

# Agencies and Stakeholders

Discussant Comments

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# Summary

Agenda formation + two mechanisms of profit-motivated influence

1. Structure Is Destiny for agenda formation (also partisanship)
2. Structure Is Destiny for in-house science. Our lack of transparency is bad. It empowers deep-pocketed industry.
3. Expensive taste-making lawyers legitimize interpretations of fact and law.

Agreement that the **norms of science** can help. Tension over the structural role of **scientists** in decision-making.

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# Dwidar and Richardson: “Who Makes the Rules?”

# Summary of Findings 1: HUGE partisan conflict effects

Officials reporting **high** partisan conflict over their agencies

- More perceived influence of appointees
- Less perceived influence of career staff

# Summary of Findings 2: **CONDITIONAL** **partisan conflict effects**

Officials reporting **high** partisan conflict over **liberal agencies**

- More perceived influence of appointees

Officials reporting **low** partisan conflict over **conservative agencies**

- More perceived influence of career staff

Does this depend on who the president is?

# Summary of Findings 3:

## Insulated agencies

- Less perceived influence of president/OMB/OIRA

## Expertise + uncertainty

- Less perceived influence of appointees, Congress, the president, and OMB/OIRA when their agency's work requires skill and policy effects are uncertain

# Thoughts on Framing

- Yes, pre-NPRM influence is a big important gap (for nerds)
- Could be framed bigger; it's about perceptions of who sets/moves the regulatory agenda
  - The Bureaucracy Problem (Wilson) and how most studies only address one or two principals?
  - Agenda Democracy? (Carpenter)

# Thoughts on Analysis

More direct tests of *relative* perceived influence

- Pairwise ratios or normalized ‘influence budget’

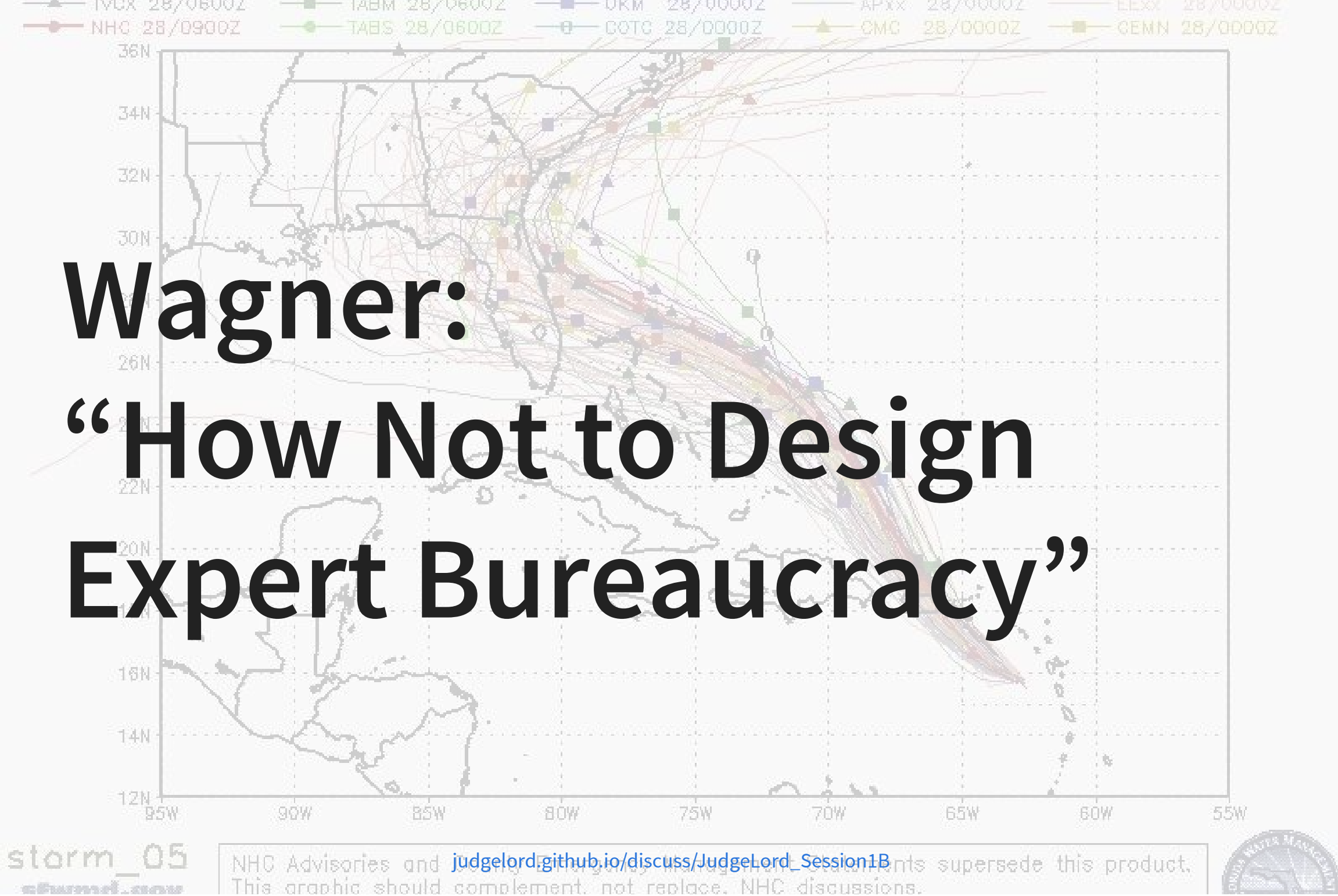
More descriptives by agency and type of official

