prohibits agencies from acting in ways that are arbitrary and capricious. Accordingly, various overlapping federal EBPM mandates have emerged over the past several decades, from Executive Orders requiring Cost-Benefit Analysis ("CBA") to statutory mandates embedded in the 1993 Government Performance and Results Act ("GPRA") and the 2018 Foundations for Evidence-Based Policymaking Act ("The Evidence Act"). Ultimately, however, these efforts have failed to codify inclusive, transparent, and trustworthy EBPM practices into the federal policymaking process, resulting in a gap in the law that ultimately led to the creation of DOGE. Despite its focus on government efficiency, DOGE eschewed evidence-based approaches under Elon Musk's leadership during the early days of the second Trump Administration. As the most democratically accountable branch of government, however, Congress is well-positioned to reassert its control over the federal regulatory process by enacting improved EBPM statutory mandates, either in future authorizing statutes or by amending and improving the Evidence Act. In doing so, Congress can respond to evolving public concerns about government efficiency while protecting regulations that are equitable, evidence-based and effective at serving the American people.

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Introduction

In the early 1980s, Los Angeles Police Department ("LAPD") Chief Daryl Gates proposed creating a new program to educate elementary and secondary school children about how to resist peer pressure to use cigarettes, drugs, and alcohol.[1] The initiative's purported goal was to prevent students from using illegal substances, thereby reducing their drug-related interactions with the punitive criminal justice system.[2] By emphasizing prevention, the effort was framed as a nonpunitive program that would "help students resist drugs by learning how to say no, recognizing the consequences of their choices, and agreeing to the importance of personal responsibility and the moral values of right and wrong."[3]

Administered as a joint project of the LAPD and the Los Angeles School District, the program modeled its curriculum off of a similar initiative underway at the time at the University of Southern California.[4] But Gates and his school district counterparts altered their approach in one key way: rather than being taught by teachers or doctors, their program would be administered by police officers.[5] Gates rooted this decision in his belief that law enforcement officers would be "more credible than a teacher" in administering the curriculum, because police officers, unlike classroom educators, had real-world experience with making drug and alcohol-related arrests.[6] The choice

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[1] *See generally* Rosie Cima, *DARE: The Anti-Drug Program That Never Actually Worked*, Priceonomics (Dec. 19, 2016), https://priceonomics.com/dare-the-anti-drug-program-that-never-actually/ [https://perma.cc/4M4Z-3N5Q].

[2] *See* Jim Newton, *DARE Marks a Decade of Growth and Controversy: Despite Critics, Anti-Drug Program Expands Nationally. But Some See Declining Support in LAPD*, L.A. Times (Sep. 9, 1993), https://www.latimes.com/archives/la-xpm-1993-09-09-mn-33226-story.html [https://perma.cc/QZ6D-RCXD] (quoting Chief Gates as saying that DARE was created because of the "appalling" number of undercover police officers successfully buying drugs from students at schools).

[3] Max Felker-Kantor, *DARE to Say No: Police and the Cultural Politics of Prevention in the War on Drugs*, Modern American History 5, 315 (2022), doi:10.1017/mah.2022.19.

[4] *See* Cima, *supra* note 1.

[5] *See* Newton, *supra* note 2.

[6] *Id.*; *see also* U.S. Dep't of Justice, Fact Sheet, *Drug Abuse Resistance Education Program (D.A.R.E.)* 1 (Sep. 1995) [hereinafter "DOJ Fact Sheet"], https://www.ncjrs.gov/pdffiles/darefs.

was also borne from a desire to reinforce the law-and-order message of the police, "reorient students to accept the mission of law enforcement," and help them develop more positive attitudes toward police.[7]

Gates's program would eventually come to be known nationally as the "Drug Abuse Resistance Education" ("DARE") Program. Launched at the height of President Ronald Reagan's "War on Drugs," DARE became wildly popular. The program's focus on personal responsibility appealed to parents and policymakers who wanted to emphasize the importance of individual choice and divert blame from structural inequality in the context of the War on Drugs. Within a decade, the program had expanded to reach more than 5.5 million students in 5,200 communities in all 50 states.[8] When Congress passed the sweeping Anti-Drug Abuse Act of 1986—the most comprehensive piece of legislation affiliated with the War on Drugs—it included a section called the "Drug-Free Schools and Communities Act" to provide funding to support programs like DARE.[9] Members from both chambers of Congress would go on to introduce an official resolution recognizing DARE "for its contributions to the fight against drug and alcohol abuse."[10] An amendment to the Drug-Free Schools and Communities Act enacted in 1990 subsequently provided additional federal funding to local governments seeking to "replicate a program" like DARE that Congress believed had a "demonstrated record of success at either the State or local level in preventing or eliminating student abuse of drugs or alcohol."[11]

There was just one problem: the statute did not instruct grantees about *how* to go about determining which existing programs were proving to be most effective at achieving the statute's stated goal of preventing or eliminating student abuse of drugs or alcohol. As a result, DARE's popularity became a proxy for effectiveness, and the program continued to expand nationwide, boosted by millions of dollars in federal funding.[12] Many parents and politicians advocated for the proliferation of DARE not because it was proving to be successful at preventing or eliminating drug and alcohol use, but because it aligned with other "broader debates about personal responsibility, family values, support for the police, and respect for law and order."[13] Because the statute provided no framework for evaluating what "success" would look like, DARE's stated goal of preventing drug and alcohol use became secondary to its political purpose "as a means to soften the image of the police forces that had otherwise aggressively pursued scorched-earth policies in communities of color in the name of the drug war."[14]

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pdf [https://perma.cc/XR8W-K99S] ("D.A.R.E. achieves these objectives by training carefully selected law enforcement officers to teach a structured, sequential curriculum in the schools.").

[7] Falker-Kantor, *supra* note 3, at 320.

[8] Newton, *supra* note 2.

[9] *See* Pub. L. No. 99-570, §§ 4101–44, 100 Stat. 3207-125.

[10] *See* H.R. Con. Res. 110, 100th Cong. (1987); S. Con. Res. 60, 100th Cong. (1987).

[11] Crime Control Act of 1990, Pub. L. No. 101-647, § 1504, 104 Stat. 4790, 4839.

[12] *See* DOJ Fact Sheet, *supra* note 6, at 4 (charting five-year growth in DARE's student participation and federal funding).

[13] Falker-Kantor, *supra* note 3, at 315.

[14] *Id.* at 336.

Perhaps because of this lack of focus on the actual effectiveness of the program at achieving its state goals, by the early 1990s, scientific studies evaluating the program began to conclude that DARE had little to no effect in preventing drug and alcohol use among participating students. Worse, the studies even suggested that DARE might be having a "boomerang" effect by *increasing* drug and alcohol use among students who had gone through the program.[15] The studies became so widespread that by 1994 the Department of Justice was forced to conduct a meta-analysis and acknowledge that, although the program was highly popular, especially among parents and law enforcement officers, the DARE curriculum had been "less successful" than other similar programs at achieving its prevention-related goals.[16] At the same time, DARE *was* successful at legitimizing the "get-tough policies and expanded police presence in schools," justifying mass arrests that disproportionately impacted Black and Brown schools.[17]

The DARE program highlights a key risk inherent in federal policymaking: how do public officials who are tasked with achieving a particular policy goal know whether their proposed approach will be effective at solving the problem they are trying to address? And how does the public assess whether the federal government is legitimately pursuing its stated policy goals, as opposed to using its power to achieve other unspoken ends? Suppose politicians had more rigorously tested the theory that police officers would be effective administrators of DARE's curriculum before the program became so widespread. Might such research have generated evidence demonstrating that some students would be *less* receptive to anti-drug programming administered by law enforcement officers as opposed to teachers? This might have proven to be particularly true in Gates's own jurisdiction, where LAPD officers Gates supervised viciously assaulted Black motorist Rodney King in 1991, bringing national attention to systemic racism and misconduct in policing and deepening mistrust between law enforcement officers and community members in Los Angeles and across the country.[18]

If such evidence generation had indicated early on that police officers were in fact *not* effective drug resistance messengers—or that DARE's overall prevention-oriented framework was ineffective at stopping students from using drugs or alcohol—might that have persuaded politicians to stop scaling the program through federal legislation and funding? If so, evidence-based policymaking ("EBPM") could have revealed key biases and incorrect

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[15] *See* Steven L. West and Keri K. O'Neal, *Project D.A.R.E. Outcome Effectiveness Revisited*, 94 Am. J. Pub. Health 1027, 1028 (2004) (highlighting four studies finding that DARE had "no effect . . . relative to control conditions" and one study finding that DARE was less effective than control conditions at achieving its desired outcomes).

[16] Christopher L. Ringwalt et al., *Past and Future Directions of the D.A.R.E. Program: An Evaluation Review*, U.S. Dep't of Justice 9 (Sep. 1, 1994), https://www.ncjrs.gov/pdffiles1/Digitization/152055NCJRS.pdf [https://perma.cc/58LQ-TUKG].

[17] Felker-Kantor, *supra* note 3, at 336.

[18] *See* Joe Domanick, *Daryl Gates' Downfall*, L.A. Times (Apr. 18, 2010), https://www.latimes.com/archives/la-xpm-2010-apr-18-la-oe-domanick18-2010apr18-story.html [https://perma.cc/7XCH-ZUBQ] (explaining that the Rodney King riots eventually led to Gates's forced resignation as Chief of the LAPD).

assumptions about the DARE program early on, allowing its administrators to make programmatic adjustments or by eliminating the program entirely. Instead, DARE allowed lawmakers to appear as though they were taking important steps to address the alleged drug crisis while actually "absolving the federal government of responsibility for robust social policy" to address the underlying systemic factors at play,[19] while also doing nothing to effectively prevent drug and alcohol use. Worse, it legitimized an approach that "solidified the drug crisis as a problem to be solved by law enforcement rather than social policy or public health experts,"[20] justifying the expansion of policing and incarceration.

Recognizing the value evidence can provide in the policymaking process, presidential administrations on both sides of the aisle have for several decades now embraced the use of EBPM "in systems as varied as education, human services, criminal justice, and international development."[21] Despite their differing views on most major policy areas, for example, both the first Trump Administration and the Obama Administration incorporated EBPM principles into agency guidance during the 2010s.[22] The subsequent Biden Administration took an even stronger approach, declaring that evidence should be at "the core of how we operate" as a government and society[23] and more formally incorporating EBPM into regulatory guidance. President Trump appeared to champion some of the ideals underlying EBPM again during the 2024 presidential campaign by announcing his plan to create a "government efficiency commission tasked with conducting a complete financial and performance audit of the entire federal government"[24] if elected to a second term. As discussed

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[19] Felker-Kantor, *supra* note 3, at 336.

[20] *Id.*

[21] Vivian Tseng, *Democratizing Evidence*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 408, 408 (Kelly Fitzsimmons & Tamar Bauer eds., 2024). While CBA first gained traction in the 1980s under the Reagan administration, as discussed *infra* Part III(A), the implementation of more holistic EBPM practices in federal agencies began in earnest in the early 2000s, when the U.S. Department of Education controversially established a department-wide incentive to use randomized control trials ("RCTs") to evaluate education programs. *See* Notice of Final Priority, Scientifically Based Evaluation Methods, 70 Fed. Reg. 3586 (Jan. 25, 2005).

[22] *Compare* Off. of Mgmt. & Budget, Exec. Office of the President, President's Management Agenda 4 (2018), https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/04/ThePresidentsManagementAgenda.pdf [https://perma.cc/M3RF-5HQA] (describing the first Trump Administration's endorsement of the "use of data and evidence . . . to orient decisions and accountability"), *with* Memorandum from Sylvia Burwell et al. to Heads of Executive Departments & Agencies (July 26, 2013), http://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2013/m-13-17.pdf [https://perma.cc/9R7R-V3ZL] (encouraging agencies to "draw on existing credible evidence in formulating their budget proposals and performance plans" and "propose new strategies to develop additional evidence relevant to addressing important policy challenges").

[23] Memorandum from Shalanda D. Young to Heads of Executive Departments & Agencies 17 (June 30, 2021) [hereinafter OMB M-21-27], https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-27.pdf [https://perma.cc/HD32-HMM6].

[24] Helen Coster & Gram Slattery, *Trump Says He Will Tap Musk to Lead Government Efficiency Commission If Elected*, Reuters (Sep. 6, 2024), https://www.reuters.com/world/us/trump-adopt-musks-proposal-government-efficiency-commission-wsj-reports-2024-09-05/ [https://perma.cc/VB9W-3399]. While Democratic candidate Kamala Harris did not make government reform a cornerstone of her presidential campaign, she did indicate an intention to generally continue the policies of the Biden Administration, which presumably would have included

infra in Part III(D), however, the subsequent creation of the Department of Government Efficiency ("DOGE"), and the approach taken by its inaugural leader, Elon Musk, during the first hundred days of the administration,[25] in fact represented a stark departure from EBPM, despite sharing many of its theoretical goals.

The Obama, Trump, and Biden Administrations' EBPM efforts come against the backdrop of Congress's 2018 enactment of the Foundations for Evidence-Based Policymaking Act ("the Evidence Act"), which passed with overwhelming support from legislators on both sides of the aisle. Congress's enactment of the Evidence Act demonstrates that, even in today's highly polarized climate, "Democrats and Republicans actually can agree on" the benefits of EBPM.[26] The Evidence Act took important initial steps to codify a framework for requiring federal agencies to incorporate EBPM into their policymaking processes. Yet the Evidence Act lacks important enforcement mechanisms and has failed to create EBPM mandates that are sufficiently inclusive, transparent, or trustworthy. The ultimate inefficacy of the Evidence Act has left a gap in the law that is now being filled by DOGE's non-evidence-based approach.

This problem is compounded by the fact that the Administrative Procedure Act ("APA") fails to sufficiently require agencies to rely on evidence during the regulatory process. In the administrative law context, the role of evidence is most frequently considered in the context of § 706(2)(A) of the APA, which requires reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27] As expanded upon by the Supreme Court in *Motor Vehicle Manufacturer's Ass'n v. State Farm Insurance*, this standard requires agencies to examine available evidence and articulate a satisfactory explanation for their actions, demonstrating that they have made a "rational connection between the facts and the choice made."[28] Yet while *State Farm* requires agencies to rationally consider available evidence during the policymaking process, it stops short of requiring them to proactively engage in evidence-building activities to inform their policy decisions and priorities. While agencies therefore cannot make a

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maintaining its new, more rigorous commitment to EBPM. *See* Ebony Davis et al., *Harris Says There's Not Much She'd Have Done Differently Than Biden Over the Last 4 Years*, CNN (Oct. 8, 2024), https://www.cnn.com/politics/harris-2024-campaign-biden/index.html [https://perma.cc/D5BZ-J8A3].

