

OIRA 2.0:

How Regulatory Review Can Help Respond to Existential Threats

REPORT BY **TODD N. TUCKER** AND **RAJESH D. NAYAK**

APRIL 2020

THE
GREAT
DEMOCRACY
INITIATIVE

 ROOSEVELT
INSTITUTE

**THE
GREAT
DEMOCRACY
INITIATIVE**

**ABOUT THE GREAT
DEMOCRACY INITIATIVE**

The Great Democracy Initiative develops policy blueprints that offer solutions to the most pressing problems of our time. From taming the concentration of power in our economy to fundamentally reforming our broken government, GDI aims to generate policy ideas that confront the forces that have rigged our society in favor of the powerful and connected.



ABOUT THE ROOSEVELT INSTITUTE

The Roosevelt Institute is a think tank, a student network, and the nonprofit partner to the Franklin D. Roosevelt Presidential Library and Museum that, together, are learning from the past and working to redefine the future of the American economy. Focusing on corporate and public power, labor and wages, and the economics of race and gender inequality, the Roosevelt Institute unifies experts, invests in young leaders, and advances progressive policies that bring the legacy of Franklin and Eleanor into the 21st century.

ABOUT THE AUTHORS

Todd N. Tucker is a political scientist and the director of governance studies at the Roosevelt Institute. His research focuses on political economy, democracy, and judicial politics. Dr. Tucker has testified before legislatures and expert committees around the world. His writing has been featured in *Politico*, *Time Magazine*, *Democracy Journal*, the *Financial Times*, and the *Washington Post*. He is author of *Judge Knot: Politics and Development in International Investment Law* (Anthem Press 2018).

Rajesh D. Nayak is an attorney and fellow at the Labor and Worklife Program at Harvard Law School and was previously deputy executive director and research director of the National Employment Law Project. Prior to that, he spent seven years serving in senior roles in the Obama administration's Department of Labor, most recently as deputy chief of staff to Secretary Tom Perez. In his roles at the department, Mr. Nayak had extensive experience in managing the rulemaking process and cost-benefit analysis. He has written for *Slate*, *Newsweek*, and *Fortune* in recent years.

ACKNOWLEDGEMENTS

The authors thank the following for their comments and insight on this project at various stages: David Arkush of Public Citizen, Sam Berger and Jacob Leibenluft of the Center for American Progress, Sharon Block of Harvard Law School, Greg Leiserson of the Washington Center for Equitable Growth, Suresh Naidu of Columbia University (and Roosevelt), K. Sabeel Rahman of Demos, Shayna Strom of the Century Foundation, David Talbot of the University of Cambridge, David Weil of Brandeis University, and Steven K. Vogel of the University of California, Berkeley. Roosevelt staff Nell Abernathy, Kendra Bozarth, Matt Hughes, Suzanne Kahn, Anna Smith, Steph Sterling, Michelle Sternthal, and Victoria Streker all contributed to the project.

The contents of this publication are solely the responsibility of the authors. We thank the Open Society Foundations for supporting this work.

Executive Summary

Our nation and world face tremendous structural challenges ahead: Pandemic infectious diseases, the looming climate crisis, widening inequality, and the erosion of governing norms are among them. But for most of the past decade, obstructionists in Congress have been unwilling to make even a down payment on the substantial changes needed to tackle these crises. If that dynamic continues, robust executive action is the primary avenue for the next progressive administration to claw back the policy gains made in the Obama administration—and to make even more substantial progress on necessary policy reforms. Even if Congress does pass strong health and safety measures or enact industrial policy and a Green New Deal to create good jobs and decarbonize equitably, the next administration will need to implement them by harnessing the federal regulatory process—the formal process by which government agencies prioritize and issue new regulations in line with their legislative mandates.

Meanwhile, the Trump administration has weakened longstanding norms governing the rulemaking process. To be clear, they have not formally amended Executive Order 12866, a Clinton-era roadmap for regulatory review that has been remarkable both for its resilience and its flexibility over the years. But at various times, this administration has expedited its actions by burying unfavorable economic analysis, ignoring basic legal requirements, and overruling or even simply bypassing knowledgeable civil servants both in the federal agency charged with centrally reviewing regulations—the White House Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA)—and in federal agencies around the government.

In recent decades, there has been a healthy debate over the proper role of OIRA, which has been tasked with reviewing agencies’ cost-benefit analyses and managing the interagency review of regulations since the Reagan administration. Some progressives have gone so far as to call for eliminating OIRA altogether in order to speed up rulemaking efforts.

Given the enormity of the challenges ahead, it is especially important that OIRA’s regulatory review process is not used to paralyze government and significantly delay or even derail important environmental, consumer, and worker protections. But instead of eliminating regulatory review, the next administration should take the opportunity to remake it, leveraging both the process and the expertise of OIRA’s career staff to support vital policy reforms. An OIRA 2.0 would transform traditional cost-benefit analysis and modernize rulemaking, including by:

1. Enhancing Capacity and Expanding Mandate: To execute on this vision, OIRA's capacity must be significantly enhanced. Additionally, a new OIRA subsidiary office should monitor under-regulation and develop methodologies for more holistic cost-benefit analysis.

2. Promoting Sustainability: We are in the middle of a climate crisis that threatens the whole of humanity. But current cost-benefit analysis—against the guidance of climate experts—significantly deprioritizes gains (or losses averted) that occur in the future. By making changes to the ground rules for regulatory accounting—the so-called “discount rate” and “value of a statistical life”—rulemaking can be better aligned with addressing the climate crisis (as well as other challenges that require long time horizons).

3. Tackling Inequality and Catalyzing Growth: Current levels of inequality constrain our nation's overall economic growth. Yet current rulemaking does too little to incorporate the reality of inequality as an assumption on the front end, or the positive and normative value of reducing inequality on the back end. By better accounting for how rulemaking can transfer resources and even power among subsets of the population, we can more effectively address inequality and catalyze growth.

4. Boosting Equity and Inclusion: Too often, people of color, immigrants, and other marginalized groups are excluded from the rulemaking process, which often fails to consider how policy impacts them and how they can be more proactively engaged. A new set of tools and procedures can provide more robust measurement of how these communities will be impacted, give them more voice in the process, and target benefits intersectionally.

5. Enhancing International Competitiveness: The domestic rulemaking process does not take place in a vacuum. Rather, a network of (often pro-deregulation) treaties circumscribes the scope for government action. We recommend turning this on its head, with the new subsidiary office in OIRA tasked with identifying necessary and useful changes to these international rules—rather than using the international rules to lock in outdated practices.

Introduction

The US faces major structural challenges and opportunities. Today, we are confronting the COVID-19 pandemic—a public health crisis that has forced the closure of whole swaths of our economy. The rapidly accelerating climate crisis will require the US to remake its economy in a matter of years, rather than decades. The ongoing concentration of wealth poses threats not only to social equity, but also to our economy’s ability to grow and innovate. And amid the rise of competitors with state-driven capitalist economies, such as China, industries the US was long thought to dominate are now being picked apart and shipped overseas.

These challenges have prompted a new generation of scholars and advocates to craft what we call “structuralist” and transformational fixes. These include a public option for vaccine manufacturing, a Green New Deal to decarbonize with equity, stock buyback bans and wealth taxes to reverse the upward redistribution of income, and an industrial policy by which the state uses public sector power to catalyze and focus new engines of economic growth.¹ These changes are increasingly seen as core building blocks of a sound and resilient political economy, not merely options for those with like-minded ideological preferences.

Yet these progressive policies for structural transformation face a fundamental problem. While there is greater demand for and supply of ideas than in previous generations, major institutional hurdles stand in the way of implementation. Among these constraints: a Supreme Court bench tilted toward business interests; a US Senate that calcifies the power of the wealthy; and a federalist system that resists economy-wide planning. These represent what political scientists call “veto points”—or actors that must sign off before action occurs. Relative to most developed democracies, the US has both an unusually high number of anti-progressive veto points and weak potential progressive veto points (given the decades-long attack on labor unions, for example).²

¹ For an overview of the new structural thinking and analysis of how it differs from neoliberal thinking, see (Wong 2020). For examples in each of these domains, see, respectively, (Brown and Sterling 2020), (Hendricks, Gunn-Wright, and Ricketts 2020), (Saez and Zucman 2019), and (Mazzucato and Semieniuk 2017).

² For a review of veto point theory, see (Tsebelis 2002). For an elaboration of this literature that looks beyond formal veto points to more informal means of exercising influence through so-called “access points,” see (Ehrlich 2011). For a line of Roosevelt Institute analysis of each of the veto points mentioned in this paragraph, see (Tucker 2018b), (Tucker 2019a), (Tucker 2019b), and (Tucker 2018a).