- Are those reporting conflict the ones we would expect?
- Are people more likely to see others as having power?
- Are perceptions formed by official duties?
- Recent orders or attention from the president or Congress?

Descriptively leverage sub-agency heterogeneity



# Wagner: “How Not to Design Expert Bureaucracy”



# The call to Agencies

(in hopes of deference or safe harbor)

1. clarify the line between empirical and normative judgments
2. explain why their record is reliable
3. be transparent

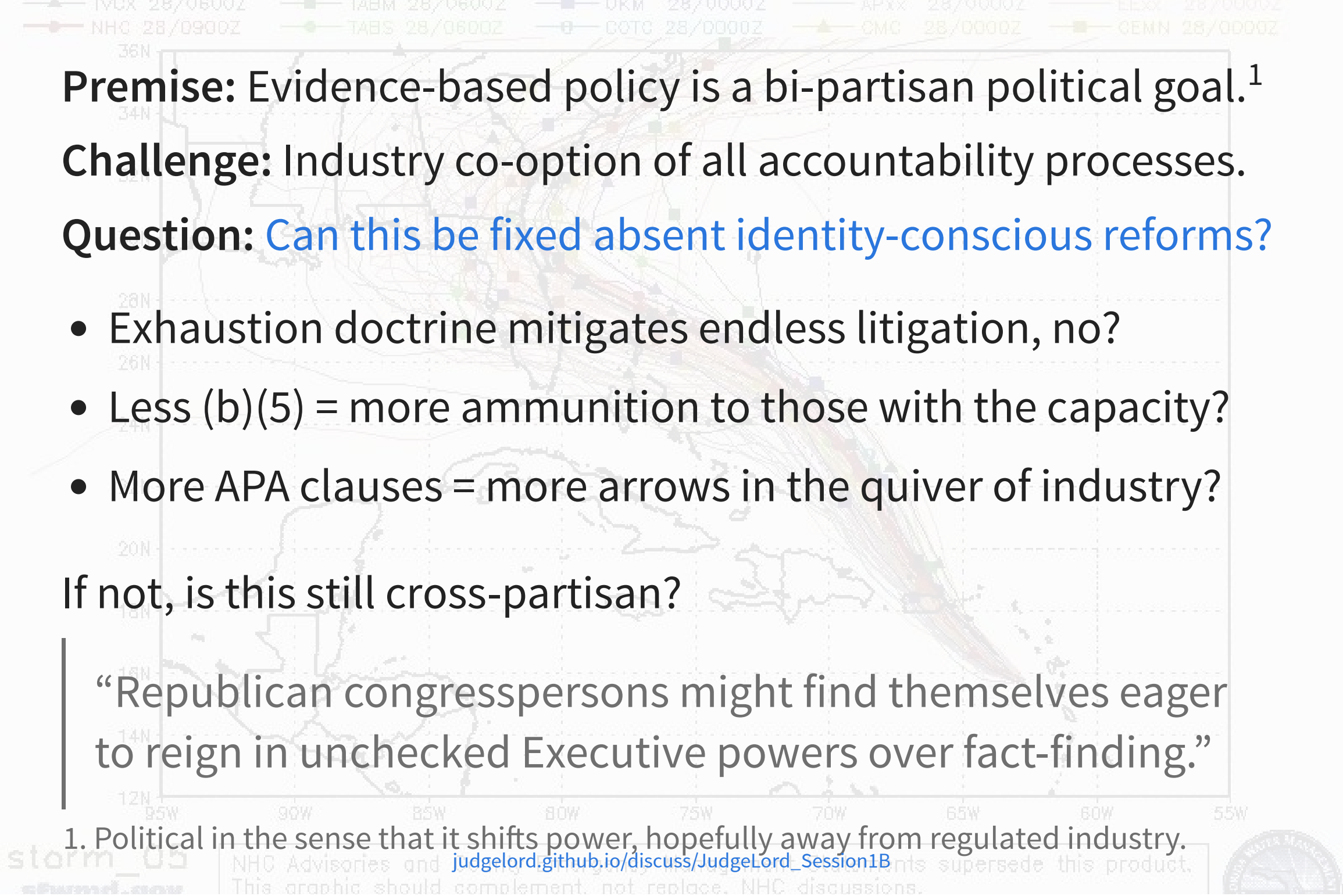


# The call to Congress

1. Revise APA: “arbitrary or capricious, including with respect to the scientific integrity of the factual record.”
  - ideally, also a safe harbor for documentation of their work
2. Revise (b)(5): open factual record to FOIA
3. New process requirements for explanation, peer review, and transparency that are not judicially reviewable but may contribute to arbitrary and capricious review.

# The call to Courts

1. Look suspiciously upon science that involved only industry
2. Revise exhaustion doctrine & encourage diverse interveners
3. Reverse expansion of (b)(5) FOIA exemptions



**Premise:** Evidence-based policy is a bi-partisan political goal.<sup>1</sup>  
**Challenge:** Industry co-option of all accountability processes.  
**Question:** Can this be fixed absent identity-conscious reforms?

- Exhaustion doctrine mitigates endless litigation, no?
- Less (b)(5) = more ammunition to those with the capacity?
- More APA clauses = more arrows in the quiver of industry?

If not, is this still cross-partisan?

“Republican congresspersons might find themselves eager to reign in unchecked Executive powers over fact-finding.”

1. Political in the sense that it shifts power, hopefully away from regulated industry.



# Is NEPA reform a model?

“102(2)(D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document.”

- Building United States Infrastructure through Limited Delays and Efficient Reviews Act of 2023

Or is it evidence that industry sees an opportunity to add a cause of action?



# Other challenges to overcome

## 1. Relies on the shadow of judicial review

- downstream of executives' desire to make particular policies
- only a real threat to a small number of policies

## 2. Relies on courts to understand scientific conventions (redistricting, climate, 🤨)

## 3. Description implies prescription

# Questions for an unequal world

Assuming process reforms are somewhat sticky, do they frustrate or enable counter-scientific pressure?