[25] On May 28, 2025, Elon Musk announced his departure from the federal government and thanked President Trump for the "opportunity to reduce wasteful spending" as the leader of DOGE. *See* Elon Musk, X, https://x.com/elonmusk/status/1927877957852266518?lang=en [https://perma.cc/JQ88-M3VT] (last visited Aug. 13, 2025). While Musk reiterated his belief in the DOGE mission and called for it to "strengthen over time as it becomes a way of life throughout the government," this Article focuses on the early actions taken by DOGE under Musk's leadership, primarily during the first hundred days of the second Trump Administration.

[26] Colleen V. Chien, *Rigorous Policy Pilots: Experimentation in the Administration of the Law*, 104 Iowa L. Rev. 2313, 2318 (2019).

[27] 5 U.S.C. § 706(2)(A).

[28] 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

policy decision that "runs counter to the evidence before the agency"[29] under § 706(2)(A), *State Farm* does not require agencies to adopt EBPM.

Part I of this Article provides a definition of evidence in the policymaking context and defines the term EBPM. Part II explains the limited extent to which administrative law already requires agencies to utilize evidence in policymaking and contrasts the APA's arbitrary and capricious standard as interpreted by the Supreme Court in *State Farm* with EBPM. Part III describes the additional overlapping EBPM-related mandates that have emerged over the past several decades to fill this gap and argues that, despite its invocation of EBPM principles, the approach taken by Musk's DOGE during the early days of the Trump Administration represented a departure from these evidence-based approaches. Part IV details fairness-related concerns with the current EBPM approach codified by Congress in the Evidence Act and proposes solutions to create EBPM processes that are more inclusive, transparent, and trustworthy. Part V concludes that Congress should codify these practices, either in future authorizing statutes or by amending the Evidence Act, to create equitable EBPM processes that are trusted by—and therefore most effective at serving—individuals and communities impacted by federal regulations. The Article concludes that Congress can reassert its constitutionally vested power over the agency regulatory process in the wake of DOGE's unprecedented cuts to federal programs by codifying improved evidence-based policymaking practices. As the most democratically accountable branch of government, Congressional action is necessary both to counteract DOGE's distinctly non-evidence-based approach to government reform and to restore public confidence in the federal policymaking process.

I. Defining Evidence-Based Policymaking

A. Defining Evidence

Anyone engaged in the practice of law is undoubtedly already familiar with the concept of evidence. While the term most often invokes images of crime scene photographs or witnesses on the stand, "[e]vidence matters outside the courtroom as well" and is frequently used by "[t]ransactional lawyers, dealmakers, negotiators, lobbyists, in-house corporate counsel, and attorneys of all stripes . . . to analyze and advance their clients' causes."[30] This is true also of government officials and policymakers, who frequently deploy evidence as "a set of techniques for advancing knowledge about particular questions."[31] In both the litigation and policymaking contexts, evidence "is the essential counterweight to abstract legal rules"[32] and technical government policies,

[29] *Id.*

[30] Deborah Jones Merritt & Ric Simmons, Learning Evidence 2 (5th ed. 2022).

[31] Brian Scholl, *The Unfinished Business of Evidence Building: Directions for the Next Generation*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 243, 244 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[32] Jones & Simmons, *supra* note 30, at 2.

providing lawyers and policymakers with the ability to "explain and persuade" others of the value inherent in a chosen approach.[33] The use of evidence recognizes that people—whether they be members of a jury or of the voting public—respond better to "examples, details, and stories" than to "abstract, theoretical arguments" about legal standards or policy objectives.[34]

In the courtroom context, the Federal Rules of Evidence ("FRE") define "relevant evidence" as evidence having "any tendency to make a fact more or less probable than it would be without the evidence."[35] In other words, a given piece of evidence is merely a "brick" and not a "wall,"[36] meaning that it "need not prove the ultimate fact conclusively; it can simply be a component of a larger whole that supports a finding."[37] In the policymaking context, the Office of Management and Budget ("OMB") has defined evidence "as the available body of facts or information indicating whether a belief or proposition is true or valid."[38] This definition is more expansive than the limited one Congress provided in the Evidence Act, which states simply that evidence is "information produced as a result of statistical activities conducted for a statistical purpose."[39]

Congress's narrow definition of evidence in the Evidence Act fails to recognize, as the FRE's broader definition does, that relevant evidence can have "not only statistical but also practical significance."[40] Practitioners have drawn upon the FRE's "brick and not a wall" analogy to argue that, in the policymaking context, evidence is best viewed as a "flashlight" rather than "a road map."[41] Instead of providing foolproof statistical validation about which policy choice is best, evidence "alone does not guide us to where we need to go but, rather, illuminates our path" in the policymaking context.[42] Evidence in the context of EBPM must not be narrowly defined as statistical data, but thought of broadly as encompassing other forms of expertise, "such as that emanating from lived experience and qualitative, community-focused methodologies."[43] Only then

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[33] *Id.*

[34] *Id.* at 1.

[35] Fed R. Evid. 401.

[36] Fed R. Evid. 401 advisory committee's note (quoting Charles T. McCormick, Handbook of the Law of Evidence § 152 (1st ed. 1954)).

[37] Erin Murphy, *No Room for Error: Clear-Eyed Justice in Forensic Science Oversight*, 130 Harv. L. Rev. F. 145, 146 (2017).

[38] OMB M-21-27, *supra* note 23, at 24.

[39] 5 U.S.C. § 311(4) (incorporating the definition as set forth in 44 U.S.C. § 3561(6)). Statistical activities, in turn, are defined as "the collection, compilation, processing, or analysis of data for the purpose of describing or making estimates concerning the whole, or relevant groups or components within, the economy, society, or the natural environment," including "the development of methods or resources that support those activities, such as measurement methods, models, statistical classifications, or sampling frames." 44 U.S.C. § 3561(10).

[40] Tamar Bauer et al., *Introduction: Why This Book and What You'll Learn*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 1, 13 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[41] Michael McAfee, *Reimagining Evidence as Justice*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 89, 93 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[42] *Id.*

[43] Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48:2 BYU L. Rev. 403, 410 (2022).

will evidence inform federal policymaking in ways that can actually lead to a more just and equitable society.

The definition promulgated by OMB during the Biden Administration better encapsulates this broader view. The guidance explains that evidence may be "quantitative or qualitative and may come from a variety of sources, including foundational fact finding . . . performance measurement, policy analysis, and program evaluation."[44] In line with the "brick and not a wall" theory, OMB acknowledges that "the strongest evidence generally comes from a portfolio of high-quality, credible sources rather than a single source."[45] If the purpose of evidence in the policymaking context is to help ensure that "efforts are not just well-intentioned but effective,"[46] it is important to expand beyond Congress's narrow statistical definition and "reimagine evidence to consider context, confidence level, size of impact, speed to insight, and cost of implementation."[47] OMB's definition thus provides the best available definition of evidence in the policymaking context, where evidence is employed not to prove a particular point in litigation, but because it is "critical to getting our work to work and keeping our democracy democratic."[48]

B. Defining Evidence-Based Policymaking

As important as it is to define evidence in the policymaking context, it is equally critical to clarify how it should be used and to what ends. For the past several decades, a growing bipartisan consensus has emerged around the value of adopting an evidence-based approach to policymaking, such that even in today's highly partisan political environment the idea "presents a rare opportunity for agreement."[49] So what, exactly, does evidence-based policymaking entail? The concept stems from an understanding that agency officials across the political spectrum face a "knowledge problem" that hinders their ability to achieve a given administration's desired policy outcomes.[50] These gaps in understanding about the impact and effectiveness of a given administrative program leave policymakers uncertain about what choices to make, what the impact of those choices will be, and which policy choices are most likely to achieve the agency's ultimate policy goals or fulfill its statutory mandate from Congress.[51]

The economist Brian Scholl posits that government agencies are generally tasked with "trying to make something good happen for a number of

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[44] OMB M-21-27, *supra* note 23, at 24.

[45] *Id.*

[46] Betina Jean-Louis, *Engaging the Full Arc of Evidence Building*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 28, 28 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[47] Bauer et al., *supra* note 40, at 13.

[48] Scholl, *supra* note 31, at 244; *see also* Jean-Louis, *supra* note 46, at 28 (describing evidence as our "strongest weapon *to ensure that do-gooders are* ***actually*** *doing good*") (emphases in original).

[49] Chien, *supra* note 26, at 2317.

[50] *Id.* at n.11 (citing Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 Yale L.J.F. 263, 263–64 (2015)).

[51] *See id.* at 2316.

people," such as feeding the hungry, sheltering the unhoused, or reducing unemployment.[52] While Congress typically states its policy objectives in such socially desirable terms, it is important to acknowledge that the government may at times also be acting upon other implicit motivations. For example, in the context of DARE, although the statutory language focused on the program's success at preventing drug and alcohol use, historical evidence makes clear that many who promoted the program also favored its use for other purposes. In 1991, for example, Assistant Attorney General Jimmy Gurulé told then-Attorney General William Barr that a "very important part" of the DARE program was its ability "to provide an environment in which children will develop a positive attitude toward law enforcement,"[53] a goal that is nowhere stated in Congress's statutory language.

Stated policy goals have related outcomes (which Scholl deems "Y" for shorthand), such as the number of people who are not hungry, the number of people who have found housing, or the number of people who have a job.[54] To achieve these goals, agencies implement various policies (which Scholl deems "p" for shorthand). Because the outcome Y changes when agencies implement different policy approaches, Y is a function of p. In other words, "change the mix of levers and we get different outcomes for our beneficiaries" (a relationship Scholl denotes as "Y(p)").[55] Given limited resources, all agencies, regardless of their specific policy goals, typically aim to identify the best possible outcome ("Y*") the agency can facilitate with an ideal combination of policies ("p*"). Evidence helps policymakers achieve their policy goals by giving them the information necessary to get "closer to figuring out Y* and p*" by "understand[ing] the relationship between Y and p."[56] Evidence-based policymaking draws upon Scholl's framework by asking policymakers to engage in "both the generation and use of empirical evidence at several time points"[57] to facilitate the use of evidence in achieving Y*p* in the way Scholl describes. In this way, EBPM can help provide the public with a means of holding the government accountable to its stated policy goals and outcomes.

Rather than making policy decisions based on political preferences or instincts about which course of action is best, EBPM in the agency context asks policymakers to engage in "the systematic use of empirical research . . . when making government decisions."[58] As discussed further *infra* in Part III(C), in 2016 Congress took a significant step toward exploring the use of EBPM in the federal government by creating a fifteen-member commission ("the EBP Commission") to study the government's capacity for more formally engaging

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[52] Scholl, *supra* note 31, at 244.
[53] Felker-Kantor, *supra* note 3, at 319-20.
[54] *See id.*
[55] *Id.* at 245.
[56] *Id.*; *see also* Kristen Underhill, *Broken Experimentation, Sham Evidence-Based Policy*, 38 Yale L. & Pol'y Rev. 150, 216 ("When there is a shared view that a problem exists, evidence can identify the scope and causes thereof . . . [, and] [w]hen there is a shared agreement on a set of appropriate and politically palatable solutions to a problem, evidence can identify the feasibility and likely effectiveness of solutions in that set.").
[57] Underhill, *supra* note 56, at 153.
[58] *Id.*

such a framework in agency decision-making.[59] In its resulting 2017 report to Congress, the EBP Commission defined evidence-based policymaking as "the application of evidence to inform decisions in government,"[60] and recognized that in order for agencies to do so, "a supply of evidence must first exist."[61] EBPM therefore inherently involves not only the application of existing evidence to policy decision-making, but also the proactive "generation of evidence"[62] to ensure that agencies have all the information necessary to create well-informed evidence-based policy decisions.

This process of generating evidence for agencies to use in decision-making is a key feature of EBPM and typically begins with the creation of an "evidence-building plan." Evidence-building plans serve as roadmaps for "identifying and addressing priority questions relevant to the programs, policies, and regulations of an agency."[63] Rather than starting from scratch, agencies typically begin by consulting existing research evidence, to the extent it exists. Where such data is missing or inadequate, however, EBPM asks agencies to "fund or allow research that will evaluate the impacts"[64] of a particular policy decision, rather than simply acting on the best available evidence. Evidence-building processes typically begin with identifying a set of questions to answer, such as diagnostic questions (to assess the current status quo); policy development questions (to assess the impact of a specific policy design); long-term outcome questions (to assess the correlation between policies and outcomes); and policy implementation questions (to assess different methods of policy execution).[65] Successful evidence-building plans will result in "a framework to use data in service of addressing the key questions an agency wants to answer to . . . develop appropriate policies and regulations to support successful mission accomplishment."[66]

Once a plan exists, agencies typically proceed to the foundational fact-finding stage, during which they conduct exploratory studies and engage in basic research to better understand the problem they are trying to solve.[67] In the context of DARE, for example, this could have included pilots comparing the efficacy of having police officers administer the program as opposed to schoolteachers. EBPM is not particular about the methodology that should

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[59] Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317.

[60] Comm'n on Evidence-Based Policymaking, The Promise of Evidence-Based Policy Making 11–12 (2017) [hereinafter Commission Report], https://www2.census.gov/adrm/fesac/2017-12-15/Abraham-CEP-final-report.pdf [https://perma.cc/WH9G-FZJE].

[61] *Id.* at 12.

[62] *Id.*

[63] Diana Epstein, *Beyond the Evidence Act*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 381, 383 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (explaining that practitioners in the EBPM field often refer to evidence-building plans as "learning agendas" and that the "two terms are synonymous").

[64] Underhill, *supra* note 56, at 153.

[65] Chien, *supra* note 26, at 2339–40.

[66] Epstein, *supra* note 63, at 384.