But this bias is not only against the executive branch’s freedom to maneuver vis-à-vis other branches and actors; it is mirrored in the executive itself through the regulatory review process, which agencies must hurdle before pushing regulations out the door. At the center of this executive rulemaking process is an agency little known to the general public: the Office of Information and Regulatory Affairs (OIRA), which sits within the executive branch’s Office of Management and Budget (OMB). This agency has three core functions in the rulemaking process: (1) ensuring that the federal government speaks with one voice in rulemaking, negotiating any conflicts within the government; (2) ensuring that agency policymaking reflects the president’s priorities; and (3) serving as a peer reviewer for agency policymaking, including substantively reviewing each rule’s cost-benefit analysis. In addition, OIRA manages priority administration initiatives from time to time—for example, the Obama administration’s “retrospective review” efforts to identify “outmoded, ineffective, insufficient, or excessively burdensome” regulations and “to modify, streamline, expand, or repeal them in accordance with what has been learned” (“Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review” 2011; Coglianese 2012).

At the center of this executive rulemaking process is an agency little known to the general public: the Office of Information and Regulatory Affairs (OIRA).

OIRA’s regulatory review process has been accused of delaying or even blocking important rules from moving forward, and of being easily captured by corporate interests, even in progressive administrations (Warren 2016; Rogers 2017). Ex-OIRA head Cass Sunstein has previously pushed back on that characterization, noting that OIRA, by definition, aggregates and amplifies the concerns of other agencies—a process that necessarily takes time (Sunstein 2013). Nonetheless, in his recent book *The Cost-Benefit Revolution*, he notes that the Reagan administration (in which he served as a Justice Department lawyer reviewing the initial order empowering OIRA) was motivated in part by a desire to “proliferate veto points on regulatory activity . . . because regulation was an obstacle to economic growth and job creation” (Sunstein 2018, 12).³

³ Their other motivations include empowering technocrats (relative to interest groups), coordinating the federal bureaucracy, and ensuring democratic accountability of federal agencies. We firmly embrace the latter two goals, and believe that they can be reasonably severed from the deregulatory aspect of OIRA’s mission. And while technocracy has its place, we call for a more calibrated role for interest groups. “Interest group” organizations advocating for worker rights and the environment should have a stronger role in the regulatory process, while “interest group” organizations representing businesses arguably have too much of a role today. For a firsthand account by a former regulator of the role of business groups in delaying regulatory action, see (Michaels 2020).

THE OIRA STORY IN THREE EXECUTIVE ORDERS

OIRA has had strong bipartisan support for four decades. Three key overlapping executive orders underpin its activities.

Executive Order 12291, signed by President Ronald Reagan in 1981, inaugurated the cost-benefit revolution, forbidding regulatory action unless the benefits outweigh the costs, prioritizing regulation that maximizes net benefits, requiring regulators to choose the least costly alternative means of regulating, and requiring special attention to industries affected by regulation. All of these considerations had to be documented in a Regulatory Impact Analysis (RIA) for each proposed regulation.

The Clinton administration extended the enterprise in 1993 with **Executive Order 12866**. This document loosened the standards such that the benefits of regulation need only “justify” the costs, and highlighted the importance of considering qualitative impacts of regulation. It defined the maximization of net benefits as not only promoting a narrow definition of efficiency, but also promoting environmental, public health and safety, distributive, and equity-based goals. At the same time, it suggested that regulation should only be undertaken if there are “material failures of private markets to protect or improve the health and safety of the public, the environment, or

the well-being of the American people.” As Sunstein has written, this language ensures that “the presumption is against regulation” (Sunstein 2018).

Finally, in 2011, the Obama administration issued **Executive Order 13563**. While extending many of the principles contained in the two older orders, this document emphasized the importance of public participation, open exchange of ideas, and easy-to-understand language. It also established a requirement to measure the actual result of regulations after the fact and obligated regulators to “promote predictability and reduce uncertainty” while using the “least burdensome tools for achieving regulatory ends.”

Taken together, these orders create precedents for many of the innovations we recommend in this report. At the same time, it is clear why they have come under fire for advancing a neoliberal approach to the state that is inappropriate to the public sphere (McCluskey 2016).⁴

⁴ We define “neoliberalism” as the enterprise of using state power to redistribute income upwards—all while using the rhetoric of markets and individualism to describe this activity. See (Slobodian 2018).

Taking a step back, there are at least four deeply intertwined factors that can delay or block ambitious regulations:

Resources:

OIRA is inadequately staffed to field routine rulemaking activity, let alone to move quickly against existential threats that may require broad structural change to the economy (Bolton, Potter, and Thrower 2014). This relatively small agency, with approximately 45 full-time staffers, is charged with managing and reviewing rulemaking across dozens of major cabinet agencies and more minor boards, commissions, and other offices.

Misaligned Roles:

Agencies (at least those with a pro-regulation mission and culture) use the rulemaking process to advance key policy goals and fully exercise their authority from Congress. Meanwhile, one of OIRA's main roles is to serve as a peer reviewer and to ensure that agencies refrain from taking action that fails to meet certain standards and procedural requirements. Thus, there is a potential misalignment between those agencies that favor action and OIRA, which looks for reasons for an agency not to take action.

Process:

OIRA's regulatory review process requires striking a continuous balance between expediency and rigor in reviewing regulatory packages. The result can be a slowdown of regulatory action.

Standards:

OIRA relies upon cost-benefit analysis as a primary measure of the value of any particular rulemaking. But this method as it is practiced today has important limitations. Prevailing metrics put too little value on avoiding existential threats. The analysis is rooted in concepts like individual willingness to pay to avoid harms, rather than a more structural accounting of which groups in society gain or lose from courses of action and inaction.

The result is that OIRA's current regulatory review process can be bogged down—or worse, that it favors “deregulatory” actions. Indeed, average review times ballooned to four-plus months in 2013–2014 before dropping back down to 80–88 days at the end of the Obama administration and 67–68 days in the first two years of the Trump administration (Carey

2019, 25). Nonetheless, as of March 2020, over half of pending reviews at OIRA took longer than the maximum 90 days envisioned by Executive Order 12866.⁵

Objections raised by relatively minor agencies like the Small Business Administration's Office of Advocacy—a taxpayer-funded agency charged with being an advocate for “small businesses”—can delay workplace regulations despite policy decisions made by the president.⁶ While the current COVID-19 crisis has shed a light on the crucial role small businesses play in our economy (and the importance of aiding them in crisis times), the concerns of all stakeholders must be balanced against other policy objectives.

One possible response to these concerns would be to significantly diminish OIRA's authority to review regulations. Some have called for abolishing OIRA and centralized regulatory review of agency rulemaking entirely (Steinzor 2012). While that might sound radical in the abstract, there have been longstanding exemptions to OIRA review in some contexts. For example, OIRA and the Department of the Treasury signed a memorandum of understanding that for decades (until recently) exempted certain Treasury Department tax rules from centralized review.⁷ Likewise, the Administrative Procedure Act (APA) excludes from its purview rulemaking that involves “a military or foreign affairs function of the United States.” Executive Order 12866 in turn exempts “[r]egulations or rules that pertain to a military or foreign affairs function of the United States . . .”⁸ As a result, some of the most consequential decisions in our nation's history—such as the decision to go to war in Vietnam or Iraq—are not subjected to the same type of review that basic labor regulations are. More recently, as part of the COVID-19 response, financial regulators have pushed for changes to bank capital requirements that would be exempted from normal regulatory review and go into effect immediately.⁹

⁵ See <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>. Note, however, that the order allows extensions. In any case, there are no consequences for failing to meet these timelines.

⁶ For example, in 2014, President Obama directed the Department of Labor to issue a rule modernizing the salary threshold that workers must be paid in order to be exempt from overtime requirements under the Fair Labor Standards Act (Hudson 2014). The SBA Office of Advocacy held a number of roundtables with small businesses (attended by DOL) and ultimately submitted a comment letter deeply skeptical of the labor department's proposal (Rodgers 2015).

⁷ See (“Memorandum of Agreement Between Treasury and OMB on Implementation of Executive Order 12291” 1983). That agreement was updated by the Trump administration, with the Treasury pledging to send more of its regulations through the interagency review process (“Memorandum of Agreement Between Treasury and OMB on Review of Tax Regulations Under Executive Order 12866” 2018). That MOU further agrees to expedite review of rules implementing President Trump's signature Tax Cuts and Jobs Act. See also (Vogel 2018; Leiserson and Looney 2018). Initial reports from the Government Accountability Office suggest that OIRA is meeting those deadlines (Government Accountability Office 2020).