1. **Conflicts of interest:** Insulation depends on the strength of norms. Could be co-opted.
2. **Peer review:** Likely positive, but tradeoffs: allows opponents to expunge new science (as in the EPA transparency rule)
3. **Transparency** (e.g., fewer (b)(5) exemptions): Tradeoffs. Clarifies influences (if observers have capacity) and reduces costs of technical comments, but also gives ammunition to hostile groups.



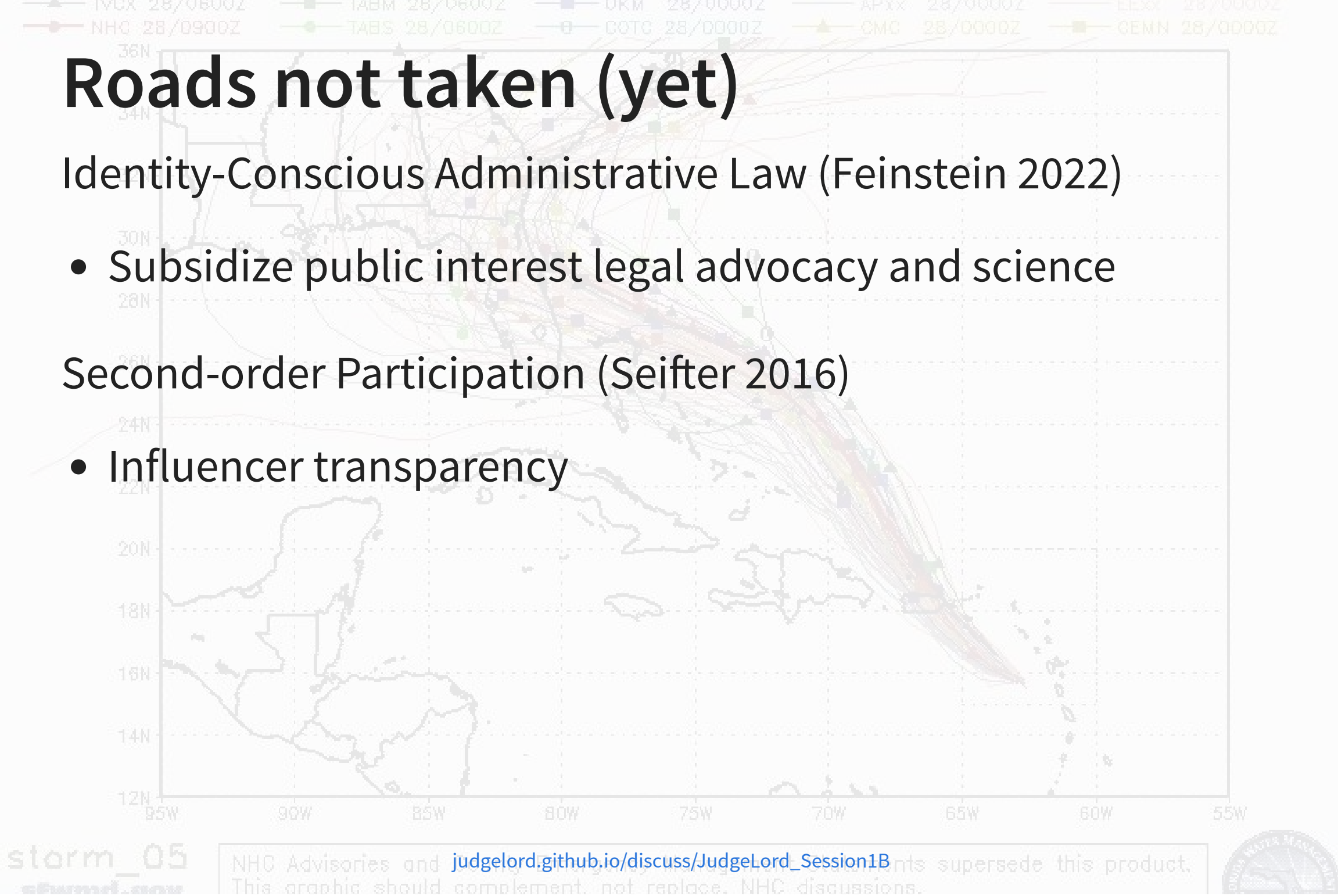
# Roads not taken (yet)

Identity-Conscious Administrative Law (Feinstein 2022)

- Subsidize public interest legal advocacy and science

Second-order Participation (Seifter 2016)

- Influencer transparency



# Discussion Question

How does this travel to other agencies?