[67] Memorandum from Russell T. Vought to Heads of Executive Departments & Agencies 13 (July 10, 2019) [hereinafter OMB M-19-23], https://www.whitehouse.gov/wp-content/uploads/2019/07/m-19-23.pdf [https://perma.cc/DA2V-RNM4] (defining "foundational fact finding" as one of the four core "components of evidence").

be used in evidence generation, and evidence-building plans can include a "range of methods and types of evidence,"[68] which can be weighed according to their methodological quality at the end of the evidence-building process.[69] Once data exist, the agency typically moves onto a policy analysis phase in which generated evidence is applied to inform policy decisions by estimating regulatory impacts and other relevant effects.[70] In the DARE example, evidence generated from initial pilots could have been applied to inform policy decisions about who should administer DARE's curriculum, and whether a prevention-oriented framework was effective at achieving its stated goals. After a set of policy decisions are made, EBPM asks the agency to continue generating evidence and applying data to conduct program evaluations and performance measurement activities to assess the effectiveness and efficiency of the agency's chosen path.[71]

These intertwined steps ensure that the EBPM process is a continuous lifecycle, rather than a set of threshold activities that must occur before a program can be implemented. Once sufficient evidence has been generated, EBPM instructs policymakers to use it not only to inform initial policy decisions, but also to assess the impact of those decisions once made, and to guide the agency in changing course if necessary.[72] Viewing EBPM as an ongoing and ever-evolving process is critical to ensuring that agencies do not use evidence (or a lack thereof) to justify eliminating or halting critical government programs. Such an understanding of EBPM also ensures that policymakers can quickly adjust to newly generated evidence that indicates that they have made a less-than-optimal policy choice. These subsequent responsive programmatic changes are not viewed as a failure of EBPM, but rather as a natural and desirable part of a process that is working as it should.[73] If evidence had indicated early on that police officers were not effective messengers of DARE's curriculum, for example, policymakers could have adapted the program's approach. Or if evidence had demonstrated that DARE's prevention-oriented framework was ineffective, it could have provided the public with a mechanism through which to question the federal government's motivations for continuing to scale the program. As explained in the following section, however, while existing administrative law requirements account for the use of evidence in policymaking to a limited extent, the current doctrine fails to impose true EBPM requirements on federal agencies.

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[68] *Id.* at 35.
[69] Underhill, *supra* note 56, at 158.
[70] OMB M-19-23, *supra* note 67, at 13.
[71] *Id.*
[72] Underhill, *supra* note 56, at 158.
[73] For more on the importance of embracing failure as part of the EBPM process, see Ryan Martin, *Building More Haystacks, Finding More Needles*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 391, 393–94 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (explaining that government needs to "fail with more certainty, more frequently, more cheaply, and much faster than ever before" given that "[m]ost things won't work and that is ok").

II. The Role of Evidence in Administrative Law

As explained in the previous section, EBPM asks agencies to "start with the question" the agency seeks to answer, rather than with the data that already exists about a particular problem. EBPM thereby ensures that agencies engage in proactive evidence-building activities that are tethered to their defined policy goals, rather than asking them to simply review existing data before proposing a given regulation. By contrast, the legal standards governing review of agency action under existing administrative law principles do not require agencies to engage in proactive goal-setting or evidence-building activities before proposing a new regulation. Rather, the APA's arbitrary and capricious standard, as interpreted by the Supreme Court in *State Farm*, asks only whether the agency rationally considered existing available evidence during its decision-making process. This standard is an insufficient substitute for EBPM because it asks the agency only to consider an existing body of evidence that was built by, and is often supplied by, external third parties who have policy priorities that may not align with those of the agency. To account for this dynamic, arbitrary and capricious review therefore ultimately permits agencies to reach conclusions that contradict the evidence before it, as long as the agency rationally explains its choice. As a result, arbitrary and capricious review as interpreted by *State Farm* fails to require agencies to engage in evidence-based policymaking as defined *supra* in Part I.

A. The APA's Arbitrary and Capricious Standard

Since 1946, § 706(2)(A) of the APA has required reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74] A closer look at the meaning of the terms "arbitrary" and "capricious" makes clear that the concepts are inherently connected to evidence. According to dictionary definitions,[75] an action is "arbitrary" if it is "existing or coming about seemingly at random or by chance,"[76] and "capricious" if it is characterized by[77] "a sudden, impulsive, and seemingly unmotivated notion or action."[78] In other words, an action is arbitrary or capricious if it is untethered to evidence or inexplicable given the facts and circumstances.

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[74] 5 U.S.C. § 706(2)(A).

[75] While reviewing courts have appropriately interpreted the APA's statutory terms over the years through the lens of the statute's legislative history, straightforward dictionary definitions are illustrative here for the purposes of understanding the connection between arbitrary and capricious review and evidence-based policymaking.

[76] *Arbitrary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/arbitrary [https://perma.cc/SQB4-RL7G] (last visited June 21, 2025).

[77] *Capricious*, Merriam-Webster, https://www.merriam-webster.com/dictionary/capricious [https://perma.cc/S4VC-PLJ4] (last visited June 21, 2025).

[78] *Caprice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/caprice [https://perma.cc/7VRP-S7VZ] (last visited June 21, 2025).

In the context of the APA, the arbitrary and capricious standard is intended to provide reviewing courts with the authority to strike down agency action that, even if procedurally sufficient, is nonetheless "so unreasonable as to be arbitrary."[79] The Supreme Court's interpretation of the standard has evolved over the past several decades, mutating from an extremely deferential requirement to one that now imposes somewhat more rigor on agencies. The original standard, derived from the pre-APA case *Pacific States Box & Basket v. White*,[80] directed reviewing courts to uphold agency action so long as "any state of facts reasonably can be conceived" to support the decision.[81] In stark contrast to EBPM processes, this standard did not require an agency to find or even articulate any facts to support its conclusion. Rather, so long as the reviewing court could conceive of any facts that could have supported the agency's decision, the court would uphold the action under arbitrary and capricious review.[82]

As the administrative state's power grew in the ensuing decades, however, the Court began imposing a more stringent version of the arbitrary and capricious test known as "hard look review." This standard required reviewing courts to evaluate whether the agency "has taken a hard look at the issues with the use of reasons and standards."[83] Reviewing courts vehemently debated whether "hard look" review required agencies to engage in an EBPM-like process in the years leading up to the Supreme Court's 1983 decision in *State Farm*. Though the term EBPM was not in the popular lexicon in the 1970s to the extent it is today, D.C. Circuit Judge Bazelon advocated for agencies to employ certain evidence-related processes. Judge Bazelon believed that such an approach would provide a more objective framework for reviewing courts to assess whether agency action is arbitrary and capricious, arguing that "the best way for courts to guard against unreasonable or erroneous administrative decisions is . . . to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public."[84] Judge Bazelon believed that such a process should involve not only the agency's preparation of "a record compiling all the evidence it relied upon for its action" but also a requirement that the agency "organize and digest it . . . [and] clearly disclose when each piece of new information is received and when and how it was made available for comment" during the rulemaking process.[85]

By requiring agencies to adhere to "a framework for principled decision-making"[86] using the evidence before them, Judge Bazelon hoped to avoid circumstances in which non-technical judges would make their own "de novo

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[79] Matthew C. Stephenson & John F. Manning, Legislation and Regulation 985 (4th ed. 2021).

[80] 296 U.S. 176 (1935).

[81] *Id.* at 185.

[82] Stephenson & Manning, *supra* note 79, at 989.

[83] Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

[84] Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

[85] Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., concurring).

[86] *Int'l Harvester Co.*, 478 F.2d at 651 (Bazelon, C.J., concurring).

evaluation of the scientific evidence."[87] His proposal, however, was unanimously rejected by the Court in 1978 in *Vermont Yankee v. NRDC*.[88] Concluding that the APA provides the maximum procedural requirements Congress was willing to have courts impose on agencies, the *Vermont Yankee* Court made clear that any requirements related to the procedural use of evidence in policymaking would have to be mandated separately by Congress or employed by agencies at their own discretion.[89] Yet while reviewing courts cannot impose their own evidence-related procedural requirements on agencies under *Vermont Yankee*, the Court's decision five years later in *State Farm* clarified that evidence still plays an important role in judicial review under the APA's arbitrary and capricious standard.

B. The Evidence That State Farm Requires

In an effort to regulate the growing interstate highway system in the United States, Congress in 1966 enacted the Highway Safety Act, which created the new National Highway Traffic Safety Administration ("NHTSA"). On the same day, Congress also enacted the National Traffic and Motor Vehicle Safety Act ("NTMVSA"), which tasked the NHTSA and the Secretary of Transportation with "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents"[90] by issuing new motor vehicle safety standards. As is relevant to our discussion of EBPM, the NTMVSA instructed the NHTSA to consider "relevant available motor vehicle safety data" in the process of promulgating new regulations under the Act.[91]

After several earlier failed attempts to fulfill this mandate, in 1977 the Carter Administration issued a modified version of a regulation titled "Standard 208," which required vehicle manufacturers to install one of two kinds of "passive restraint" devices: either automatic seatbelts or airbags.[92] The Secretary of Transportation justified the regulation based on "available experimental data and limited field experience" demonstrating that passive restraints could prevent approximately 9,000 deaths and over 100,000 injuries."[93] In January 1981, however, Ronald Reagan assumed the presidency and, in a sharp departure from the Carter Administration's pro-regulatory approach, declared in his

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[87] *Ethyl Corp.*, 541 F.2d at 66 (Bazelon, C.J., concurring).

[88] 435 U.S. 519 (1978).

[89] *Id.* at 523 (holding that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies" and that while "[a]gencies are free to grant additional procedural rights in the exercise of their discretion . . . reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

[90] 15 U.S. Code § 1381 [hereinafter NTMVSA] (repealed by Pub. L. 103–272, § 7(b), July 5, 1994). While the statute delegated regulatory authority to the Secretary of Transportation, the Secretary in turn delegated the authority to promulgate motor vehicle safety standards to the Administrator of the NHSTA.

[91] *Id.* The statute also instructed the NHTSA to consider whether its proposed standards would be "reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute to carrying out the purposes" of the Act. *Id.*

[92] Federal Motor Vehicle Safety Standards, 21 Fed. Reg. 15935 (March 24, 1977).

[93] P. Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1342 (D.C. Cir. 1979) (citing 34 Fed. Reg. 11148 (proposed July 1, 1969)).

inaugural address that "government is not the solution to our problem; government is the problem."[94] The following month, Reagan's new Secretary of Transportation reopened the NHTSA rulemaking, citing "changed economic circumstances," and proceeded to rescind the passive restraint requirement.[95]

In justifying its decision to rescind the regulation, the agency did not call into question any of the above-mentioned evidence demonstrating the effectiveness of passive restraints in preventing injury when used. Rather, the agency questioned the likelihood that such restraints would in fact be used by passengers and the automobile industry. While NHTSA had initially assumed that airbags would be installed in 60 percent of vehicles, and automatic seatbelts in the remaining 40 percent, it had since become clear that manufacturers planned to install automatic seatbelts in 99 percent of new vehicles. Because these seatbelts *could be* detached by the user if desired,[96] the agency concluded, without supporting evidence, that passengers *were in fact likely* to detach the automatic seatbelts. The agency therefore concluded the new passive restraint requirement provided no discernable benefit over existing manual seatbelts.[97]

Applying §706(2)(A)'s arbitrary and capricious standard, the Supreme Court struck down the Reagan Administration's decision to rescind Standard 208 and, in the process, clarified the extent to which agencies must consider evidence in decision-making.[98] Acknowledging that the scope of arbitrary and capricious review is narrow, the Court nonetheless concluded that the agency must, at a minimum, "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[99] The Court concluded that Reagan's NHTSA failed to do so by, *inter alia*, (1) failing entirely to acknowledge the possibility of requiring the automobile industry to install airbags in lieu of automatic seatbelts, and (2) failing to explain why it believed that individuals would detach automatic seatbelts at such a high rate as to effectively render them useless.[100]

The *State Farm* Court clarified that agency action fails to satisfy arbitrary and capricious review if it "entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[101] This framework remains the governing standard for arbitrary and capricious review of agency action today. Importantly, however, this standard can be satisfied even if evidence in the record contradicts the agency's conclusion, as long as the agency

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[94] Ronald Reagan, President of the United States, Inaugural Address 1981 (Jan. 20, 1981), https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981 [https://perma.cc/9EZY-6QTG].

[95] Motor Vehicles Mfrs. Ass'n v. State Farm, 463 U.S. 29, 38 (1983).

[96] *Id.* at 47.

[97] *Id.* at 29–30.

[98] The Court also clarified that the arbitrary and capricious standard applies both when an agency first promulgates a rule and when it decides to rescind an existing regulation. *Id.* at 42.

[99] *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[100] *Id.* at 51.

[101] *Id.* at 43.

explains why it chose to make a decision that runs counter to that evidence. Indeed, the *State Farm* Court made clear that an agency's decision about how much weight and veracity to give a particular body of evidence "is precisely the type of issue which rests within the expertise [of an agency] and upon which a reviewing court must be most hesitant to intrude."[102]

The fact that no evidence exists in the record to support an agency's conclusion is likewise not fatal under the *State Farm* standard. Rather, the Court acknowledged that often "available data does not settle a regulatory issue and the agency must then exercise its judgment"[103] without access to relevant evidence. In such cases, however, the agency must generally explain why it is choosing to act "before engaging in a search for further evidence."[104] The NHSTA's rescission of Standard 208 thus failed arbitrary and capricious review not because it ran counter to evidence in the record, nor because it failed to seek out additional relevant evidence, but because it failed to properly explain its decision on either count.

To contrast this requirement with a true EBPM process, it is helpful to view the decision within Scholl's framework. Congress in the NTMVSA tasked the NHSTA with a particular goal: to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[105] The goal's measurable outcomes (Scholl's "Y") are the number of vehicles that do not experience a traffic accident, or the number of people who do not experience death or injury resulting from an accident they are involved in. Standard 208 focused on the second outcome: reducing the number of injuries or fatalities resulting from traffic accidents. It aimed to do so through a particular policy lever (Scholl's "p") by requiring all vehicles to install a passive restraint mechanism, either in the form of an airbag or an automatic seatbelt. In its various deliberations over the proper formulation of Standard 208, the NHSTA theoretically was attempting to achieve the least number of motor vehicle-related injuries or fatalities (Scholl's "Y*") by identifying an ideal combination of policies (Scholl's "p*").

The evidence in the record demonstrated clearly that the use of passive restraints would significantly help the agency achieve Y. The policy mechanism chosen in Standard 208 to achieve that outcome was to require motor vehicles to install either automatic seatbelts ("p1") or airbags ("p2"). Subsequent evidence developed after Standard 208 went into effect, but before the Reagan Administration rescinded the rule, demonstrated that, given the choice between p1 and p2, manufacturers were overwhelmingly choosing p1. The Reagan Administration thus reasoned, without evidence in the record to support its conclusion,[106] that because automatic seatbelts are detachable, p1 would not lead to Y at all, let alone Y*. The *State Farm* court rejected the agency's rescission of Standard 208 as arbitrary and capricious because the

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[102] *Id.* at 53.
[103] *Id.* at 52.
[104] *Id.*
[105] NTMVSA, *supra* note 90.
[106] *State Farm*, 463 U.S. at 52 ("… there is no direct evidence in support of the agency's finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage.").

agency's decision to rescind *both* p1 and p2 "apparently gave no consideration whatever to"[107] modifying Standard 208 to focus on p2, and because the agency failed to explain its decision not to seek additional evidence about the lack of correlation between p1 and Y.