⁸ See (“Executive Order 12866 of September 30, 1993, Regulatory Planning and Review” 1993). This exemption dates back to the Cold War, when military and foreign officials wanted to exempt themselves from normal review so that they could nimbly respond to the threat of the Soviet Union (Bonfield 1972). Nowadays, this “foreign policy” exemption has expanded such that routine decisions of the Department of Agriculture are exempted from normal review.

⁹ See <https://www.federalregister.gov/documents/2020/03/20/2020-06051/regulatory-capital-rule-eligible-retained-income>.

Nonetheless, we recommend reform over revolution for two principal reasons. First, appropriately wielded, regulatory review (broadly understood) can serve progressive ends. As the Trump administration has pushed environmental deregulation, rules requiring that officials consider the costs of doing so and not act arbitrarily and capriciously have been a vital safeguard (Eilperin 2018). More generally, requirements to tally costs and benefits provide a valuable tool for agency specialists to get presidents, courts, and the public to accept reforms that are in the interest of everyone, or of those groups in society we want to lift up. This not only promotes democracy and accountability but bolsters the promise that if we can get better at quantifying how government action and inaction determines who wins and by how much, citizens can more readily mobilize to achieve and protect political gains. Having a clear and concise understanding of the trade-offs that regulators took into account makes it easier for generalist agency heads and judges to accord more deference to agencies (Masur and Posner 2018).

Requirements to tally costs and benefits provide a valuable tool for agency specialists to get presidents, courts, and the public to accept reforms that are in the interest of everyone, or of those groups in society we want to lift up.

A second reason is international and comparative in nature. As we note later in this report, compared to its international competitors, the US's federal administrative state is ill-equipped to respond robustly and nimbly to structural economic challenges. While the Federal Reserve ably manages monetary policy, and the Treasury Department (under supportive Congresses and presidents) is capable of redistributing income through the tax code, the US governance system makes more structural changes difficult. During the COVID-19 crisis, Asian and European governments rapidly shut down regions and sectors of the economy and nationalized industries where necessary. They quickly negotiated new sectoral labor agreements to address both income security and health and safety on the jobs (Block 2020). Within weeks of the outbreak, mechanisms were in place to restart the economy with health-preserving safeguards such as publicly provided health care and testing. Even prior to the crisis, these governments were outpacing the US in launching decarbonizing industrial policies that deployed electric buses, supported solar panel development, and more.

In contrast, the US lacks a centralized planning agency, shares power with states in the federalist structure, and requires two legislative chambers and active courts to play a coordinating role. Attempts to reorganize agency functions have historically led to intra- and interbranch fights that can paralyze government. Even emergency powers (which could in theory offer workarounds to address presidential threats) permit so much discretion that they too can act as a paralyzing factor in the hands of a timid president. As we write, the Trump administration refuses to marshal authority under the Defense Production Act to rapidly fill orders for face masks or otherwise convert the country's private industrial capacity to public ends (Cassella 2020).

We contend that the regulatory review process—consistent with other aspects of the US political structure—has untapped and underused potential to help address existential threats. A remade OIRA that functions as coordinator, peer reviewer, and advocate for best practices can do on the back end what other countries do more directly on the front end. It would not write the underlying policy initiatives: That's what agencies do now and would continue to do. But it would be the holder of evaluation criteria, making policy more sustainable and equitable and advancing countervailing power¹⁰ more generally.

We are not alone in seeing OIRA as a potential industrial planner. Legal scholar Yair Lisotkin has noted that OIRA has its origins in efforts by the Nixon, Ford, and Carter administrations to use regulations (often thought of as microeconomic in nature) to control the macroeconomy (specifically price levels). He calls for an Office of Fiscal and Regulatory Affairs to restore regulation's countercyclical function, which he argues was successfully used during the New Deal through its industrial and labor policies (Listokin 2019). Regulatory experts Jeff Hauser and Todd Phillips have called for OIRA to be repurposed on day one of a new administration to train agencies how to regulate faster (Hauser 2019) (Phillips 2020). Even Sunstein has noted in passing that "in their own way, cost-benefit analysts are planners" (Sunstein 2018, 98).

The new approach we recommend can be implemented through a new executive order or perhaps even just new guidance, but it cannot be implemented overnight. Nor should its design hold up vitally important rulemaking that must happen immediately. There are also changes that can be made in other parts of the Executive Office of the President—

¹⁰ "Countervailing power" refers to the need to develop other centers of power in society (typically strong worker organizations, governments, and civil society) to push against excessive social, political, and economic control by concentrated wealthy and corporate actors. See (Galbraith 1956).

such as the creation of a National Climate Council¹¹—that can do the more explicitly political coordinating functions that will be needed. But a new administration can put us on the road to reform by instituting some procedural defaults, especially in staffing and transparency. In the sections below, we discuss ways to enhance government capacity and expand OIRA’s mandate, promote sustainability, tackle inequality and catalyze growth, boost equity and inclusion, and enhance international competitiveness.¹² In a subsequent section, we address likely objections to our proposals, including why we do not simply advocate for doing away with cost-benefit analysis and/or OIRA as an institution. A final section concludes.

¹¹ For further exploration of that proposal, see (Hendricks, Gunn-Wright, and Ricketts 2020).

¹² These criteria track those laid out for industrial policy in (Tucker 2019b).

Enhancing Capacity And Expanding OIRA's Mandate

OIRA has too little staff capacity relative to its current mission, and is woefully understaffed for the kind of expanded mandate we propose in this report. Without adequate staff, rulemaking can be excessively delayed. But these delays are not the only problem: OIRA's current mandate is too focused on reactively reviewing agency priorities rather than identifying areas of insufficient regulation. Changes such as those we recommend can leverage OIRA to help ensure that rules benefit the workers, communities, and groups more likely to be marginalized in policy.

RECOMMENDATIONS:

- Increase capacity
- Expand OIRA's mandate

INCREASE CAPACITY

At present, OIRA has around 45 staffers, divided into a leadership team and several topical branches ("Office of Management and Budget: Information and Regulatory Affairs" n.d.). These generally include (at the leadership level) a Senate-confirmed administrator, career deputy administrator, noncareer associate administrator, a non-career chief of staff, and a number of counselors and assistants.¹³ At the branch level, these include reviewers of regulations having to do with 1) food, health, and labor; 2) natural resources and the environment; 3) transportation and security; 4) information and privacy policy; and 5) statistical and science policy.¹⁴ These branch structures are not set in stone and have changed over time.¹⁵ But one common complaint across administrations is that low OIRA staffing levels hinder efficient and effective review.

¹³ See, for example: <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016-7.pdf>.

¹⁴ According to the White House, a sixth branch has recently been added, but OIRA is not transparent as to what this is. It is possible that the sixth branch reviews treasury and tax rules recently added or tackles international regulatory harmonization, another longstanding OIRA function (Regulatory Working Group 2015).

¹⁵ For example, in the 1980s, OIRA had six branches, with the following jurisdictions and staffing levels: information policy (6), information technology management (2), natural resources (6), commerce and lands (6), human resources and housing (12), and statistical policy (5). In all, OIRA had 56 staffers, with 16 of these being clerical positions (GAO 1989).

To increase efficiency, we propose increasing the size of OIRA staff to 150, including at least four additional noncareer counselors to help manage the agency’s prioritization. Approximately two-thirds of the remaining staff would be focused on OIRA’s current mission: regulatory review. These nearly 100 staffers would be housed in a renamed Regulatory Review Office subagency, headed by a dedicated deputy administrator. The Regulatory Review Office will house four branches: 1) food, health, and labor; 2) natural resources, energy, and the environment; 3) transportation, communications, and information technology; and 4) commercial policy. The first three largely track the responsibilities of existing branches, while the fourth would conduct review of industrial policy regulations (green and otherwise) that haven’t been widely in use.¹⁶ These branches would be tasked with many of OIRA’s existing duties, including ensuring conformity of agency initiatives with the elected president’s priorities and peer review of cost-benefit analysis and science. With this new capacity, OIRA should have a target of moving regulations through the review process twice as fast. Instead of the 90-day cap envisioned in current executive orders, a new cap of 45 days should be put in place.

Low OIRA staffing levels hinder efficient and effective review.

With additional resources, OIRA’s Regulatory Review Office could deepen its expertise on the sorts of analysis described elsewhere in this paper. OIRA could hire and train staff to focus on better capturing and translating non-quantifiable benefits of regulations; to think deeply about discounting; and to weigh costs and benefits across income groups, racial and ethnic groups, gender, and disability.