- Fed's All Lawyers vs. CFPB's interdisciplinary policy shop

“There were attorneys, to be very frank, that wanted us to write rules the way they’ve always written rules, which is attorneys think of what public policy should be, and they write it down. Leadership at the [Consumer Financial Protection] Bureau drove them out pretty quickly...like, do you have any evidence for that statement? And if the answer was no, it was not a comfortable meeting.”

A pair of white brogue shoes with light-colored laces, resting on a light-colored wooden floor. The shoes are positioned diagonally, with one shoe slightly behind the other.

# Libgober: “Legitimacy Brokers”

“Council to the situation”—White-Shoed God-Guru-Influencers for Hire in Regulatory Lobbying

# Gems

- The Language Broker simile: McDonalds & Home Depot as “displaced corporate persons” in the foreign terrain of Dodd-Frank lobbying
- ABA ethics rules prohibit “polycliental situationships”

# Why hire white shoes?

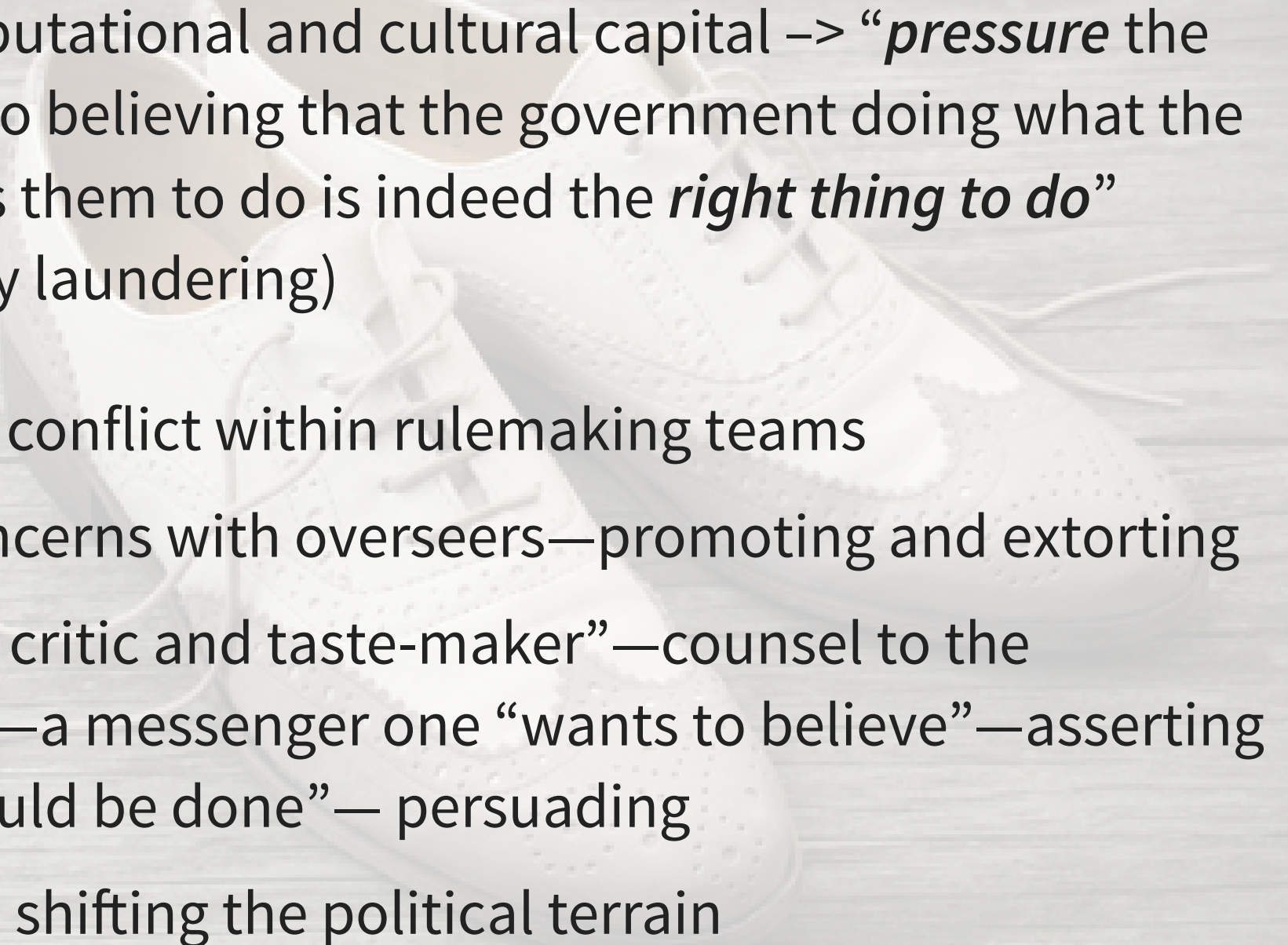
- Lawyers: **Litigation proofing**
- Political scientists: **Subsidy** (also revolving door, access, influence networks)
- Sociologists: **Bridging social networks** (e.g., revolving door)
- Libgober (JD/PhD): **Legitimacy brokering** (*laundering?*)