An EBPM approach would ask more of the agency's decision-makers: at a minimum, it would require them to engage in additional evidence-building to determine whether individuals would in fact detach automatic seatbelts at high rates. In a world in which an EBPM process had been engaged from the beginning of the NHSTA's efforts to fulfill its statutory objective under the NTMVSA, the agency would have begun by identifying a set of policy-relevant questions to answer, including diagnostic questions (to what extent do individuals detach automatic seatbelts when such a function is available?); policy development questions (how could the agency incentivize car manufacturers to install airbags in lieu of automatic seatbelts, given their proven tendency to favor the former?); long-term outcome questions (does the installation of airbags alone prevent injuries and fatalities to a significant degree without supplemental seatbelt usage?); and policy implementation questions (what is the feasibility of requiring manufacturers to install airbags instead of automatic seatbelts?).[108] Such questions would prompt the agency to proactively assess the existing landscape of relevant evidence, as opposed to waiting for interested parties to present their own studies and data as part of notice-and-comment proceedings. Moreover, when available evidence failed to answer policy relevant questions, such as the frequency at which individuals would detach automatic seatbelts, the agency would have engaged in proactive evidence-building efforts to try to ascertain the answer before acting.

By contrast, the *State Farm* standard permits the agency to reach a decision that runs counter to the evidence before it without engaging in a search for further evidence, provided that the agency rationally explains its decision-making process. In some cases, a decision not to seek additional evidence may not be rational—in which case arbitrary and capricious review could require the agency to "adduce empirical evidence that can be readily obtained."[109] The Court has made clear, however, that reviewing courts may not "insist upon obtaining the unobtainable" by requiring agencies to engage in proactive evidence-building simply to prove assumptions that "make sense" to them without evidence to back up their conclusions.[110] In the years since *State Farm*, the Court has generally rejected the suggestion that agencies have an affirmative obligation under § 706(2)(A) to proactively build evidence, concluding that "[t]he APA imposes no general obligation on agencies to commission their own empirical or statistical studies."[111]

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[107] *Id.* at 46.

[108] *See* Chien, *supra* note 26, at 2339–40 (listing the different categories of policy-relevant questions to consider).

[109] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

[110] *Id.*

[111] FCC v. Prometheus Radio Project, 592 U.S. 414, 415 (2021) (upholding a decision by the FCC in circumstances where the agency did "not have perfect empirical or statistical data" because "that is not unusual in day-to-day agency decisionmaking within the Executive Branch").

The *State Farm* standard thus falls short of requiring agencies to engage in EBPM in at least two important ways. First, while *State Farm* requires agencies to make a "rational connection" between their decisions and the available evidence, it does not require them to methodologically "apply" that evidence in their decision-making processes. Rather, the *State Farm* standard functions as a "rule of reason," allowing an agency to make policy decisions that run counter to the evidence before it, "provided its reasons for doing so are disclosed and rational."[112] Second, because *State Farm* does not require agencies to proactively build evidence, reviewing courts are confined to considering the record that was before the agency. This limits a reviewing court's ability to assess the extent to which agencies have properly engaged with available evidence because "where evidence is not introduced in the administrative record, such as through notice-and-comment rulemaking," it is difficult for "courts to identify its absence, and therefore fault agencies for lack of consideration."[113]

III. The Rise of Evidence-Based Policy Mandates

A. Cost-Benefit Analysis

Formal efforts to integrate EBPM-like processes across federal agencies began in earnest around the same time as the *State Farm* decision. The Reagan Administration's decision to rescind Standard 208 reflected the president's overall view that too many government programs were spending taxpayer money on initiatives that yielded insufficient benefits to society.[114] The government's requirement that a struggling automobile industry install automatic seatbelts that could readily be detached (and therefore rendered useless) by users was a prime example of agency overreach in the eyes of Reagan's Transportation Secretary. Although the decision to rescind Standard 208 did not follow an EBPM-like process, the underlying goals of the decision—and its roots in cost-benefit analysis—mirror the aims of EPBM.

Cost-benefit analysis was first introduced across the federal government two years before the Supreme Court issued its decision in *State Farm*, through Reagan's Executive Order ("E.O.") 12291. The E.O. was the first to require agencies to conduct a "Regulatory Impact Analysis" for all "major rules," meaning any regulation likely to result in an annual effect on the economy of $100 million or more, or a major economic impact on consumers, industries, or government.[115] In such circumstances, agencies were required to conduct an empirical analysis of the rule's potential costs and benefits, and instructed not to proceed with regulatory action "unless the potential benefits to society

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[112] WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1233 (10th Cir. 2017).
[113] Underhill, *supra* note 56, at 225.
[114] Phillip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. Times (Nov. 7, 1981), https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html [https://perma.cc/D6BD-G5VK].
[115] Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

for the regulation outweigh the potential costs to society."[116] The E.O. faced backlash from members of the public and Congress, who expressed skepticism over the approach's objectivity and voiced concerns that CBA would be used "to reach decisions that will favor business and industry . . . rather than the public."[117] These valid concerns arose from the fact that CBA "reserves the determination of 'value' exclusively for individual economic agents in a market," rather than considering other, non-economic, societal preferences as legitimate factors in the policymaking process.[118]

Despite CBA's faults, subsequent administrations have continued to use CBA, perhaps in part because cost-benefit analysis and EBPM share a similar, and rather unobjectionable, theoretical purpose: to ensure that government action, and thereby taxpayer resources, are used wisely to fund policies that will achieve their desired outcomes. But CBA is not "in itself evidence-based practice" because it is "not necessarily *used* to drive policy choices."[119] EBPM, on the other hand, initiates an evidence-building cycle that begins with identifying policy-relevant questions, and asks policymakers to proactively build evidence to guide agencies toward a particular course of action. The original formulation of CBA instead involved reviewing a developed idea for regulatory action to assess the extent to which it is necessary and beneficial, rather than an attempt to proactively create an evidence-based process by which agencies create those regulations in the first place.

President Clinton's follow-up 1993 Executive Order 12866 provides the governing framework for CBA today and comes closer to EBPM by encouraging agencies to design their regulations "in the most cost-effective manner to achieve the regulatory objective" at the outset. Moreover, E.O. 12866 asks agencies to "base [their] decisions on the best reasonably obtainable scientific, technical, economic, and other information" related to the proposed regulation.[120] In 2003, OMB finalized Circular A-4 on Regulatory Analysis to further define the process by which agencies should engage in CBA. The 2003 Circular A-4 focused agencies on identifying desired "final outcomes, such as injuries reduced, lives saved, or life-years saved," as opposed to "intermediate outputs" such as "crashes avoided."[121] The Obama Administration's 2011 issuance of Executive Order 135653 attempted to address lingering fairness concerns about the use of CBA by requiring agencies to "consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[122]

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[116] *Id.*

[117] Shabecoff, *supra* note 114. For a more recent criticism of CBA's impact on marginalized communities, see Michael McAfee, *supra* note 41, at 90 (explaining that "policies that uplift Black and brown people" are more often subject to "some cold cost-benefit analysis completely removed from the real lives and lived experiences of the people affected by the policies").

[118] Mark Silverman, *The 'Value of a Statistical Life': Reflections from the Pandemic*, Law and Political Economy Blog (Oct. 18, 2021), https://lpeproject.org/blog/the-value-of-a-statistical-life-reflections-from-the-pandemic/ [https://perma.cc/8CMP-FTZB].

[119] Underhill, *supra* note 56, at 170 (emphasis in original).

[120] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

[121] Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4, Regulatory Analysis (Oct. 10, 2003) [hereinafter 2003 Circular A-4].

[122] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

In 2023, twenty years after Circular A-4's enactment, the Biden Administration overhauled the guidance document and made additional significant changes to the regulatory analysis process. In line with the movement toward embracing EBPM processes in the federal government, the revised Circular A-4 explained that, regardless of the motivations behind a particular regulation, "all regulations can benefit from evidence-based qualitative and (when applicable) quantitative analysis of their effects."[123] In addition to making significant changes to methodological elements such as the discount rate and distributional analysis, the revised Circular A-4 also instructed agencies to conduct regulatory analysis that reflects "the highest quality evidence (including scientific, technical, economic, and indigenous knowledge) and analytical methods, as feasible and appropriate, and consistent with Federal policies for evidence building and informational quality."[124] This changed language reflected not only an evolution in the belief in EBPM on the federal level, but also the growth of EBPM mandates created through Congressional legislation since the initial enactment of CBA.

In early 2025, however, President Trump reversed course by issuing Executive Order 14193, which directed OMB to rescind the 2023 version of Circular A-4 and reinstate the old 2003 version.[125] The E.O. also contains a provision mandating that "for each new regulation issued, at least 10 prior regulations be identified for elimination"[126]—a significant ratcheting up of the nearly identical requirement Trump put in place during his first term requiring that "for everyone one new regulation issued at least two prior regulations be identified for elimination."[127] Despite his vehement embrace of the concept of government efficiency, Trump's directives in E.O. 14192 undermine EBPM principles. As Professor Kristen Underhill pointed out about Trump's 2017 "two-for-one" rescission-to-regulation ration requirement, such directives are essentially arbitrary and thus represent "a strategy far from an ideal EBPM playbook."[128] Likewise, the decision to revoke the 2023 version of Circular A-4 and reinstate a version that is now more than twenty years old increases the risk that the government will act on outdated economic formulas and data, rather than the best evidence that is currently available to agency policymakers.[129]

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[123] Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4, Regulatory Analysis (Nov. 9, 2023) [hereinafter 2023 Circular A-4].

[124] *Id.* at 84.

[125] Exec. Order No. 14192, 90 Fed. Reg. 9065 (Jan. 31, 2025) [hereinafter E.O. 14192]. Legal scholars have pointed out that federal law requires OMB to engage in a lengthy peer review process before it can do so, a fact which could potentially delay the E.O.'s effectiveness. *See* Max Sarinsky & Jason A. Schwartz, *The Legal Dynamics of Rescinding the Circular A-4 Update*, Inst. for Pol'y Integrity (Feb. 2025), https://policyintegrity.org/publications/detail/the-legal-dynamics-of-rescinding-the-circular-a-4-update [https://perma.cc/9BCY-UH58] (pointing out that it took the Biden Administration OMB seven months to go from a draft of revised Circular A-4 in 2023 to the final version due to the required peer review process).

[126] E.O. 14192, *supra* note 125.

[127] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[128] Underhill, *supra* note 56, at 176.

[129] Importantly, one critical update contained in the 2023 version of Circular A-4 was its modernization of "the discount rates used in regulatory analysis . . . to reflect recent economic

As Professors Max Sarinsky and Jason Schwartz recently pointed out, "[u]sing outdated economic practices from a superseded guidance document" not only runs counter to EBPM principles but may also violate agencies' legal obligation "to rely on reasonable and evidence-based analysis in their decision-making" under *State Farm*.[130] Because *State Farm* requires agencies to examine relevant data and make a "rational connection" between their decisions and available evidence, courts have held that "a serious flaw undermining [CBA] analysis can render [an agency's] rule unreasonable" under *State Farm* and the APA's arbitrary and capricious standard.[131] Requiring agencies to revert to an outdated version of Circular A-4 may also violate additional independent legal obligations agencies have pursuant to statutory mandates outlined in the Government Performance and Results Act ("GPRA") and the Evidence Act.

B. The Government Performance and Results Act

The same year that the Clinton Administration issued E.O. 12866, Congress enacted the GPRA to require executive branch agencies to develop strategic and operating plans.[132] Like CBA, the GPRA was born out of a concern about "waste and inefficiency in Federal programs" that threatened to undermine public confidence in government regulations.[133] The GPRA recognized that agencies are "seriously disadvantaged in their efforts to improve program efficiency and effectiveness, because of insufficient articulation of program goals and inadequate information on program performance."[134] The GPRA thus embraced CBA's goal of "improv[ing] the confidence of the American people in the capability of the Federal Government" and proposed to do so by asking agencies to be more proactive in "setting program goals, measuring program performance against those goals, and reporting publicly on their progress."[135]

Specifically, the GPRA required agencies to submit to OMB and Congress a strategic plan outlining "outcome-related goals and objectives" and a performance plan outlining "performance goals" in an "objective, quantifiable, and measurable form" to create a "basis for comparing actual program results with the established performance goals."[136] While the word "evidence" does not appear in the statute, the GPRA established an early framework for the use of EBPM in federal agencies by directing them to assess "metrics that

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data and scholarship" with the goal of making CBA more evidence-based and effective. *See* Sarinsky & Schwartz, *supra* note 125, at i.

[130] *Id.*

[131] *Id.* at 7 (quoting Nat'l Ass'n of Home Builders v. EPA, 683 F.3d 1032, 1040 (D.C. Cir. 2012) (citations omitted); *see also id.* at n.36 (citing *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007), for the proposition that courts will not "tolerate rules based on arbitrary and capricious cost-benefit analyses" under *State Farm* analysis).

[132] Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in various sections of 5 U.S.C. and 31 U.S.C.).

[133] *Id.* § 2(a)(1).

[134] *Id.* § 2(a)(2).

[135] *Id.* §§ 2(b)(1)–(2).

[136] *Id.* §§ 306(a)(2), 1115(a)(1)–(2), 1115(a)(5).

count the real-world impacts of government programs that serve their agency's mission."[137] In 2010, Congress attempted to improve this process in the GPRA Modernization Act ("GPRAMA") by, *inter alia*, creating a stronger role for OMB, requiring agencies to publish strategic plans on publicly available websites, and designating a Chief Operating Officer within each agency to oversee the implementation of the GPRA's requirements.[138] Although these laws did not fully realize their intended effects due to a lack of enforcement and oversight from Congress,[139] they set an important EBPM precedent by attempting to create an objective and transparent way for Congress and the public to know whether the federal government "is improving American society to the extent promised."[140]

C. The Evidence Act

In 2016, Congress expanded upon the requirements of the GPRAMA and moved toward a formal incorporation of EBPM by passing the Evidence-Based Policymaking Commission Act ("EBPMCA").[141] The EBPMCA established the bipartisan Commission on Evidence-Based Policymaking ("the EBP Commission") and tasked it with studying the federal government's existing capacity for and current approach to evidence-based policymaking.[142] In its resulting report, the EBP Commission offered a set of recommendations that illustrated "both the challenges and enormous possibilities that a greater focus on evidence could bring in service of improving government effectiveness."[143] The report created a first-of-its-kind blueprint for how to "strengthen the evidence-building capacity within the Federal government."[144] For example, the EBP Commission suggested that each agency establish a Chief Evaluation Officer and develop "learning agendas" (another term for "evidence-building plans") to identify and address priority questions relevant to the agency's mission, policies, and programs.[145] It also recommended that OMB play a significant role in coordinating cross-agency evidence-building efforts and called for sufficient resources to support evidence-building activities across the federal government.[146]

In response to the EBP Commission's report, Congress in 2018 enacted the Evidence Act, which "addressed about half of the commission's

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[137] Seth D. Harris, *Managing for Social Change: Improving Labor Department Performance in a Partisan Era*, 117 W. Va. L. Rev. 987, 993 (2015); *see also id.* at 1005 (explaining that agencies "were able to get away with poor performance and pro forma . . . compliance because they knew Congress was not paying attention").