EXPAND OIRA’S MANDATE

The above reforms will reduce problems of delay, but would not address the misalignment of roles between OIRA and agencies. We propose to further alignment by changing the scope of OIRA’s mandate.

¹⁶ Independent agencies like the Equal Employment Opportunity Commission would continue to operate without formal OIRA review, though we believe it would be good practice for them to conform to similar requirements. We imagine that the Regulation Planning Office (discussed below) could offer guidance on best practices. For a compelling case for subjecting financial regulations to a more precautionary cost-benefit analysis, see (Posner and Weyl 2014).

We propose the creation of a new subagency: a 50-person Regulatory Planning Office with its own deputy administrator. This would house four branches with thematic focuses parallel to the four outlined above, but would perform a more proactive function. It would serve as a think tank within government to identify areas of under-regulation, and it would convene conversations across agencies and provide guidance, for example, to identify best practices in quantifying benefits.¹⁷

This is not a totally novel idea. Under the Bush administration, Administrator John Graham innovated through the mechanism of “prompt letters,” whereby OIRA nudged agencies toward actions where none were being taken. However, only 15 of these letters were ever sent (and publicly disclosed)—the last one under Bush in April 2006.¹⁸

Under our proposal, the Regulatory Planning Office could build upon OIRA’s recent retrospective review efforts, described above, but with a broader mandate.¹⁹ In taking stock of the totality of federal regulations, and looking for opportunities to fill in regulatory gaps, this office could also—as a subsidiary function—recommend ways that defunct regulations could be revived, streamlined, or pared back.²⁰ There would thus be three primary tasks for this new office: 1) developing best practices in regulatory science that are tailored to different types of agencies; 2) monitoring systemic biases in estimating costs and benefits; and 3) conceptualizing mechanisms for applying regulatory review to new areas. Below, we discuss these in turn.

First, there are important differences in agency type that affect the White House’s ability—not to mention that of Congress, the courts, and the public—to effectively monitor what they are doing. Political scientist James Q. Wilson, for instance, drew distinctions between agencies that appropriately exercise a lot of discretion in enforcement activity and those that perform highly routinized tasks. Bureaucracies often find it easier to “play by the book” and follow a set process rather than independently ascertain whether their policy outputs are leading to broad, positive social outcomes (Wilson 1991).

¹⁷ For discussion of the myriad metrics scholars and practitioners have considered, see (Revesz 2014).

¹⁸ See (Office of Information and Regulatory Affairs n.d.). Ironically, it was later that same year that the Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that agencies cannot refuse to regulate activity (in that case, carbon emissions) that fall within its statutory responsibilities.

¹⁹ See also (Revesz 2018) for similar arguments.

²⁰ OSHA’s Standards Improvement Project provides a useful model, aggregating responses to public requests for information and federal advisory committees into regulatory packages to modernize standards (United States Department of Labor, Occupational Safety and Health Administration 2016). The agency has published four such packages since 1998.

The Regulatory Planning Office could convene a permanent panel of political scientists, business scholars, sociologists, and others to determine which type of task definition is optimal for which type of agency to more readily facilitate rapid response to existential threats and structural change. Previous such efforts have had a notable tilt toward making government work more like business, whether that's through privatization, outsourcing, or a business-like "customer service" orientation. But government has unique attributes (as we saw above) and is better positioned than business to take on the risks, coordination, and simultaneous filling of multiple objectives needed during crises and economic transformation (Bossie and Mason 2020). This new process should lean into this, and also make recommendations as to the appropriate governance arrangements for such tasks (such as independent commissions, as some are calling for in COVID-19 crisis business aid packages) (Lind and Galbraith 2020).

Second, OIRA and agencies often rely on regulated businesses for information on the costs of regulation, given that it is hard to find an independent source for this information and that industry has both access to data and resources to compile it. But industry has a long history of skewing the scientific literature and manufacturing uncertainty in order to defeat or at least delay regulation. Indeed, by shifting some key assumptions, industry can use "re-analysis" of even high-quality data to muddy the waters on causation (Michaels 2020). Likewise, industry has an incentive to submit cost estimates that are especially high. Even when estimates are derived independently, EPA researchers have found that differences between ex ante and ex post estimates have included "incorrect assumptions regarding the pace of technological innovation, failure to account for flexibilities available in the regulation as well as behavioral responses, and unexpected exogenous changes in factors such as fuel prices" (Wolverton, Ferris, and Simon 2019) (Cropper, Fraas, and Morgenstern 2017). One function of the Regulatory Planning Office would be to follow up with firms on an ongoing basis and run randomized control trials to assess the actual compliance costs, discount rates, and even non-quantifiable benefits, compared to their pre-regulatory projections. The office can also keep scorecards of industries and researchers and rate the accuracy of their cost projections. Officials would then provide lower weights to those consultants that routinely overestimate costs (as verified by after-the-fact studies).

Third, and finally, the Planning Office can think through ways to apply meaningful regulatory review to areas where normal processes are not currently applied. As mentioned above, some of the most consequential decisions in recent US history

have been undertaken with little to no cost-benefit analysis—whether that is the Iraq War, bank bailouts, or the response to COVID-19. While we do not suggest that a normal drawn-out process of consultation and comment are appropriate in times of emergency, neither do we accept the other extreme: that government should not be systematically and transparently (at least for retrospective reviews) accounting to the public the costs and benefits of these actions. The Planning Office can take the lead on developing a middle road.

Both the Regulatory Review and Regulatory Planning offices would have the ability to coordinate evaluations, but the former would be responsive to agencies, while the latter would require agencies to be responsive to them.²¹ OIRA leadership would be responsible for ensuring minimal levels of coordination—so that agencies are not getting excessive demands from both at the same time. Indeed, OIRA’s two offices would have complementary mandates. The Regulatory Review Office—housing OIRA’s traditional functions—will continue to play the role of editor and gatekeeper that promotes well-grounded policymaking by forcing agencies to adequately reason through their initiatives. The Regulatory Planning Office will play a forward-looking role, pressing agencies to pursue more effective agendas and arming them with important tools to achieve them. This new office would function as a real partner to agencies to work through ideas that may not have previously been pursued due to a lack of resources. The Regulatory Planning Office could partner with outside academics and academic associations to conduct much of its research. These two offices will balance one another, and OIRA administrators wishing to have the confidence of their staff will have to be responsive to both subcultures.²²

²¹ The current informational and statistical branches would be reallocated within the two offices depending on whether they serve an agency-serving or agency-prodding function.

²² Of course, the White House may favor one or the other mission in practice, but even the mere act of having this dual structure increases the odds for both mandates to survive and thrive.

Promoting Sustainability

Addressing capacity and mandate are only the beginning. The rest of this report addresses ways that the standards themselves can be enhanced and modernized—in this section, with respect to key metrics that affect environmental policymaking. Updating and modernizing OIRA’s analysis and approach can support the development of pro-environmental structural change. As our discussion in the previous section noted, focusing on the tasks to be performed—both by agencies and by OIRA—may be more quickly actionable than imploring agencies to execute on new or different goals. And numbers aid speed. Moreover, doing so will also yield benefits far beyond the environment and climate change. For instance, the changes we recommend would also benefit robust industrial policies that require long periods of time to show benefits.

RECOMMENDATIONS:

- Decrease the discount rate
- Increase the value of life

DECREASE THE DISCOUNT RATE

We are in the middle of a climate crisis that threatens the whole of humanity. But OIRA’s current guidance on cost-benefit analysis significantly deprioritizes gains (or losses averted) that occur in the future—against the guidance of climate experts. By making changes to the so-called “discount rate” codified in OIRA’s guide to regulatory analysis (Circular A-4), rulemaking can be better aligned with addressing the climate crisis.²³

The discount rate refers to the reduction of future benefits for the purpose of present consideration of whether to spend money. Traditionally, regulators assume that people value money available in the present more than in the future. Thus, they cannot simply compare the value of a future benefit against the value of a current benefit or cost in purely face-value terms. Instead, a discount rate is applied to the future benefit in order to understand its value today. The rate at which a future benefit should be discounted is

²³ See (Office of Management and Budget 2003).

hotly contested—especially in environmental matters.²⁴ For example, economist Tyler Cowen has contemplated a 0 percent discount rate for existential threats, the UN’s Stern Review on the Economics of Climate Change suggests a 1.4 percent rate, the Obama administration compared 3 and 7 percent rates, and the climate change–skeptic Trump administration prefers a 7 percent rate.²⁵

Figure 1 models how both the discount rate and the year in which a benefit accrues can determine the scale of the net benefit or cost for (say) a climate change mitigation measure, from 2020 to 2120. For simplicity, we assume \$1 billion in up-front investment costs for the private and public sectors and \$2 billion in future benefits for society at large; all benefits are one-off, accrue in set years, and are not cumulative. In other words, the figure is best thought of as a schedule of discrete decision points as to whether a policy would be “worth it” if the one-off benefit accrued in 2021, 2022, and so on.