(not mutually exclusive, depends on agency)

Important! **Mechanisms of *cultural capture*.**

# Clarifying the mechanisms

1. Intermediary/“honest broker”/“wider view” → *understanding* (translating and situating)
2. Fixer → *deals* (brokering)
  - Adjust the conflicts = innovation: “how one can do things”
3. Blame avoidance (p. 18)
4. Credible signaling (p. 19)
5. Deploy reputational and cultural capital

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5. Deploy reputational and cultural capital → “*pressure* the agency into believing that the government doing what the firm wants them to do is indeed the *right thing to do*” (legitimacy laundering)
- provoking conflict within rulemaking teams
  - raising concerns with overseers—promoting and extorting
  - “informed critic and taste-maker”—counsel to the situation”—a messenger one “wants to believe”—asserting “what should be done”—persuading
  - in general, shifting the political terrain



# Clarifying the questions

1. *whom* does the broker connect
2. *what* does each side of the brokerage relationship get out of it? (p. 11) (understanding, deals, deniability, credibility)
3. *how* does the broker alter perceptions of **consequences** or **appropriateness**, i.e., the political terrain

“make the particular agency look stupid”

“what has been done, how the world works, and other attempts to persuade”

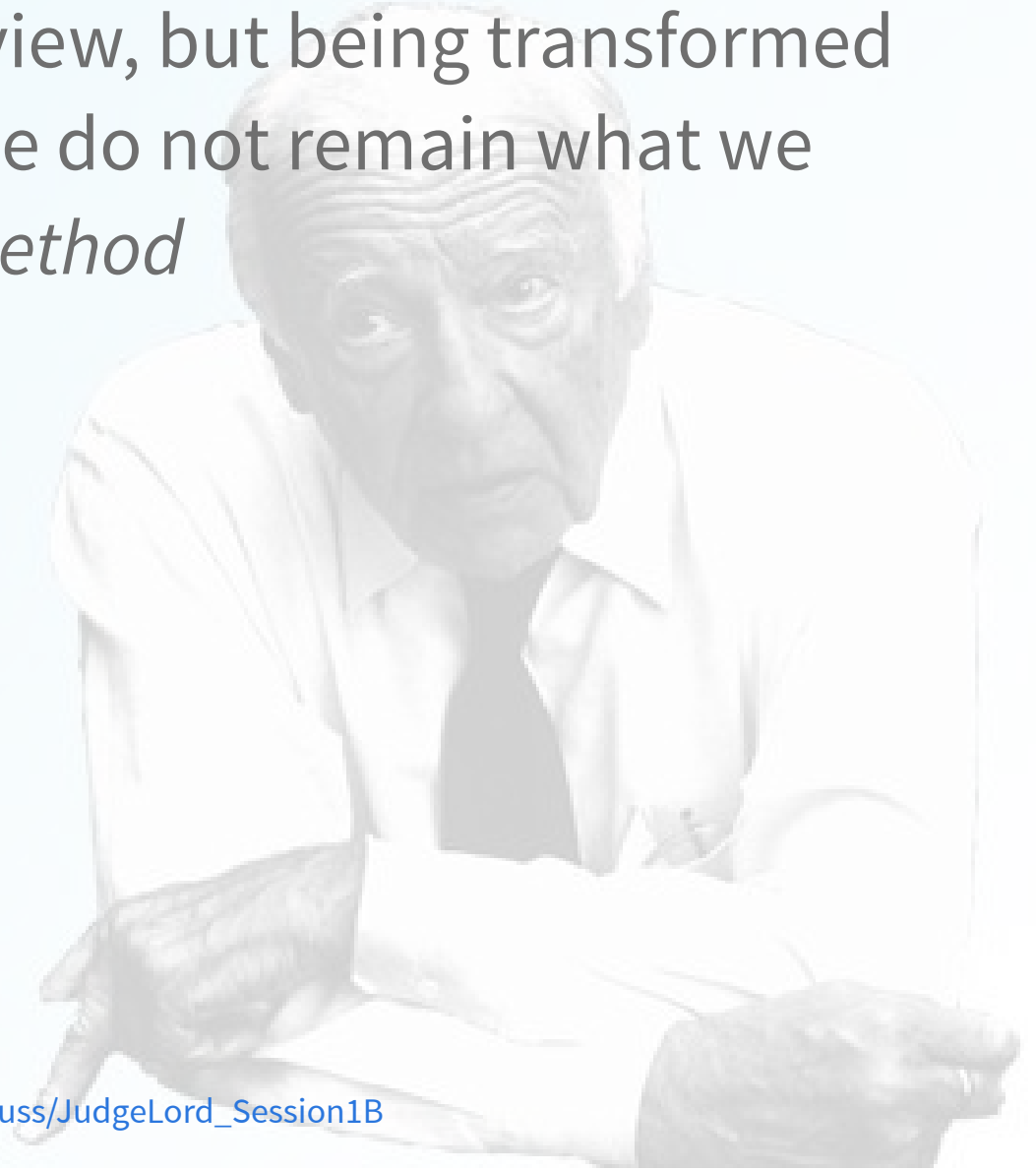


# Discussion questions

#1. Do conflict & perception adjusting go both ways? i.e., do white shoes shift the perceived desired policy of their clients?

- businesses “have a clear idea of what they want” (p. 15)
- what about tradeoffs, multiple equilibria, non-monotonic preferences, uncertainty, lack of imagination?
- firms are also political coalitions of people with beliefs embedded in audience networks (March + Carpenter)
- “Expertise requires recognition, and each side is corroborating the other” (p. 23)
- “selling” regulation to “partners in implementation”

“To reach an understanding in a dialogue is not merely a matter of putting oneself forward and successfully asserting one’s own point of view, but being transformed into a communion in which we do not remain what we were.” - Gadamer *Truth and Method*



# Discussion questions



#2. How do mechanisms interact?

- “Policy subsidy glazed with economic professional star power.”

#3. How does this travel to other agencies?

- “only on behalf of regulated industry”

#4. If the antidote is replacing legal innovation with scientific method, how do we do it?

# Other kinds of legitimacy laundering?

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- **Loyalty laundering?** (another form of moral reputation)