[138] *Id.* at 995–98.

[139] *See generally id.* at 992–98.

[140] *Id.* at 993.

[141] Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317 (2016).

[142] *Id.* §§ 2, 4.

[143] Epstein, *supra* note 63, at 381.

[144] *See* Commission Report, *supra* note 60, at 1–3.

[145] *Id.* at 3.

[146] *Id.*

recommendations, and served as a strong marker that the improved use of evidence must be a priority" for the federal government.[147] Modeled after and building upon the requirements of the GPRA and GPRAMA, the Evidence Act requires the head of each agency[148] to include "a systematic plan for identifying and addressing policy questions relevant to the programs, policies, and regulations of th[at] agency" in their GPRA-mandated strategic plans.[149] These evidence-building plans must include the identification of "policy-relevant questions for which the agency intends to develop evidence to support policymaking," as well as relevant data, methods, and analytical approaches it intends to use in answering the identified questions.[150]

In addition, each agency must issue an "evaluation plan" including "key questions for each significant evaluation study" the agency plans to undertake, along with "key information collections or acquisitions" the agency plans to begin.[151] Finally, the statute adopted the EBP Commission's recommendation to create an Evaluation Officer within each agency to "continually assess the coverage, quality, methods, consistency, effectiveness, independence, and balance of the portfolio of evaluations, policy research, and ongoing evaluation activities of the agency" and the agency's "capacity to support the development and use of evaluation."[152] In the years since the Evidence Act became law in 2018, OMB has issued several rounds of guidance clarifying agencies' responsibilities under the statute.[153] Rather than creating boilerplate evidence-building templates for agencies to adopt, these documents attempt to "allow agencies to drive this work themselves and do it in a way that makes sense for them."[154] Overall, the Evidence Act, as interpreted by both the Trump and Biden Administrations, focuses on two key priorities: developing comprehensive evidence-building plans within each agency and expanding upon the requirements of the GPRA by elevating program evaluation as a key agency function.[155]

The implementation of CBA, the GPRA, and the Evidence Act have gradually begun to impose on agencies the types of procedural evidence-related requirements championed by Judge Bazelon in the lead up to the *State Farm* decision. While the Court rejected the incorporation of EBPM-like processes

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[147] Epstein, *supra* note 63, at 381–82.

[148] The Evidence Act applies to most major federal agencies, as defined in 31 U.S.C. § 901(b). 5 U.S.C. § 311(1).

[149] 5 U.S.C. § 312(a).

[150] 5 U.S.C. §§ 312(a)(1)–(3). The statute also requires agencies to identify "challenges to developing evidence to support policymaking" and outline specific steps the agency will take to implement an evidence-based approach to policymaking in the agency. 5 U.S.C. §§ 312(a)(4)–(5).

[151] 5 U.S.C. § 312(b).

[152] 5 U.S.C. §§ 313(d)(1)–(2). The Evidence Act also calls for the creation of an Advisory Committee on Data for Evidence Building, 5 U.S.C. § 315(a), and the publication of a Government Accountability Office ("GAO") Report to continue assessing the effectiveness of the federal government's evidence-based policymaking efforts, *see* Pub. L. No. 115-435, § 101(d)(1)–(2), 132 Stat. 5529, 5533–34.

[153] *See, e.g.*, OMB M-21-27 *supra* note 23 (reaffirming and expanding on previous Evidence Act guidance, including OMB M-19-23,3 OMB M-20-12,4 and OMB Circular A-11).

[154] Epstein, *supra* note 63, at 383.

[155] *See id.* at 382.

into arbitrary and capricious review as an improper form of a "federal common law of administrative procedure" in *Vermont Yankee*,[156] these subsequent evidence-based mandates serve as a reminder that such procedures can still properly be imposed on agencies by the executive and legislative branches of government. The Evidence Act represents the most structured and formalized effort to date to impose EBPM processes on federal agencies, although it does not require agencies to do so in connection with specific proceedings like notice-and-comment rulemaking. The Evidence Act nonetheless demonstrates Congress's desire to see agencies engage not only in the application of evidence that already exists, but to also build evidence proactively in the way proponents of EBPM have long recommended. The Evidence Act also improves upon CBA as a method of assessing and implementing government programs, because, when done properly, EBPM incorporates elements of democratic participation and allows for the consideration of "other important social values, such as justice and fairness," as opposed to centering "maximized economic growth" as the government's prime objective.[157]

Early actions indicate that the second Trump Administration's deregulatory approach is in tension with Congress's desire to embrace EBPM as codified in the Evidence Act. The Administration has made clear its position that "[o]verregulation chokes the American economy and stifles personal freedom," and has begun taking steps to rescind existing regulations.[158] As discussed *supra*, one early example is the Trump Administration's decision to rescind the 2023 version of Circular A-4 (which called on agencies to conduct regulatory analysis using "the highest quality evidence" available), and replace it with the earlier 2003 version, which not only omits this specific evidence-based language, but also relies on outdated discount rates that may undermine the accuracy of basic CBA. Moreover, while the rhetoric surrounding the creation of DOGE relied on the same unobjectionable theoretical purpose that underlies EBPM—namely, to ensure that government regulations are effective at achieving their objectives and serving the American people—DOGE's stated objectives and actions to date in fact represent a significant retreat from the type of EBPM that Congress embraced in its passage of the Evidence Act.

D. The Department of Government Efficiency

President Trump began assembling DOGE even before assuming office, issuing a statement from his transition team in November 2024 appointing the

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[156] Stephenson & Manning, *supra* note 79, at 1023.

[157] James Goodwin, *A Post-Neoliberal Regulatory Analysis for a Post-Neoliberal World*, Law and Political Economy Blog (Oct. 14, 2021), https://lpeproject.org/blog/a-post-neoliberal-regulatory-analysis-for-a-post-neoliberal-world/ [https://perma.cc/KT84-EFUA].

[158] Exec. Order No. 14264, 90 Fed. Reg. 15619 (Apr. 9, 2025); *see also* Memorandum from President Donald J. Trump to Heads of Executive Departments and Agencies (Apr. 9, 2025) [hereinafter Directing Repeal of Unlawful Regulations Memo], https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/ [https://perma.cc/H9C7-JXF2] (lamenting that "onerous regulations" impede American innovation and economic growth); Exec. Order No. 14267, 90 Fed. Reg. 15629 (Apr. 9, 2025) (taking steps to eliminate regulations that "reduce competition, entrepreneurship, and innovation").

business leaders Elon Musk and Vivek Ramaswamy to run the new entity.[159] Trump's framing of the purpose of DOGE invoked some of the ideals underlying EBPM, but it also made clear his intention to go well beyond EBPM's measured and deliberate approach. In keeping with EBPM principles, the November statement expressed Trump's desire to "cut wasteful expenditures," to "partner with the White House and Office of Management and Budget," and to "make the U.S. Government accountable to 'WE THE PEOPLE.'"[160] Yet while EBPM calls for a deliberate and careful approach to policymaking that requires gathering information and setting intentions before taking action, Trump's statement made clear that he envisioned DOGE taking a more drastic approach. Describing the new entity as "potentially[] 'The Manhattan Project' of our time," the announcement called for "drastic change" that would "send shockwaves through the system."[161]

An article authored eight days later by Musk and Ramaswamy in the *Wall Street Journal* clarified that DOGE's "North Star for reform" would not be the use of evidence, but rather "the U.S. Constitution."[162] More specifically, they explained that DOGE's process for identifying which regulations to rescind would be guided by the Supreme Court's recent holdings in *West Virginia v. EPA*[163] and *Loper Bright Enterprises v. Raimondo*.[164] Setting forth the "major questions doctrine" and the rollback of *Chevron* deference respectively, these cases together require Congress to be more specific when drafting authorizing statutes that delegate regulatory power to agencies. Despite Musk and Ramaswamy's implications otherwise in their article, however, the holdings did not overrule existing legal precedents upholding statutory delegations of agency power.[165] Nevertheless, Musk and Ramaswamy misleadingly opined that "[t]ogether, these cases suggest that a plethora of current federal regulations exceed the authority Congress has granted under the law."

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[159] Statement by President-elect Donald J. Trump Announcing That Elon Musk and Vivek Ramaswamy Will Lead the Department of Government Efficiency ("DOGE") (Nov. 12, 2024) [hereinafter DOGE Statement], The Am. Presidency Project, https://www.presidency.ucsb.edu/documents/statement-president-elect-donald-j-trump-announcing-that-elon-musk-and-vivek-ramaswamy [https://perma.cc/J9F9-C7CT]. While Ramaswamy was involved in the initial tone-setting of DOGE, he left the entity during the first few days of the administration and was not involved in its implementation. *See* Thomas Beaumont & Jonathan J. Cooper, *Ramaswamy Won't Serve on Trump's Government Efficiency Commission as He Mulls Run for Ohio Governor*, Assoc. Press (Jan. 20, 2025), https://apnews.com/article/vivek-ramaswamy-doge-ohio-governor-musk-trump-328400a5cc47adde8dd97eb628d18164 [https://perma.cc/3JW5-AU77].

[160] DOGE Statement, *supra* note 159.

[161] *Id.*

[162] Elon Musk & Vivek Ramaswamy, *The DOGE Plan to Reform Government*, Wall St. J. (Nov. 20, 2024), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020 [https://perma.cc/MFV7-8FP3].

[163] 597 U.S. 697 (2022).

[164] 603 U.S. 369 (2024).

[165] *See id.* at 376 (explaining that the Court's holding did "not call into question prior cases that relied on the *Chevron* framework" and that prior holdings specific agency actions as lawful "are still subject to statutory *stare decisis* despite our change in interpretive methodology"); *see also West Virginia*, *supra* note 163, at 724 (explaining that the Court was applying an approach it had already recognized in cases like *FDA v. Brown & Williamson*, 59 U.S. 120 (2000), and *King v. Burwell*, 576 U.S. 473 (2015), rather than creating a new doctrine).

Thus, they explained, DOGE would proceed by identifying existing regulations that supposedly violate the Supreme Court's holdings in *West Virginia v. EPA* and *Loper Bright* and "present this list of regulations to President Trump, who can, by executive action, immediately pause the enforcement of those regulations and initiate the process for review and recission."[166] On April 9, 2025, the Trump Administration began formally implementing this plan by issuing an Executive Order entitled "Directing the Repeal of Unlawful Regulations," which directs agency heads to evaluate each existing regulation's lawfulness under *West Virginia v. EPA*, *Loper Bright*, and eight other identified U.S. Supreme Court rulings.[167]

This approach has likely disappointed proponents of EBPM who might have hoped that DOGE would instead evaluate existing regulations against the best available evidence, and, in keeping with its moniker, identify *inefficient* regulations to present to President Trump for rescission. Instead, Trump subsequently codified the approach outlined by Musk and Ramaswamy in Executive Order 14219, which outlined the Administration's intent to "focus the executive branch's limited enforcement resources on regulations squarely authorized by constitutional Federal statutes."[168] The word "evidence" appears nowhere in the order, and, highlighting DOGE's departure from its own nomenclature, the concept of "efficiency" appears only in the context of referring to the entity. While § 2(a)(v) of the order incorporates basic CBA principles by calling on DOGE to identify regulations that "impose significant costs upon private parties that are not outweighed by public benefits,"[169] the vast majority of the E.O. instructs DOGE to focus on "restoring the constitutional separation of powers"[170] by rescinding regulations that appear to be in tension with the Supreme Court's holdings in *West Virginia v. EPA* and *Loper Bright*.[171]

The Trump Administration further eschewed EBPM principles during its first hundred days in its efforts to eliminate virtually all activities of certain federal agencies without evaluating the importance or effectiveness of their programs. On March 28, 2025, for example, the Trump Administration notified Congress of its intent to discontinue all functions of the U.S. Agency for International Development ("USAID") that do not align with the Trump Administration's priorities.[172] While Secretary of State Marco Rubio issued a general CBA-inspired statement opining that the "gains were too few and

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[166] Musk & Ramaswamy, *supra* note 162.

[167] Directing Repeal of Unlawful Regulations Memo, *supra* note 158.

[168] Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 19, 2025).

[169] *Id.* § 2(a)(v). The order also instructs DOGE to prioritize major rules as defined by President Clinton's 1993 CBA-related E.O. 12866. *See id.* § 2(b).

[170] *Id.* § 1.

[171] *See id.* § 2(a)(iii) (asking DOGE to identify regulations that are "based on anything other than the best reading of the underlying statutory authority or provision," echoing the *Loper Bright* holding); *id.* § 2(a)(iv) (asking DOGE to identify "regulations that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority," echoing the holding in *West Virginia v. EPA*).

[172] Sara Cook, Camilla Schick, & Graham Kates, *Trump Administration Takes Steps to Formally Shutter USAID*, CBS News (Mar. 28, 2025), https://www.cbsnews.com/news/trump-administration-takes-steps-formally-shutter-usaid-doge/ [https://perma.cc/K82D-PLKA].

the costs were too high"[173] to justify USAID's continued existence, the speed with which this change was enacted makes clear that the Administration did not engage in a methodical, evidence-based assessment of USAID's functions before deciding to dismantle the agency in its entirety. The same is true of Trump's March 2025 issuance of an Executive Order calling for the complete closure of the Department of Education without any evidence-based assessment regarding the efficacy of the agency's existing programs and activities in achieving its goals.[174]

These early Trump Administration actions thus represented a significant departure from the governmental movement toward EBPM that began in earnest in the 1980s with Reagan's embrace of CBA and eventually led to Congress's bipartisan enactment of the Evidence Act in 2018. As the most democratically accountable branch of government, and the branch that both vests agencies with regulatory authority and defines the scope of that authority, Congress can play a powerful role in counteracting the Trump Administration's recent departure from EBPM. As described in the next section, however, the approach Congress codified in the Evidence Act suffers from shortcomings that threaten to hamper federal agencies' abilities to best serve the individuals and communities most impacted by federal regulations. Understanding and addressing these deficiencies is a critical prerequisite to Congress's ability to draft and enact the types of effective evidence-based statutory mandates proposed *infra* in Part V.