Are \$2 Billion in Benefits in the Future Worth \$1 Billion in Costs Today? Schedules under Four Discount Rates

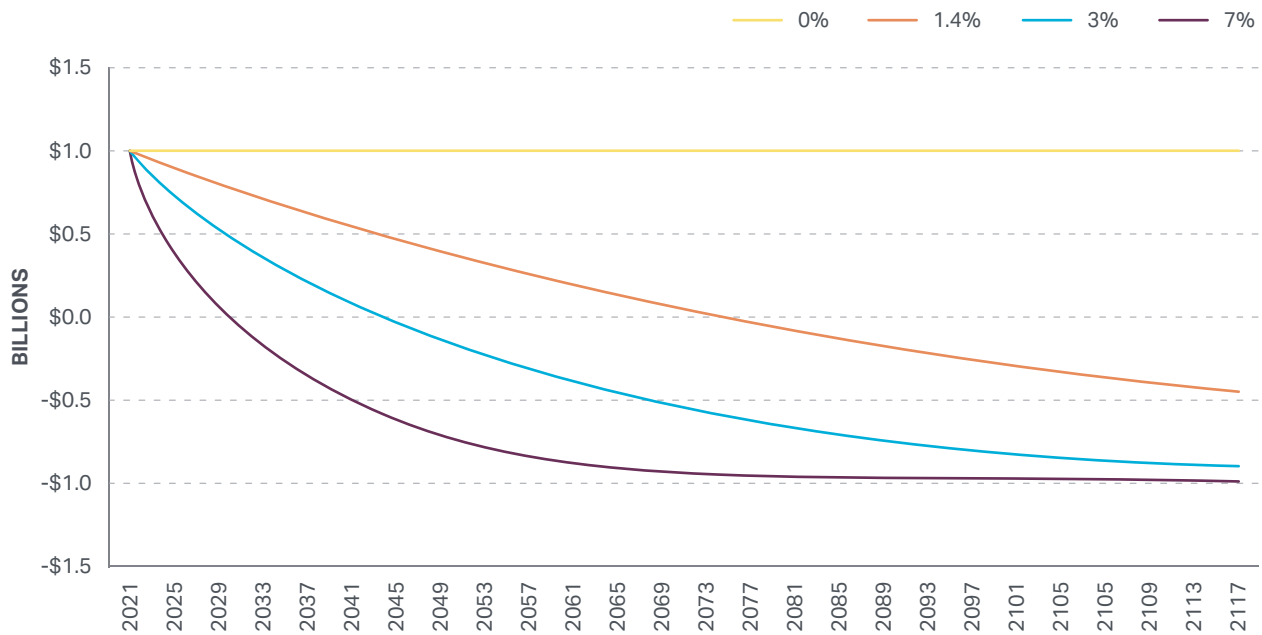


FIGURE 1 Source: Authors’ Calculations

²⁴ Discount rates are applied in all policy areas, not just environmental matters. And the benefits to a lower discount rate could also be felt outside the environmental domain. For instance, subsidies for steel today could lead to benefits for steel-using industries 10 years from now. A low discount rate could make the difference between such an industrial policy showing a net benefit or not.

²⁵ (Cowen 2007) (for existential threats, arguing that individuals do not differentiate between these in the mid- to long-range future) (Stern 2007); (US Government 2016) (arguing this as a middle in between a range of 2.5 and 5 percent for carbon-related benefits); and (Harvey 2017) (reporting on Trump’s EPA).

Under a zero discount rate, the decision is clear: \$2 billion in future benefits will always be worth \$1 billion in up-front costs, no matter when the benefit accrues. Thus, there are always \$1 billion in net benefits (benefits over costs), and cost-benefit analysis would always suggest the climate mitigation investment should be made. By comparison, there is a point at which the one-off benefit would not be “worth it” under a 1.4 percent discount rate. Namely, in any of the 54 years until 2074, the one-off benefit of \$2 billion would be worth the start-up costs. After that, however, the discounting of far-off benefits would raise their net present value over the start-up costs, suggesting the investment should not be made. That “break-even” year for a one-off benefit is even shorter in the case of 3 and 7 percent discount rates: 2044 and 2031, respectively. Thus, under the 7 percent rate favored by the Trump administration, a one-off benefit of \$2 billion would be worth \$1 billion in up-front costs only if the benefit were realized in the next 10 years.

Is there any rationale for the higher rate? One reason to prefer a 7 percent or other relatively high percent discount rate is that a given investment outlay today to avert a future harm could alternatively be invested in stocks in a dedicated fund today, generate a return, and then be used to compensate those harmed in the future. Indeed, depending on the discount rate, the returns on that investment could exceed the monetized value of the harms averted. But there are serious reasons to doubt that any government today could credibly commit future governments to live up to this bargain—meaning the compensation will never happen (Posner 2004, 151).

In other words, political realities require us to assume that complex financial and compensation schemes will not work and to design policy accordingly. Indeed, one need look no further than the failure to compensate workers hurt by increased import competition after 1990s trade deals to see that compensation can’t be assumed.

There are other technical reasons that economists—including the Council of Economic Advisors—have raised to prefer lower discount rates. Initially, the choice of the 3 and 7 percent rates was based on the then-average borrowing cost of the public sector and the return on capital in the private sector, respectively. The former represented an estimate of the “rate at which society as a whole can trade consumption today for consumption in the future” (CEA 2017, 3), whereas the latter represents the future redistributive logic Posner articulated above. Since that time, however, interest rates have steadily dropped, allowing the public sector to (in theory) make economic structure-altering long-term investments at basically zero interest rates. Meanwhile, recent economic research has indicated that the return to capital has more to do with outside political and market

power—namely, the ability of private actors to extract rents from the rest of society—and does not internalize the many externalities of climate change and other risks (Piketty 2014). As such, the analytics behind these rates may no longer be sound.

In order to advance intergenerational equity, OIRA should immediately require agencies to adopt a wider range of discount rates—including 0 and 1.4 percent. While this change alone will not supply a rule of decision (i.e., it will not say whether a 0 or 3 percent discount rate should be preferred), it will provide a benefit of transparency. If needed regulations are regularly being rejected because they have net benefits at a 0 or 1.4 percent discount rate and net costs at a 3 percent discount rate, the public and policymakers can see more clearly that it's the failure to adopt a more intergenerationally sensitive rate that is "doing the damage." Over the longer term, OIRA's Planning Office should work with the CEA, other agencies, and outside advisors to establish actual rules of decision.

In order to advance intergenerational equity, OIRA should immediately require agencies to adopt a wider range of discount rates—including 0 and 1.4 percent.

INCREASE THE VALUE OF LIFE

The types of discounting discussed in the prior section intersect with a related issue: how to value the direct benefits of a regulation. In current practice, there are numerous types of benefits that are commonly considered, but few that are routinely quantified given methodological limitations, data uncertainties, and a lack of emphasis in the rulemaking process as compared to costs. In general, OIRA should deploy its additional resources to press agencies to quantify benefits whenever possible, and the proposed Regulatory Planning Office can support that effort. Here, we will focus on revisiting one widely accepted monetization scheme: valuing life.

In the regulatory review process, regulators attempt to attach a dollar value to a so-called "statistical life." This exercise uses surveys and data on the wage premium that workers demand in order to engage in potentially life-threatening work, and extrapolates this to the population as a whole. Thus, if workers are willing to pay \$1 a year to reduce their risk of death by one in a million, then the value of a statistical life (VSL) is \$1 million.²⁶ For a similar risk and a willingness to pay of \$100, then the VSL amounts to \$100 million.

²⁴ This was the rate actually used in the 1980s by regulators contemplating an asbestos ban (D. A. Farber and Hemmersbaugh 1993).

This quantification ends up mattering greatly for whether regulations are “worth it.” Say it will cost businesses \$500 million to comply with an environmental regulation. Let’s assume away any discounting and just compare costs and benefits in static terms. Under the \$1 million lower value of the VSL (corresponding to eliminating a one-in-one million risk) and a US population of 330 million, the costs would outweigh the benefits (\$500 million versus \$330 million). However, at the higher estimate of a \$100 million VSL, the net benefits would be an overwhelming \$32.5 billion (\$33 billion minus \$500 million). Agencies have substantial discretion in picking a VSL, as well as determining when and how frequently to update it. In practice, up through the Obama years, the VSL applied by agencies ranged from around \$7 million to \$9 million. However, some studies reviewed by the OECD show VSLs for certain studies as high as \$197 million (in 2005 dollars) (Lindhjem et al. 2012, 94).