IV. Evidence-Based Policymaking's Shortcomings

The rise of EBPM and the sentiments that led to the creation of DOGE stem from a shared understanding that ineffective federal programs create opportunity costs—both for the individuals who participate in the program at the expense of pursuing other avenues for assistance, and for the funds that could have instead been used on an effective program.[175] In the context of programs like DARE, the case for adopting an evidence-based policy approach across federal agencies seems clear: it is a way for the executive branch to simply "[f]und more of what works and less of what doesn't,"[176] and to provide public accountability for government action. The reality, however, is that evidence-based policymaking is susceptible to the same institutional problems that characterize other existing agency policymaking processes like notice-and-comment rulemaking.

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[173] Press Statement, Marco Rubio, Secretary of State, On Delivering an America First Foreign Assistance Program (Mar. 28, 2025), https://www.state.gov/on-delivering-an-america-first-foreign-assistance-program/ [https://perma.cc/E6PV-XBPX].

[174] *See* Exec. Order No. 14242, 90 Fed. Reg. 13679 (Mar. 20, 2025).

[175] *See* Martin, *supra* note 73, at 393 ("A program funded for a decade with the intention of helping low-wage workers move up the economic ladder is not benign if it doesn't work. Those who participated likely passed up other opportunities. They could have pursued a different education or training path, taken a new job, or even just stayed with the one they had.").

[176] Tseng, *supra* note 21, at 408.

A. Institutional Bias and (Lack of) Inclusion

Administrative law principles call for judicial deference to the executive branch in part because, even without sophisticated evidence-building practices in place, it is still considered to be "the most knowledgeable branch."[177] Agency officials are typically specialists in their field with significant experience in their area of work and unique policy-related knowledge about "how various substantive areas and questions relate to one another, and which deserves attention first."[178] Yet the source of their expertise—such as previous private or public sector employment, educational training, or research exposure—renders them susceptible to dynamics such as regulatory capture, confirmation bias, and political pressures. These are subjective problems that evidence, as an ostensibly objective measure, aims to reduce. Evidence-based policymaking is not immune to these forces, however, and efforts to explicitly incorporate the approach into agency decision-making must therefore be intentional about addressing these concerns.

As explained in more detail *supra* in Part I(B), EBPM typically begins with evidence-building activities that start with identifying a set of questions to answer.[179] At this stage of the process, the question designers—who, in the agency context, are typically comprised of experts of the kind described above—are inevitably making choices "about whose lived experience to center; choices about whose worldviews get prioritized; choices about who gets reflected in the work."[180] Underlying these choices is the overarching question of how the decision makers will define policy success.[181] Because "[w]here we stand determines what we see,"[182] agency experts are inherently susceptible to making this determination based on their own subjective experiences, beliefs, or objectives. Like other stakeholders, agency officials have a built-in tendency to "interpret evidence in the manner that advances their interests,"[183] whether those be personal, political, or professional. Given the expert-driven nature of agency policymaking, this leads to a risk that EBPM, like other agency policymaking processes, will center the views of an elite minority, rather than the diverse voting public—a view that Musk has reinforced by referring to agency officials as an "unelected, fourth unconstitutional branch of government."[184]

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[177] Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. Pa. L. Rev. 1607, 1610 (2016).
[178] *Id.* at 1609.
[179] *See* Chien, *supra* note 26, at 2339–40.
[180] Heather Krause, *All Data is Biased*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 94, 94 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).
[181] *Id.* at 99 (describing a time the author sought to address high expulsion rates among Black and Latinx boys and the policymakers problematically "defined success as the rate of white boys" being expelled).
[182] Introduction to Section 1: Centering on Practitioners and the Communities They Serve, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 19, 19 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).
[183] Chien, *supra* note 26, at 2335.
[184] Forbes Breaking News, *Musk Outlines DOGE Goal: Bureaucracy Is An 'Unelected, Fourth Unconstitutional Branch of Government'*, YouTube (Feb. 11, 2025), https://www.youtube.com/watch?v=5ItfBmfJIpQ [https://perma.cc/W6J4-7T5D].

Confirmation and institutional biases can affect policymakers' assessments at various steps of the EBPM process, from identifying the agency's desired outcomes, to risk tolerance, to the weight the agency might give to a particular body of evidence.[185] In other cases, more explicit conscious political biases may prompt agency officials to interpret evidence in ways that serve the interests of their administration (and often, relatedly, their personal career trajectories). In the federal agency context, it is thus important to recognize that all evidence "may be vulnerable to political agendas"[186] and that some degree of "[m]obilization, distortion, and selective production of evidence is to be expected."[187] To some degree, this is a desired function of the agency process that could serve to address concerns about agency officials' lack of democratic accountability. Yet these biases can veer beyond the political and into the personal, since all human beings inevitably tend to "interpret social science in ways that are consistent with their beliefs, embracing work that supports them and rejecting work that does not."[188]

By failing to incorporate steps to counteract these dynamics, the current federal approach to developing and using evidence remains "an enterprise shaped by elites: evidence for the public, shaped by the few."[189] Just as processes like notice-and-comment suffer from "dynamics of capture and the nonparticipation of impacted entities,"[190] so too have evidence-based approaches failed to meaningfully incorporate the perspectives of the communities directly impacted by the policies they create. Instead, federal evidence-based policymaking has often been "top down, driven by the objectivity (and bias) of the expert" rather than "predicated on trust or learning" from impacted individuals.[191] This creates a related concern about the use of "evidence as a double standard," whereby some communities (typically those with less institutional power) are required to show evidential proof in order to justify the need to implement certain policies or programs, while others (typically those with greater institutional power) are not.[192] The use of evidence as a double standard can lead to underfunding or under developing much-needed policies in areas that require significant change, since there is generally "plenty of evidence for the status quo," but less evidence to support policies that "would

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[185] *See* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 Admin. L. Rev. 491, 496 (2019) (explaining that individual perspectives are "often clouded by cognitive biases and a form of 'motivated' reasoning that leads people to reject valid science when it challenges core cultural values and identities.").

[186] Marika Pfefferkorn, *Data Justice and the Risks of Data Sharing*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 194, 197 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[187] Underhill, *supra* note 56, at 155.

[188] Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 Cornell L. Rev. 901, 922–23 (2011).

[189] Tseng, *supra* note 21, at 408.

[190] Chien, *supra* note 26, at 2321.

[191] Kelly Fitzsimmons & Archie Jones, *Constructive Dissatisfaction*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 21, 21–22 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[192] *See, e.g.*, McAfee, *supra* note 41, at 89 ("No one ever asks a white school what evidence they have for expanding an afterschool program or varsity sports . . . All those investments are seen as self-evidently good for the community, so we skip right past the evidence phase to the implementation phase.").

create a different world than the one in which we currently live."[193] This concern is compounded by the fact that agencies often have more evidence about the costs of a particular regulation than about the benefits, particularly in emerging scientific areas like those under the purview of the Environmental Protection Agency ("EPA").[194]

Concerns about institutional bias and insufficient public participation aren't abstract—they threaten regulatory effectiveness by creating a lack of alignment between the people impacted by policy and those building the evidence to drive agency decisions.[195] These failures have led some scholars to call for the abolishment of the evidence-based paradigm altogether, at least in the context of the criminal justice system.[196] The lack of alignment in existing agency policymaking process has also led others to embrace the drastic "chainsaw" approach to slashing government regulations that has been carried out by DOGE.[197] If done properly, however, EBPM processes can help address these issues by using evidence-based practices that are "more driven by, inclusive of, and responsive to communities,"[198] and by heeding Professor Erin Collins's call to "re-envision what information 'counts' as data, what we ask data to do, and—crucially—whose voices matter in setting the research agenda."[199]

For example, EBPM processes should be intentional about involving impacted community members throughout the evidence-building process, "from defining questions to gathering, interpreting, and applying data, to sharing results."[200] Such an approach would address the problem that "research questions often arise from researchers' conversations with each other" and instead lead to policies that "arise from vibrant back-and-forth exchanged between researchers, practitioners, *and communities*."[201] While community input will not be valuable in all aspects of policymaking—for example, non-expert

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[193] *Id.* at 91.

[194] *See* Amy Sinden, *The Shaky Legal and Policy Foundations of Cost-Benefit Orthodoxy in Environmental Law*, Law and Political Economy Blog (Oct. 19, 2021), https://lpeproject.org/blog/the-shaky-legal-and-policy-foundations-of-cost-benefit-orthodoxy-in-environmental-law/ [(explaining that in an assessment of the EPA's major rulemakings over a 13-year period spanning most of the George W. Bush and Obama administrations, "the agency left significant categories of benefits unquantified 80 percent of the time" because only a "small subset [of chemicals] have undergone sufficient toxicity testing to support regulation.").

[195] Chien, *supra* note 26, at 2345.

[196] *See* Collins, *supra* note 43, at 410–11 (challenging the entire EBPM paradigm as one that "presumes that the existing system is sound in principle, if not in application" and incorrectly "suggests that if we collect more data about its impact and refine reforms accordingly, we can fix its dysfunctional and unjust outcomes.")

[197] *See* Adriana Gomez Licon, *Musk Waves a Chainsaw and Charms Conservatives Talking Up Trump's Cost-Cutting Efforts*, AP News (Feb. 21, 2025), https://apnews.com/article/musk-chainsaw-trump-doge-6568e9e0cfc42ad6cdcfd58a409eb312 [https://perma.cc/A52E-4SZZ].

[198] Carrie S. Cihak, *Building Evidence and Advancing Equity*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 144, 145 (Kelly Fitzsimmons & Tamar Bauer eds., 2024); *see also* Daniel J. Cardinali, *The Power of Community Voice*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 189, 192 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (recognizing that "methodologies and tools that hard and social sciences have to offer" should be part of EBPM and used in connection with "the trust of people in communities").

[199] Collins, *supra* note 43, at 411.

[200] Bauer et al., *supra* note 40, at 8.

[201] Tseng, *supra* note 21, at 409 (emphasis added).

individuals may not have helpful insights on scientific questions concerning safe levels of certain pollutants or chemicals—they can be critical in addressing areas of policymaking that involve behavioral choices and in assessing the potential impact of government regulations on specific communities once implemented.[202]

In the context of DARE, for example, including community members from the beginning of the program's development could have addressed the institutional and confirmation biases of the program's creators, thereby either making DARE's curriculum more effective or making the case for abandoning a prevention-oriented framework altogether. As proposed *supra* in Part II(B), program pilots could have asked both teachers and police officers to administer the curriculum in separate classrooms and then evaluated which of the two administrators were better received by students and parents. Such an approach might have led DARE's creators to question their initial assumption that police officers would be credible messengers and could have allowed for adjustments to the program or to its elimination before it grew to a national scale. The Evidence Act incorporates the concept of community engagement to a small extent by directing heads of agencies to "consult with stakeholders, including the public, agencies, State and local governments, and representatives of non-governmental researchers."[203] Yet while the Act requires public engagement generally, it says nothing about intentionally engaging affected stakeholders or communities throughout the EBPM process. Without a more deliberate approach, EBPM processes are likely to experience the same "turnout problem" that affects notice-and-comment rulemaking, resulting in a lack of meaningful public participation from the people and communities that are most impacted by government regulations.[204]

OMB guidance issued by the first Trump Administration reiterated the Evidence Act's statutory public consultation requirement and urged agencies to also engage in "broader consultation with additional stakeholders, including: the Office of Management and Budget, Federal grant recipients, Congress, and industry and trade groups,"[205] but did not mention engaging with the public. The Biden Administration took a stronger approach to public participation, both in its Evidence Act guidance and through Executive Orders. On his first day in office, for example, President Biden issued an Executive

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[202] For example, in the context of the regulation at issue in *Industrial Union Dept, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 624 (1980) ("the Benzene case"), community inclusion might have been less useful in helping the Occupational Safety and Health Administration ("OSHA") determine exactly how much benzene is safe for people to be exposed to in the workplace. Their input, however, could have guided the agency's understanding of how implementation of such a standard, once promulgated, might disproportionately impact certain types of industries or workers. Likewise, in the context of *State Farm*, community inclusion would have been less useful in helping the NHTSA determine the technical effectiveness of air bags in preventing injury or death but could have generated important data about how a resulting increase in car prices might have disproportionately affected certain socioeconomic groups, and how the agency might have mitigated such impacts through the use of subsidies.

[203] 5 U.S.C. § 312(c).

[204] Chien, *supra* note 26, at 2321 (attributing the problem to the "dynamics of capture and the non-participation of impacted entities in the process").

[205] OMB M-19-23, *supra* note 67, at 16.

Order calling on agency heads to "study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals." The E.O. required agencies to "consult with members of communities that have been historically underrepresented in the Federal Government" in the process of formulating agency policy recommendations.[206] The E.O. also established an "Equitable Data Working Group" tasked with "identifying inadequacies in existing Federal data collection" in order to "expand and refine the data available to the Federal Government to measure equity and capture the diversity of the American people."[207]

The Biden Administration's Evidence Act guidance also called on federal policymakers to conduct "[r]obust stakeholder engagement" through "intentional interactions with diverse stakeholders" during the EBPM process. The guidance recognized explicitly that the "exchange of perspectives, ideas, and information that this process provides allows agency staff to better understand how its policies, programs, and procedures are experienced by recipients, the challenges those recipients face, and suggestions for improvement."[208] It thus instructed agencies to consult affected community members "throughout the lifecycle of evidence-building regardless of the methodological approach," including at the question-setting, evidence-generation, and analysis and application phases of EPBM. This was the first, and so far only, acknowledgment in federal EBPM guidance that "[e]arly, active, and consistent engagement with stakeholders who can represent a diverse set of perspectives and experiences is critical so that evidence-building activities can yield high-quality insights and do not inadvertently perpetuate underlying biases."[209] Importantly, the guidance recognized that such efforts should be intentional, understanding that "high-quality stakeholder engagement cannot be accomplished solely by issuing a formal Request for Information in the Federal Register," but must instead include efforts such as "participatory research methods, listening sessions or focus groups . . . and a thorough consideration of the lived experiences of those affected by agency policies in order to determine how they can best engage."[210]

In 2022, the Biden Administration's Office of Science and Technology Policy ("OSTP") and Council on Environmental Quality ("CEQ") also issued first-of-its-kind guidance recognizing the "valuable contributions of Indigenous Knowledge." Defined as information that "Tribal Nations and Indigenous Peoples have gained and passed down from generation to generation," the guidance directed agencies to apply Indigenous Knowledge "in decision making, research, and policies across the Federal Government."[211] Although the guidance was not tied directly to the requirements of the Evidence Act,

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[206] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).
[207] *Id.*
[208] OMB M-21-27, *supra* note 23, at 8.
[209] *Id.* at 13.
[210] *Id.* at 8.
[211] Memorandum from Arati Prabhakar to Heads of Federal Departments and Agencies 3 (Nov. 30, 2022), https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf [https://perma.cc/4AGD-52YJ].

it was rooted in "the understanding that multiple lines of evidence or ways of knowing can lead to better-informed decision making"[212] and thus represents one of the most explicit acknowledgments yet by the federal government that it should adopt a broad definition of evidence that includes the perspectives and methodologies of those who have historically been excluded from the federal policymaking process.

Some municipal, state, and federal agencies have implemented community outreach programs that can serve as a model for future EBPM processes in the regulatory context. In 2008, for example, Seattle Mayor Greg Nickels issued an Executive Order on "Inclusive Outreach and Public Engagement" which required all city departments to "develop and implement outreach and public engagement processes inclusive of people of diverse races, cultures, gender identities, sexual orientations and socio-economic status" to inform government decision-making processes.[213] The order led to the creation of an outreach and public engagement liaison from each city department, tasked with helping community members with "the translation and interpretation of policies using data and with understanding study specifics."[214] Along similar lines, under the Biden Administration, the federal Equal Employment Opportunity Commission ("EEOC") implemented the REACH initiative, a multi-year program to engage "workers who often are the least likely to seek the agency's assistance, despite their great need."[215] The program consisted of in-person and virtual listening sessions across the country, aimed at understanding the barriers that exist to facilitating communication between workers and the EEOC's anti-discrimination and harassment resolution mechanisms.[216]

These efforts to include diverse stakeholder voices[217] in the EBPM process acknowledge that evidence-building practices have often excluded the very individuals and communities that are most impacted by federal regulatory

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[212] *Id.*

[213] *Inclusive Outreach and Public Engagement Guide*, City of Seattle 4 (Oct. 2009), https://www.seattle.gov/Documents/Departments/Neighborhoods/PPatch/Inclusive-Outreach-and-Public-Engagement-Guide.pdf [https://perma.cc/2VTZ-AXXH].

[214] Amy O'Hara & Stephanie Straus, *De-Risking Data: Equitable Practices in Data Ethics and Access*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 126, 130 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[215] *Enhancing OutREACH to Vulnerable Workers and Underserved* Communities, Equal Employment Opportunity Comm'n, https://www.eeoc.gov/initiatives/enhancing-outreach-vulnerable-workers-and-underserved-communities [https://perma.cc/ZB4Y-PWXA] (last visited Apr. 10, 2025).

[216] *Id.*

[217] While the Trump Administration has recently used the word "diversity" to refer to alleged preferential treatment of certain groups or individuals on the basis of race, gender, or other protected statuses, *see generally* Fact Sheet, President Donald J. Trump Removes DEI From the Foreign Service (Mar. 18, 2025), https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-removes-dei-from-the-foreign-service/ [https://perma.cc/632V-BEAV], the author uses the term in this Article in its ordinary meaning, as encapsulated by Cambridge Dictionary's definition of the term: "including many different types of people or things." *See Diverse*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/diverse [https://perma.cc/AUS3-VRW6] (last visited Apr. 10, 2025). Efforts to include diverse groups of individuals and communities in the EBPM process should thus aim to include people of all races, genders, geographies, education levels, and socioeconomic statuses, prioritizing those who are most likely to be impacted by a given regulation and centering voices that have typically been left out of the federal policymaking process.

policies. This includes not only individuals and groups that have been historically discriminated against on the basis of race, national origin, gender, or religion, but also those who simply have not had access to the regulatory process, perhaps because of geography (*e.g.*, rural communities) or socioeconomic status (*e.g.*, those who receive welfare benefits but have had no input into how such programs are crafted). Correcting for this dynamic is important not only to building community support for government regulations, but also to ensuring that regulations are more effective at serving everyone they intend to benefit.

In the context of the NHTSA's efforts to reduce safety incidents on the highways, for example, community inclusion could have helped the agency assess how affected parties might respond behaviorally to the use of automatic seatbelts or a potential increase in car prices. Public participation could have helped the agency determine the rate at which people would detach automatic seatbelts, and whether those rates varied across different populations (*e.g.*, whether younger drivers would be more or less prone to detach an automatic seatbelt than older drivers). Or, if the agency was concerned that the auto industry would pass along costs to the consumer in the form of higher car sales prices, it could have conducted research to determine the impact of such an eventuality on different communities (*e.g.*, whether lower-income families would be more likely to forego new car purchases) and come up with policy solutions (*e.g.*, income-driven subsidies) to mitigate the likely impact. Yet, while such research has the potential to yield informative evidence, questions about who gathers this data, from whom, by what means, and to what ends are equally critical to creating transparent and trustworthy EBPM processes.

B. Transparency and Trust

For EBPM to be truly effective, it must have what Professor Amy O'Hara refers to as "social license," which exists "when the public trusts that data will be used responsibly and for societal benefit."[218] This is particularly critical in the context of agency decision-making, given the heightened concerns that exist when the government collects data about the public, especially when collection efforts involve communities who have been harmed by the government in the past.[219] In order to create social license and effective EBPM procedures, evidence-building methods must move away from "treating the generation of evidence as an extractive industry" and "allow citizens to participate in decisions that shape their lives."[220]

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[218] O'Hara & Straus, *supra* note 214, at 128.

[219] *See* Dallas M. Nelson et al., *Lakota Perspective on Indigenous Data Sovereignty*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 137, 141 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (explaining that "Indigenous people have not been in a position to be able to control the information that has been collected from them since European contact."); *see also* Underhill, *supra* note 56, at 208 ("When the government is acting as experimenter, either by itself or by contracting with researchers, the ethical basis for experimentation may deserve special scrutiny.").

[220] O'Hara & Straus, *supra* note 214, at 126.

While related to the issue of inclusion, the need to create social license in EBPM requires addressing distinct concerns about trust and transparency. Engaging impacted individuals and communities in the EBPM process is a necessary component of creating social license because when policymakers' work "does not match the lived reality of the very people the data comes from, people do not buy it, and they are right not to."[221] Inclusion in the EBPM process without accompanying commitments to transparency around how data will be collected, employed, and protected, however, threatens to undermine "the public's trust that the data will be used for greater good."[222] By contrast, increasing transparency about the data collection process (*i.e.*, explaining *why* information is being gathered) and allowing affected communities to access the resulting evidence allows them to "participate in decisions that shape their lives, to influence the way those in power make decisions, and to hold them accountable for those decisions."[223]

In the context of DARE, for example, if administrators had launched the type of pilot program proposed *supra* in Part II(B), it would have been critical for them to be transparent (especially with the children's parents) about the type of data being collected and the purposes for which such information would be used. Existing EBPM mandates have increasingly sought to address these transparency-related concerns, while also tackling the often-competing interest in data privacy and security. For example, whereas the 2003 version of Circular A-4 called for regulatory analysis to be "transparent" such that "a *qualified* third party reading the report [can] see clearly how you arrived at your estimates and conclusions,"[224] the updated 2023 version more directly addressed public accessibility by requiring regulatory analysis to be "transparent in its methods, data sources, and analytic choices" in order to inform "policymakers, other government stakeholders, *and the public*."[225] The 2023 guidance also instructed agencies to follow best practices around providing public electronic access to the details of their regulatory analysis and supporting documents.[226]

Likewise, OMB guidance on implementing the Evidence Act has increasingly focused on the importance of transparency in EBPM. The first Trump Administration's guidance took important steps in the right direction by emphasizing the need for agencies to make their evidence-building plans

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[221] Heather Krause, *supra* note 180, at 100.

[222] O'Hara & Straus, *supra* note 214, at 126.

[223] Robert Newman et al., *Stop Extracting: Our Data, Our Evidence, Our Decisions*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 119, 124 (Kelly Fitzsimmons & Tamar Bauer eds., 2024); *see also* Bauer et al., *supra* note 40, at 8–9 (highlighting that this is particularly important when data collection efforts involve communities that have historically been "disproportionately injured by bad data practices"). For examples of organizations working to improve data collection practices within communities that have been harmed by problematic data collection practices in the past, *see* Tseng, *supra* note 21, at 410 (highlighting the work of Data for Black Lives, which aims to counteract discriminatory practices such as redlining, and the Discriminology Initiative, which enables Black and brown communities to use school data to advocate for educational equity).

[224] 2003 Circular A-4 (emphasis added).

[225] 2023 Circular A-4 at 83 (emphasis added).

[226] *Id.* at 85.

transparent[227] in order to "enable accountability and help ensure that aspects of an evaluation are not tailored to generate specific findings."[228] The Biden Administration's guidance built on these commitments and more explicitly tied the need for transparency to the concept of social license by asking agencies to engage stakeholders "using methods that are transparent, generate trust, and advance equity."[229] The Biden Administration guidance also recognized that agencies "need[] partners to solve the big problems we face, and posting [EBPM] documents publicly in a transparent way offers an opportunity for external partners to use their skills and expertise to help find solutions."[230] An EBPM approach to developing DARE, for example, could have adopted these best practices by publicly sharing administrators' plans to pilot different classroom leaders, or soliciting feedback on the prevention-oriented framework, thereby gaining community buy-in for not only the program but also the process by which it would be developed.

While EBPM processes must promote transparency, they also need to address related concerns around privacy and data security. Although U.S. federal EBPM mandates and other similar international efforts have made strides toward establishing best practices in this space, there are currently "no adequate, widely accepted guardrails for responsible data use in a big data world focused on evidence building."[231] This is problematic because public faith that data collection efforts are safe and secure is important to building social license.[232] The EBP Commission's report included a variety of recommendations for improving secure, private, and confidential data access, some (but not all) of which were incorporated into the final text of the Evidence Act.[233] One recommendation that was not included in the Evidence Act was the creation of a National Secure Data Service ("NSDS") to "facilitate access to data for evidence building while ensuring privacy and transparency in how those data are used."[234] In 2022, Congress finally authorized the creation of an NSDS pilot in the Creating Helpful Incentives to Produce Semiconductors ("CHIPS") Act, providing funding to explore the creation of such a system through at least 2027.[235]

Congress's authorization of an NSDS pilot in the CHIPS Act highlights a critical shortcoming of the recent strides toward incorporating community inclusion, transparency, and trust-building efforts into federal EBPM

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[227] *See* OMB M-19-23, *supra* note 67, at 14.

[228] Memorandum from Russell T. Vought 16 (March 10, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-12.pdf [https://perma.cc/Q4XE-TQ2V].

[229] *See* OMB M-21-27, *supra* note 23, at 8.

[230] *Id.* at 12.

[231] O'Hara, *supra* note 214, at 127.

[232] *Id.* at 127–28 (explaining that, according to the Administrative Data Research Network in the United Kingdom ("ADRN-UK"), the "public is broadly supportive of their data being used as long as: 1) the work is in the public interest; 2) data privacy and security needs are being met; and 3) there is trust and transparency").

[233] *Compare* Commission Report, *supra* note 60, at 40–47, *with* 44 U.S.C. §§ 3561–83 (the "Confidential Information Protection and Statistical Efficiency Act of 2018").

[234] Commission Report, *supra* note 60, at 1.

[235] *See The National Secure Data Service Demonstration*, National Center for Science and Engineering Statistics, https://ncses.nsf.gov/initiatives/national-secure-data-service-demo [https://perma.cc/2L3B-EU6R] (last visited Apr. 10, 2025).

processes: whereas the NSDS now has explicit statutory authorization from Congress, the other commitments to creating more inclusive, transparent, and trustworthy EPMB processes discussed in this section lie solely in OMB guidance and Executive Orders that can be dispensed of by future administrations. This vulnerability has already been exploited by the Trump Administration's recent directive to revert to the 2003 version of Circular A-4 and its rescission of almost 100 Biden-era Executive Orders, including some of the E.O.s discussed in this section.[236] Without these additional measures to ensure inclusion, transparency, and trust, the requirements currently outlined by the GPRA and the Evidence Act risk losing social license and becoming ineffective. Congress, however, has the power to remedy this shortcoming either by codifying EBPM best practices into future authorizing statutes delegating regulatory authority to agencies or by amending the Evidence Act.

V. Enacting Improved Evidence-Based Statutory Mandates

While the Evidence Act formally incorporated EBPM into federal policymaking, Congress's decision to model the statute after the requirements of the GPRA has left it vulnerable to some of the same shortcomings discussed *supra* in Part III(B). As with the GPRA, the Evidence Act says little about Congress's oversight role in ensuring agencies comply with the EBPM processes laid out in the statute. The Evidence Act requires the Government Accountability Office ("GAO") to summarize agency findings and trends and, if appropriate, recommend actions to Congress to "further improve agency capacity to use evaluation techniques and data."[237] Yet, like the GPRA, the Evidence Act could have included more robust enforcement mechanisms, such as a requirement that Congress "hold at least one annual hearing on agencies' compliance with" the statute.[238] Alternatively, Congress could have required the GAO or each agency's Inspector General to "conduct annual audits of every agency's compliance and performance" with the statute's requirements.[239] Instead, as with the GPRA, "Congress chose to require nothing of itself."[240]

A. Evidence-Based Authorizing Statutes

While these issues could be fixed by amending the Evidence Act to include both greater Congressional oversight and steps to create more social

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[236] *See* Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025) (rescinding seventy-eight of President Biden's executive orders, including E.O. 13985 discussed *supra*); *see also* Exec. Order No. 14236, 90 Fed. Reg. 13037 (March 14, 2025), https://www.whitehouse.gov/presidential-actions/2025/03/additional-recissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/V57Q-4C8G] (rescinding an additional nineteen executive actions).

[237] 5 U.S.C. § 315(d).

[238] Harris, *supra* note 137, at 118.

[239] *Id.*

[240] *Id.* The same can be said of efforts to improve the GPRA in the GPRAMA, which likewise "did not aggressively assert congressional oversight of the GPRA process." *Id.* at 123.

license for EBPM, as proposed *infra* in Part V(B), another option is for Congress to incorporate EBPM requirements into future authorizing statutes. When Congress drafts an authorizing statute delegating regulatory power to agencies and charges them with achieving a particular set of goals, it has the opportunity to set forth processes to which the agency must adhere in fulfilling its statutory mandate, above and beyond the default provisions provided by the APA. Congress already often does this. For example, in the context of *State Farm*, the NTMVSA instructed the Secretary of Transportation to "consider relevant available motor vehicle safety data"[241] and to "conduct research, testing, development, and training necessary"[242] to develop regulations. In the process of doing so, the NTMVSA specifically asked the agency to "collect[] data from any source"[243] and even to procure experimental motor vehicles and equipment for research and testing purposes.[244]

Other similar authorizing statutes today likewise require agencies to engage in evidence-related practices, such as by including performance-based mandates[245] or by asking agencies to evaluate potential policy choices based on specific evidentiary requirements.[246] But while the NTMVSA's statutory mandate incorporated EBPM-like principles, it failed to require the kinds of proactive and intentional EBPM processes that have now been codified in the Evidence Act. Moreover, existing evidence-based statutory mandates generally do not incorporate emerging best practices around employing processes that are inclusive, transparent, and trustworthy, and thus risk losing public faith in the regulations they produce.