There are various reasons to be using a higher estimate of the VSL. First, there are reasons to believe that individuals’ willingness to pay for risk reduction may suffer from any number of cognitive biases (Sunstein 2018). When it comes to existential threats, the probabilities are arguably too small for individuals to meaningfully assess. As Posner writes, “the risk of an extinction event is smaller than the smallest risks in the value-of-life studies from which the consensus value is derived. None of the studies involves a risk as small as one in a million.” He adds, however, that “on the one hand people tend to dismiss as beneath notice any risk of death lower than one in a million but on the other hand they tend to weight heavily risks that are ‘dreadful’ or ‘unknown’” (Posner 2004, 167–168). Citing a study that reported people would have been willing to pay higher airline prices to pay for security measures that could have avoided the 9/11 hijacking, Posner then suggests that a VSL of \$28 million may be justified in avoiding particularly dreadful events.

Second, the economic structure of the country has changed. The surveys on which the EPA, the Occupational Safety and Health Administration, and other agencies base their underlying estimates are over a generation old and were calculated at a time when union membership was widespread and workers were able to push for higher salaries for taking on more risks. This meant that wage premiums were a somewhat reasonable proxy for willingness to pay. However, in today’s economy, workers lack the power to demand wage premiums (Alberini 2019), while the very rich can afford to pay for all manner of risk reductions. Indeed, EPA estimates show that people with double the income of others are twice as willing to pay for risk reductions (EPA 2016). These inequalities suggest the need for new metrics that are based less on what individuals are willing to pay for insurance-like services and more on how our nation collectively prioritizes achieving structural change.

COVID-19 AND THE VALUE OF LIFE

These considerations are particularly salient during the COVID-19 outbreak, as the administration considers “turning the economy back on” even if it risks 2.2 million deaths. As biologist Carl Bergstrom notes, even under the current \$10 million VSL, that many deaths would be equivalent to \$20 trillion in costs—a full year of national income. Though this back-of-the-envelope

estimate doesn’t factor in all relevant figures, he notes, “it shows us the scale of what is being proposed when people talk about bringing the economy back online shortly. Since doing so comes at a human cost of a year’s GDP, this sets the bar for any countervailing arguments about the advantages of ‘taking it on the chin.’”

We believe that calculating and publishing ranges with higher VSLs is merited. As an interim measure, the next administration should begin requiring agencies to show a cost-benefit range with double and triple the current value of a statistical life (at \$10 million, \$20 million, and \$30 million).²⁷ Over the longer term, OIRA’s Planning Office should fund scholars from a variety of disciplines to consider alternative means of calculating a VSL-like measure. For example, rather than relying on wage premium studies, some scholars are already discussing fielding surveys to ask for how much they would individually pay (within a realistic budget constraint) for various types of risk reductions (Revesz and Livermore 2008, 128). While potentially informative, such an exercise could be supplemented by getting respondents to think in terms of how to divvy up the budget of the state as a whole under different assumptions about the public sector’s share of national income and wealth. The public sector currently takes up a little over a third of GDP. However, with a 6 percent wealth tax on billionaires and other tax reforms, that could increase substantially. Having more information about how citizens would allocate money for different risk reduction measures and other priorities under such scenarios could provide valuable inputs into the regulatory review process.²⁸

²⁷ This is not so far-fetched. Several studies suggest that parents value the life of their children twice as much as their own. See (Williams 2013).

²⁸ The vast advances in data science since the issuance of the OIRA-relevant executive orders open up still other possibilities. See (Masur and Posner 2015).

Admittedly, the way that costs and benefits are currently estimated inherently requires us to make difficult intersubjective utility comparisons—a \$1 cost to (say) the pharmaceutical industry is equal to \$1 in saved lives from marginalized communities. This is morally and analytically problematic. Our policymaking should not be neutral as to these different constituencies. In the next two sections, we suggest ways that better account for transfers—who benefits and who loses in income terms—and put regulatory review on sturdier ground. Nonetheless, since cost-benefit analysis is firmly entrenched in contemporary regulatory review, making the changes we recommend at least pushes the process toward responding to existential threats.

Tackling Inequality And Catalyzing Growth

While cost-benefit analysis may be perceived as a technocratic mechanism to measure the value of policy, OIRA could leverage this tool to help measure how well we address one of the major challenges of our day: inequality. Indeed, a new generation of economic analysis demonstrates that inequality is a key force that “obstructs, subverts, and distorts” economic growth (Boushey 2019). This occurs, for example, when would-be entrepreneurs are denied access to the best schools and networks due to opportunity-hoarding by the rich. OIRA can effectively focus attention on the key question of how public policy can reduce inequality, and therefore strengthen the country’s overall political economy.

RECOMMENDATIONS:

- Center the value of social transfers
- Assess how rulemaking redistributes power

CENTER THE VALUE OF SOCIAL TRANSFERS

Executive Order 12866 requires agencies to conduct cost-benefit analysis of certain “significant” rules, including those that have an annual effect of \$100 million or more on the economy (“Executive Order 12866 of September 30, 1993, Regulatory Planning and Review” 1993). And the executive order further acknowledges that distributive impacts are important and should be weighed in considering regulatory alternatives. But the executive order goes on to define narrow “costs” and “benefits” in a way that largely sidelines so-called “transfers” from one subset of the population to another. Simply promoting the discussion of transfers in regulatory review—how policies under review redistribute resources and thereby impact inequality—would signal an important change of emphasis that builds neatly upon existing practices.

To explain, the executive order lays out a broad “regulatory philosophy” that directs agencies to “assess all costs and benefits of available regulatory alternatives,” and eventually to “select those approaches that maximize net benefits.” The executive order

itself does not even discuss transfers, but OIRA's guidance on regulatory analysis, Circular A-4, does advise agencies to distinguish between costs, benefits, and transfer payments (Office of Management and Budget 2003).

Indeed, agencies regularly conduct this analysis. For example, the Obama administration's 2016 overtime rule was projected to extend protections to 4.2 million additional workers by raising the salary that any worker must earn to be exempt from overtime pay (from \$23,660 to \$47,476 per year).²⁹ The overtime rule quantified direct employer "costs" of nearly \$678 million in the first year, and just below \$300 million on average annually over the first 10 years (United States Department of Labor, Wage and Hour Division 2016, 32, 452). But these costs largely involved overhead for employers: becoming familiar with the new regulation, assessing the impact of the regulation on payrolls, notifying affected employees, and closely scheduling and monitoring employees to avoid overtime hours.

Meanwhile, the overtime rule failed to *quantify* any monetary "benefits." The rule instead *qualitatively* described the benefits accruing to workers in having a stronger bright-line overtime rule, including less likelihood to be underpaid, a reduction in litigation, greater work-life balance, and even better health, just to name a few (United States Department of Labor, Wage and Hour Division 2016, 32, 500–04).

The most consequential portion of this rule was classified neither as a cost nor as a benefit, but instead as a series of "transfers" — "payments [that] occur when income is redistributed from one party to another," or here, employers to employees due to the change in the overtime rule (United States Department of Labor, Wage and Hour Division 2016 32, 481–82). In the first year alone, the final rule was estimated to have resulted in \$1.29 billion in transfers from employers to workers. Unlike costs, the average annualized value of these transfers would continue in the range of \$1.2 billion annually for at least a 10-year period.

While agencies clearly calculate transfers under the current cost-benefit analysis regime, this analysis is not relevant to Circular A-4's directive to maximize net benefits.³⁰ In

²⁹ In November 2016, the rule was enjoined by a federal judge in Texas just prior to its effective date. *Nevada v. U.S. Department of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). The labor department appealed to the Fifth Circuit, and even the Trump administration pursued the appeal, though they asked the court to stay proceedings until they could issue a new rule—which they ultimately did in September 2019 (United States Department of Labor, Wage and Hour Division 2019) 84 Fed. Reg. 51, 230 (Sep. 27, 2019). The new rule will raise the overtime threshold modestly to \$35,568 per year, leaving behind more than 3 million workers who would have gotten new overtime protections under the Obama administration's 2016 rule (Shierholz 2019b).

³⁰ The executive order likewise provides in relevant part: "Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits . . ." ("Executive Order 12866 of September 30, 1993, Regulatory Planning and Review" 1993).

effect, it would be difficult to justify the overtime rule on the grounds of maximizing net benefits over a 10-year period: an average annual cost just under \$300 million each year, versus no quantifiable benefits. (United States Department of Labor, Wage and Hour Division 2016, 32, 452).