An improved version of the NTMVSA, for example, could have required the Secretary of Transportation to not only "consider" and "collect" existing available data about motor vehicle accidents and related injuries and deaths, but to begin by developing a "list of policy-relevant questions for which the agency intends to develop evidence to support"[247] its decision-making. It could have gone further by also requiring the agency to include affected stakeholders in that process. Likewise, in the context of DARE, an amended version of the Drug-Free Schools and Communities Act could have defined "success" by asking program administrators to engage in EBPM activities—such as foundational fact finding, policy analysis, program evaluation, and performance measurement—and to include affected parents and students in the process. This relatively open-ended approach would allow key policymakers to make

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[241] *See* NTMVSA, *supra* note 90, § 101(f)(1).
[242] *Id.* § 106(a).
[243] *Id.* § 106(a)(1).
[244] *Id.* § 106(a)(2).
[245] *See* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. Chi. L. Rev. 1309, 1311 (2015) (defining performance-based statutes as those wherein "rather than the law dictating that a factory smokestack must incorporate a particular scrubber, the law sets limits on a firm's emissions and the firm can then determine how to meet those limits").
[246] *See* Martin, *supra* note 73, at 395–96 (highlighting examples such as The Every Student Succeeds Act (P.L. 114-95) (which ranks potential programs as having strong, moderate, or promising evidence); The Family First Prevention Services Act (P.L. 115-123) (which similarly rates programs on a scale based on a rigorous review of evidence); and § 551 of the Social Security Act (which requires funding to be spent on programs that meet certain evidence requirements)).
[247] *See* 5 U.S.C. § 312(a)(1) (requiring the same of agencies in their strategic plans).

determinations about the program's goals and the evidence required to inform implementation. It also would have allowed the public to question why the federal government continued to scale the program if it was proving to be ineffective at achieving Congress's stated prevention goals, perhaps exposing the law and order-related motivations behind the program earlier on.

Alternatively, Congress could take the additional step of identifying a set of policy-relevant questions itself and codify them in the authorizing statute. In the context of the NHTSA, for example, Congress could have done so by making clear that it wanted the agency to consider relevant behavioral trends (such as the extent to which different groups of people would use or benefit from certain safety features) and the impact of any policy choice on various communities (such as the extent to which an increase in vehicle sales prices might disproportionately impact certain socioeconomic groups). In authorizing federal funding for programs like DARE, Congress could have specified the outcomes it wanted to see such programs achieve, rather than using a vaguely defined term such as "success" without further elaboration. This approach has the added benefit of creating greater specificity about Congress's intent in an era in which the Court is increasingly demanding more from authorizing statutes under the Major Questions Doctrine.[248] Congress should be careful, however, to explicitly delegate further definition or interpretation of relevant statutory terms to the agency to ensure policymakers have the necessary flexibility and discretion in the post-*Loper Bright* era.[249]

While either approach to implementing EBPM statutory mandates could have tremendous value, Congress must also be mindful of potential pitfalls of such efforts and address them explicitly by statute. For example, while EBPM provides an ideal framework for intentionally developing policies that deliver desired results, it is by nature a lengthy process that is not always well-suited to the kind of rapid policy decision-making that justifies congressional delegation of authority to agencies in the first place. Congress should thus begin by incorporating EBPM mandates into authorizing statutes in circumstances where a long-term policy development process is desired, rather than situations demanding rapid response to an emerging threat. In the context of Artificial Intelligence ("AI") regulation, for example, Congress could mandate EBPM processes for long-term development of AI policies while creating an exception for circumstances demanding more swift agency action to respond to an immediate problem.

As with any additional requirements imposed on agencies by authorizing statutes, Congress should also be mindful about the risks of creating additional grounds for invalidation of agency action under the APA. Asking

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[248] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 766 (2022) (holding that in cases of major economic, political, or social significance, agencies must point to "clear congressional authorization" for the power they claim Congress intended them to exercise) (internal quotation marks and citations omitted).

[249] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 n.5 (2024) (explaining that reviewing courts should give discretion to agency interpretations where the statute is clear that Congress intended to expressly delegate to an agency the authority to give meaning to a particular statutory term) (internal quotation marks, citations, and alterations omitted).

agencies to engage in inclusive EBPM processes that include public input is important, but so too is preserving a role for agency expertise and judgment in crafting its ultimate regulation. Authorizing statutes can address this concern by including specific language addressing how reviewing courts should assess arbitrariness and capriciousness in the context of EBPM. For example, a revised NTMVSA that required the agency to use EBPM processes could also have also stated that the agency's ultimate action should not be deemed "arbitrary and capricious" under § 706(2)(A) of the APA so long as the agency acts rationally and discloses its reasoning considering the (presumably now improved body of) evidence before it.

Including such an explicit statutory provision reiterating and specifying how the arbitrary and capricious standard should be applied in the context of EBPM could be useful in clarifying congressional intent in early stages of incorporating EBPM processes into authorizing statutes. The result would be to impose a heightened requirement on agencies with respect to the methodology used to create and implement regulations, while also retaining the desired degree of discretion intended by § 706(2)(A) of the APA and the *State Farm* standard. Returning to the example of *State Farm* itself, had the agency been operating under this proposed "enhanced EBPM" version of the NTMVA, it would have been required to set forth the policy-relevant questions proposed *supra* in Part II(B) and to build evidence about the rate at which individuals would be likely to detach automatic seatbelts before rescinding Standard 208. Yet the agency would still have discretion to take such an action if it could rationally explain its decision given the improved body of evidence before the agency resulting from its EBPM processes.

Finally, it is important to ensure that the implementation of EBPM in federal policymaking does not unduly prevent agencies from promulgating important regulations. This is particularly true considering DOGE's ongoing efforts to implement a "drastic reduction in federal regulations"[250] without any apparent plan to assess the effectiveness of such policies. In addressing this problem, lawmakers drafting EBPM-related statutory mandates, or policymakers implementing EBPM processes, can benefit from considering the distinction between type I (false positive) and type II (false negative) errors in the scientific fields. In policymaking, a type I error occurs when agency officials implement a policy to address a problem they believe exists, or implement a solution they think will work, but data subsequently proves that no such problem exists, or the solution is not effective. The implementation of DARE is an example of a type I error: the program's creators, and their champions in Congress, believed that the program would reduce drug abuse among program participants when, in fact, no such positive result occurred. While this type of error can result in wasted federal dollars and opportunity costs for the program's participants, it is overall less harmful than type II errors, which

[250] Musk & Ramaswamy, *supra* note 162.

could result in a complete failure to implement needed government solutions to address pressing problems.[251]

B. An Improved Evidence Act

While incorporating EBPM processes into authorizing statutes has the benefit of allowing Congress to tether its EBPM preferences to specific agency goals, such an approach may not always be desirable nor feasible given timing and political constraints. Thus, at a minimum, Congress should take action to amend the Evidence Act to establish a more effective and inclusive framework for incorporating EBPM in federal agencies. For example, Congress should create greater accountability mechanisms so that agencies actually comply with the Evidence Act's EBPM mandates. As suggested above, this could include creating a more significant role for the GAO or agency IGs, or for Congress itself, by asking agencies to report on a more regular basis to their authorizing congressional committees. This could occur in the form of more frequent written reports, annual hearings, or ideally as part of the appropriations process, so that Congress could more directly condition an agency's program funding to its willingness to engage in proactive evidence-building activities to ensure policy effectiveness.

Such steps to enforce the use of EBPM more rigorously in agencies should only be implemented alongside corresponding measures to ensure that EBPM processes are inclusive, trustworthy, and transparent. As Professor Underhill points out, if "the government acts with invidious intent to disadvantage particular groups, greater efficiency can amplify the harm caused by legislative and regulatory action."[252] Even if the government is not acting invidiously, EBPM processes that fail to intentionally center inclusion, trust, and transparency will not lead to better policy outcomes. This is particularly true given that programs that fail to address these considerations will lack social license, and therefore the buy-in and faith of the communities the policies intend to serve. Federal regulations that benefit from claiming the framework of EBPM to enhance their validity but fail to "assess outcomes of importance for the individuals who experience the policy" lack the "democratic legitimacy" central to their ultimate effectiveness.[253]

An improved version of the Evidence Act could address these problems by incorporating language from recent OMB guidance and the Executive Orders described *supra* in Part IV(A). For example, the Evidence Act's requirement that agencies "consult with stakeholders, including the public, agencies, State and local governments, and representatives of non-governmental

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[251] To ensure that a lack of evidence does not prevent important government action, an amended Drug-Free Schools and Community Act could have directed local governments to use an EBPM process to define the term "success" while stipulating that they could still proceed with programming while the EBPM process is underway.

[252] Underhill, *supra* note 56, at 162 (describing EBPM as "an agnostic tool to promote efficiency, which is desirable only insofar as one supports the ends of governmental action").

[253] *Id.* at 183.

researchers"[254] could be enhanced by drawing upon the Biden Administration's suggestion to conduct listening sessions or focus groups with those who are most likely to be impacted by the regulation.[255] The Evidence Act could also codify into statute the requirements of the now-rescinded Executive Order 13985, which required agency heads to "consult with members of communities that have been historically underrepresented in the Government" throughout the lifecycle of evidence building.[256] Legislators could also consider codifying recent federal initiatives, such as the EEOC's REACH initiative or OSTP's Indigenous Knowledge guidance, to ensure agencies include as many voices in both the evidence-building processes as possible.

Finally, the Evidence Act could also codify recent OMB guidance by directing agencies to engage in EBPM processes that use methods that are transparent and that generate trust.[257] For example, legislators could reexamine the recommendations in the EBP Commission's report and consider codifying additional privacy and transparency-related provisions that were not included in the Evidence Act. Congress should also ensure that the EBP Commission's vision for the use of the NSDS for evidence-building purposes comes to fruition under the CHIPS Act. An amended Evidence Act could ensure, for example, that as the NSDS is piloted and established, it "facilitates data access for evidence building" not only to produce semiconductors, but also in federal policymaking efforts more broadly.[258]

Conclusion

Echoing President Reagan's justifications for rescinding Standard 208 and enacting CBA, President Trump created DOGE with the mission of "making government work for the people again."[259] This basic premise appeals to proponents of EBPM, who believe that regulators can better serve the public and avoid wasteful government spending by using an evidence-based approach. Under Musk's early leadership, however, DOGE eschewed EBPM principles, instead adopting the chainsaw-based approach favored by Musk in his private sector companies. To the extent DOGE committed to undertaking any kind of methodological assessment of existing regulations to identify priorities for rescission during the first hundred days of the Trump Administration, it made clear that its "North Star" would not be the presence or

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[254] 5 U.S.C. § 312(c).

[255] OMB M-21-27, *supra* note 23, at 8.

[256] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). While this Executive Order was rescinded by President Trump as an example of the Bident Administration's use of what it calls "illegal" DEI, including diverse stakeholders in the regulatory process need not include preferences on the basis of race, gender, or any other legally protected status. Rather, as discussed *supra* in Part IV, such a process can and should include people of all races, genders, education levels, geographies, and socioeconomic statuses to ensure they are as inclusive as possible.

[257] *See* OMB M-21-27, *supra* note 23, at 8.

[258] Commission Report, *supra* note 60, at 5.

[259] *See ICYMI: DOGE's Mission to Make Government Work Again*, The White House (Mar. 28, 2025), https://www.whitehouse.gov/articles/2025/03/icymi-doges-mission-to-make-government-work-again/ [https://perma.cc/4DFL-X3AC].

lack of evidence that might justify preserving those regulations, but rather the extent to which such regulations were in line with the Supreme Court's recent holdings in cases like *West Virginia v. EPA* and *Loper Bright v. Raimondo*.[260] The Administration's announcement of an arbitrary "ten-for-one" rescission-to-regulation ratio rule further demonstrated the extent to which President Trump and DOGE strayed from any definition of "efficiency" that might also have been embraced by proponents of EBPM during Musk's tenure as the leader of DOGE.

While a myriad of policy issues ranging from inflation to immigration undoubtedly impacted the way people voted in the 2024 election, President Trump is claiming a broad public mandate for his current efforts to drastically curtail federal agency power.[261] To the extent that Trump is correct that the American people voted for these efforts, the extremity of DOGE's current approach exposes the dangers inherent in enacting government-backed policies and programs that are not evidence-based. When programs like DARE, which initially benefitted from widespread popular support, become discredited by subsequent evidence that they are ineffective or even harmful at achieving their stated objectives, the public loses faith in both the agencies and the processes that created them, leading to at least increased (if not majoritarian) buy-in for the drastic government-reduction measures currently underway.

While DOGE's current direction is a missed opportunity to employ an evidence-based approach to make the government more efficient, it also exposes a gap in administrative law that Congress has the power to remedy. As the most democratically accountable branch, Congress is in a better position than DOGE to respond to purported public distrust in federal agency policymaking. Doing so requires rethinking the EBPM paradigm to ensure that it codifies a broad definition of evidence that properly centers lived experiences, community input, and values non-quantifiable benefits as much as those backed by statistical or empirical data.

Moreover, as the branch tasked with vesting federal agencies with regulatory power, Congress has a unique opportunity to shape the processes agencies employ through statutory mandates. Long before the existence of DOGE, lawmakers on both sides of the aisle and in both chambers of Congress had already begun to address concerns about the public's lack of confidence in government regulations by codifying EBPM processes in the Evidence Act. This was an important step in the right direction, but, as the rise of DOGE has shown, the Evidence Act's shortcomings have left a gap in federal law that is

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[260] *See, e.g.*, Directing Repeal of Unlawful Regulations Memo, *supra* note 158 (opining that the Supreme Court has recently issued a "series of decisions that recognize appropriate constitutional boundaries" on agency power and directing agencies to evaluate "each existing regulation's lawfulness" in light of ten listed U.S. Supreme Court decisions, including *West Virginia v. EPA* and *Loper Bright*).

[261] *See, e.g.*, Department of Government Efficiency, https://doge.gov/ [https://perma.cc/76DH-JXW5] ("The people voted for major reform.").

now being filled by the executive branch. Congress, however, can still reassert its constitutionally vested power over the agency regulatory process by enacting improved EBPM statutory mandates, either in future authorizing statutes or in an amended Evidence Act, to respond to evolving public concerns about the efficiency and effectiveness of the federal government, and to ensure that it acts in ways that advance justice and equity.