Another example lies in the Trump administration’s recent final rule adding work requirements for the food security program called Supplemental Nutrition Assistance Program (SNAP) (United States Department of Agriculture 2019b). The US Department of Agriculture itself styled this as a “reduction in transfers” rule, estimating that it will prevent \$7.86 billion to \$8.5 billion in transfers from the government to families facing food insecurity over the next five years (United States Department of Agriculture 2019a). The agency projects no costs or benefits of the rule, so it easily passes muster under a traditional “net benefits” analysis. But taking a step back and assessing the actual impact of this transfer—away from families who need food assistance and toward the government—the rule is harder to justify.

OIRA should direct agencies to at least calculate (when possible) how any given proposal impacts the eventual distribution of benefits from one group to another.

Instead, OIRA should direct agencies to at least calculate (when possible) how any given proposal impacts the eventual distribution of benefits from one group to another.³¹ With sufficient microdata, agencies could significantly expand their analysis of “transfers” in order to break down regulatory impacts in a more systematic way. From what percentile of income distribution does the transfer come? To which percentile is it going? If the transfer is to or from government, how does our system of taxation intersect with the question of who benefits?

³¹ To be sure, there is an ongoing debate among scholars as to whether federal agencies should ever focus on redistribution or even “predistribution” of social welfare (dividing the pie), versus simply maximizing social welfare (growing the pie). For the view that regulators in health and environmental agencies should not focus on distribution (but only maximization of net benefits), see (Kaplow and Shavell 1994). Revesz (2019) makes a compelling argument that there are circumstances when agencies should be focused on redistribution—for example, when the tax system is poorly suited to deal with non-income-based distributional consequences, or when Congress is paralyzed by partisan gridlock (the types of veto points we address in the introduction). If agencies begin to routinely calculate and disclose the distribution of benefits from one group to another, the data they generate will at least contribute to the conversation. Tsuda (2017) has called for distributive impact statements for regulations with significant redistributive impact. These would require identification and publication of potential compensatory mechanisms (such as through the tax code). Since the regulating agency would often not be the same agency that could manage redistribution, this would necessarily be an interagency process—ideal for where OIRA is situated. For an alternative process involving administrative juries of citizens, see (Arkush 2013). And for a broader discussion of the different calculations that might privilege those with lower incomes, see (Adler 2008).

Traditional cost-benefit analysis fails to capture many important policy considerations, as can be seen from recent attempts to apply it where it had been previously unused. As noted above, under a 1983 memorandum of understanding, many Treasury Department regulations have been exempted from the standard OIRA review. However, in April 2018, the Treasury Department and OMB reached an agreement to review tax regulations before their release. This riled tax experts, who argued that OIRA's traditional methods were inappropriate when applied to tax policy, which directly concerns itself with revenue generation and distribution. In a December 2018 report, former Obama administration tax staffers Greg Leiserson and Adam Looney sharply criticized the new procedure, writing that "while the treatment of revenues as a transfer makes sense for the analysis of mandates intended to correct market failures, it is poorly suited to tax analysis. Indeed . . . any tax system would appear to fail a cost-benefit test: Taxation consumes real resources, like taxpayers' time and IRS enforcement costs, and discourages productive activity, such as work and investment, solely to transfer resources from the public to the government" (Leiserson and Looney 2018). They go on to urge tax and OMB officials to instead look to the distributional and revenue calculations made by Treasury's Office of Tax Analysis for insight into the likely impact (and thus implicit desirability) of tax regulations.

While we concur with their argument for exempting taxation policy from traditional CBA, we would go a step further and suggest that even regulations geared toward correcting market failures can benefit from deeper distributional analysis. It would be inappropriate to assume that regulations that respond to public health crises, promote unionization, or help mitigate climate disaster are distributionally neutral.³² Indeed, as we're seeing today, a virus can infect anyone regardless of economic status, but that does not mean that the policy response is class-neutral. Gig workers, those without health insurance, and people experiencing material poverty—not to mention those most closely impacted by structural racism—will suffer more than the rich. We do not adjudicate the methodological issues in any detail here, but Leiserson and Looney's call for greater distributional welfare analysis of tax regulations is promising. Treasury officials in the next administration should work with OIRA's Planning Office to consider how best to apply such analysis to the types of broader market-correcting regulations traditionally reviewed by OIRA. Indeed, we agree with Sunstein, who in a recent book argued that cost-benefit analysis is still in its relative infancy; fleshing out metrics on how regulations will affect the distribution of welfare gains is a vital next step in bringing the "cost-benefit" field into maturity (Sunstein 2018).

³² Indeed, as Liscow (2018) notes, there are reasons to believe that even seemingly neutral policies disproportionately negatively impact those experiencing material poverty.

ASSESS HOW RULEMAKING REDISTRIBUTES POWER

Beyond just considering transfers, which are a proxy for monetary power, cost-benefit analysis could be further reimagined to assess the impact of policies on the broader question implicit above: How does this proposal reshape who has power in society (broadly construed)?³³ Before we get to this, however, one major caveat: We recognize that what we are suggesting more explicitly puts the state's thumb on the scale in favor of one group of people (who happen to be the majority—i.e., working people) over another (the wealthy and businesses). This would be a break from the way government action is often described: While the government plays favorites, it usually does so in more muted tones.³⁴

Political scientists regularly speak of three so-called “faces of power.” The first is when actor A is able to directly compel actor B to do something that they would prefer not to do, perhaps by outvoting or firing them. The second is when actor A is able to set institutional and decision-making rules such that actor B's preferences cannot or will not be taken into account, perhaps by ensuring that a vote never happens or that their concerns are not allowed to be discussed in polite company or the workplace. The third is when actor A uses their social and human capital to change the way actor B thinks, such that their revealed preferences actually go against their own objective interests (Lukes 2004).

The regulatory process can address socioeconomic disparities along each of these axes. First, the views of working people can be given *greater weight* than those of elites and business groups. Regulations that have the support of more people (such as through online polls) or of organizations with a high number of less privileged members (such as comments and letters of support from the large, low-wage service worker union SEIU), could jump to the top of OIRA's queue, displacing regulations or deregulations supported only by business associations.³⁵

This redistribution of power does not only have to be about process: It can also privilege certain outcomes. OIRA could direct agencies to assess policies in terms of whether

³³ See also (Rahman 2017).

³⁴ There are many constitutional, administrative, and labor law questions that would need attention before these ideas could be executed, and we plan to return to these in future work. The present is a work more of visualizing a process and thinking through first principles—namely, that we feel a “preferential option” for workers is justified, given current high levels of inequality and the way these trends are systematically biasing government action.

³⁵ Sen. Elizabeth Warren's plan for trade policy, for instance, showed one way of doing this. She gave labor, environmental, and consumer groups greater numerical representation than business groups on government advisory committees, and allowed expedited congressional consideration only for agreements that had labor support (Warren 2019).

they will lead to increased union density (evaluated through a net institutional density metric). This is obviously beneficial to the workers themselves, giving them a 20 percent wage premium over nonunion workers (Farber et al. 2018). But research has shown that it is also beneficial for communities as a whole, with declining union membership accounting for 20 to 30 percent of the overall inequality rate impacting both union and nonunion workers alike (Rosenfeld 2014). Unions also help boost voter participation and reduce the likelihood of anti-worker legislation being passed (Feigenbaum, Hertel-Fernandez, and Williamson 2018). In short, unions build working people’s power. Thus, policies that have positive effects on union density (or that build worker power in other ways) could jump to the front of a queue and could even see the benefit side of the ledger multiplied by an appropriate index.³⁶

Second, the regulatory process can ensure that working people’s voices and views are heard throughout the life of a project. Likewise, if regulations are not having the intended effect of, say, boosting union density, a modified regulatory lookback from the Regulation Planning Office can take that into account and determine how to right the regulation.

Finally, regulations can help shift the way experts and ordinary citizens think and talk about policy. Agencies should be given credit when their regulations involve publicity-generating activities that help beneficiaries *know* they’re being helped. By identifying environmental conservation or union density as a goal—and then setting up expert committees and training a new generation of scholars and policymakers to better understand how regulations can help achieve that—this OIRA 2.0 approach ensures that progressive objectives become part of the media and policy discourse, and that “epistemic communities” or “communities of practice” grow up around them. This could go a long way to making policy “sticky,” even when progressives are not in power.³⁷ Thus, even conservative administrations or deregulation-oriented agencies have to justify explicitly why they would *not* boost worker power—rather than never having to address the matter in the first place, or being allowed to make assertions unsupported by evidence that “regulations always kill jobs” or that “society can’t afford to regulate.” Keeping inequality centered in the national conversation will make it more likely that the public’s policy preferences will reflect the greatest public interest.

³⁶ For analytic sequence, we separate these labor-focused recommendations from our section on promoting sustainability, but these types of changes to metrics would in fact be part and parcel of the same phase of regulatory review that considers VSLs and discount rates.

³⁷ Our recommendations here are consonant with those suggested in (Hacker and Pierson 2019).

JUDICIAL REVIEW MAY ALSO NEED TO BE 2.0'D

In many ways, the reimagined cost-benefit analysis laid out in this report is very different than the analysis that agencies currently perform pursuant to Executive Order 12866. Some may even argue that reliance on these considerations may jeopardize regulations under the Administrative Procedure Act's "arbitrary and capricious" standard.

"Arbitrary and capricious"—as a standard—should not be read to disallow agencies from taking into account broader contextual considerations in rulemaking. Over the years, various executive orders have already required agencies to consider impacts of rulemaking upon federalism, tribal sovereignty, protection of children, energy supply, constitutionally protected property rights, and civil justice, to name a few.³⁸ In this context, the president can surely ask agencies to disclose whether they have consulted with frontline communities or analyze their efforts to decarbonize without being per se arbitrary or capricious.

Indeed, the Supreme Court has recently held that agencies must consider costs, and that

it would be arbitrary and capricious not to do so. See *Michigan v. EPA* (discussed below). Our new accounting builds upon these core analyses rather than displacing them, providing agencies with a more robust set of data upon which to make their decisions. Indeed, by providing consistent metrics that impose minimal analytical taxes, judges might find it easier to swallow structural reforms *with* OIRA 2.0 than without it.³⁹ That said, if the Supreme Court pushes back on the methods of an OIRA 2.0, we would look to reforms that could be proposed to the Administrative Procedure Act (and perhaps even the National Labor Relations Act) to allow this more context-rich consideration to proceed.

³⁸ See ("Executive Order 13132 of August 4, 1999, Federalism" 1999; "Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments" 2000; "Executive Order 13045 of April 21, 1997, Protection of Children from Environmental Health Risks and Safety Risks" 1997; "Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" 2001; "Executive Order 12630 of 1988, Governmental Actions and Interference with Constitutionally Protected Property Rights" 1988; "Executive Order 12988 of February 5, 1996, Civil Justice Reform" 1996).

³⁹ For reasons why even an overhauled cost-benefit analysis might be to judges' liking, see (Masur and Posner 2018).

During the Clinton administration, some OIRA officials reported having a desire to use cost-benefit analysis and regulatory review to improve—not just weaken—regulation. They complained, however, that outside advocates did not “play the game,” such as by spending their staff resources to hire economists and engineers who could quantify the benefits of regulation.

Frankly, this is a lot to ask of advocates. Not only are many opposed in principle to the notion of this type of commodification and quantification (Ackerman and Heinzerling 2005), but declining union density and anti-structuralist philanthropic giving make it nearly impossible to raise enough funds to come close to matching the analytic firepower of big business (Giridharadas 2019). Moreover, the regulatory process tends to splice the relevant policy questions into such small slices (Revesz and Livermore 2008) that it would be difficult for dispersed networks of NGOs to even identify which processes most merit their attention. Even were they to identify the right intervention, it could be in such a technical setting that it would be difficult to get their grassroots members and funders to focus attention and money on this. In short, excessive technocracy obscures the political stakes and favors those with the deepest pockets. But a refashioned OIRA allows alternative means for the regulatory process to arrive at outcomes that serve workers’ interests.

Boosting Equity And Inclusion

OIRA's guiding executive orders acknowledge the importance of equity and inclusion in regulatory review. Executive Order 12866 has long established that equity is one of the net benefits that should be maximized in choosing among regulatory alternatives ("Executive Order 12866 of September 30, 1993, Regulatory Planning and Review" 1993). Executive Order 13563 reaffirms this commitment, though it concedes that values like equity, human dignity, fairness, and distributive impacts can be difficult (if not impossible) to quantify ("Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review" 2011).

But in practice, few agencies actually center equity and inclusion in crafting regulations and examining regulatory alternatives. Most agencies treat rulemaking as a race- and gender-neutral practice, but policies that are built upon historical structures of racism and patriarchy are rarely "neutral" in practice (Flynn et al. 2016). Facially neutral policies may nonetheless adversely impact groups that are too often marginalized, including Black and brown people, immigrants, women, LGBTQ+ individuals, Native peoples, young and old people, and people with disabilities.

Most agencies treat rulemaking as a race- and gender-neutral practice, but policies that are built upon historical structures of racism and patriarchy are rarely "neutral" in practice.

Throughout this paper, we have included recommendations that will boost equity in rulemaking—for example, by tackling inequality. In this section, we propose an additional recommendation to more explicitly center the interests of marginalized groups, and by extension, everyone across the nation. We recognize that our recommendations in the previous sections were intended mostly to speed up the regulatory process. Consultation and inclusion of the kind we outline here—all else equal—will tend to slow things down. This is one area where the Regulation Planning Office can help determine how agencies can best execute on these tasks while staying within the 45-day deadline.

RECOMMENDATIONS:

- Measure impacts on marginalized groups
- Create incentives to engage impacted communities

MEASURE IMPACTS ON MARGINALIZED GROUPS

OIRA should require agencies to consider the disparate costs and benefits shouldered by women, communities of color, immigrants, people with disabilities, and other communities that are too often marginalized in the policymaking process. As a first step, OIRA should require agencies to complement existing cost-benefit analysis with an “equity analysis” to assess the impact of proposed policies on marginalized communities. Depending on the policy, this would involve considering which group (or groups) tend to be marginalized in this particular context. For example, policies involving air pollution could potentially benefit (or harm) Black communities and other non-white communities at higher rates than the population as a whole (Mikati et al. 2018). Policies involving reproductive rights may have life-threatening impacts on transgender men in particular (Mamone 2019).

Agencies should focus their equity analysis on the impacts of policy changes on these marginalized groups, but they should be allowed to tailor their analyses based on the quality of data available. If robust microdata are available, this could be a quantitative analysis.⁴⁰ Alternatively, an agency could simply approximate the effects of their proposals by extrapolating from the findings of prior high-quality studies. At minimum, agencies can outline and acknowledge the qualitative equity impacts of their policies, along with their efforts to proactively engage impacted communities and solicit their feedback. Agencies should always balance the importance of preparing a robust analysis versus the urgency of pursuing action, not to mention the impact of inaction.

By centering marginalized communities and assessing impacts upon them, this equity analysis will illuminate differential impacts of policies on those populations—whether or not intentional—and should be disclosed to the public. Some communities may react by pressing agencies to rethink their policies, or they may decide to lend support toward policies that they deem beneficial. Indeed, if these impacts are beneficial for

⁴⁰ See for example (Shierholz 2019a). Importantly, this analysis should not be used as a means of delaying rulemaking. Agencies should be empowered to ask questions of the public and even crowdsource data to inform supplemental analysis if possible.

the most marginalized populations, then the policy is also likely to have benefits for the population as a whole.⁴¹

The CUNY Institute for State and Local Governance’s Equality Indicators could provide a starting point for this analysis (CUNY Institute for State & Local Governance n.d.). The indicators provide a taxonomy of connected indicia of impacts across a variety of policy areas. They were explicitly developed to be reported in numbers and narratives, respectively, depending on the indicator. PolicyLink’s National Equity Atlas provides another resource for centering equity in policymaking, compiling data on demographic change, racial inclusion, and the economic benefits of equity for the largest cities, regions, and states around the country (PolicyLink n.d.).

More concretely, a new spate of social science research gives us new tools to assess how given regulatory changes affect communities. Economist David Autor and coauthors have developed a new data set on the impact of the so-called “China Shock” to see how an exogenous factor like increased imports can affect unemployment, other public benefits spending, tax revenue, and even political partisanship (Autor, Dorn, and Hanson 2016). This work has been extended by others to study how such exogenous shocks impact rates of opioid overdose and military enlistment (Dean 2018). OIRA should partner with the National Economic Council to commission studies on the best possible estimates of the impact of regulations on these types of sociotropic indicators.

Importantly, this sort of specialized analysis is far from unprecedented. The Regulatory Flexibility Act—which was enacted immediately prior to President Reagan’s first executive order mandating cost-benefit analysis—requires agencies to publish an analysis of the impact of certain proposed and final rules on small businesses, broadly defined. While the law does not mandate any particular outcome as a result of that analysis, it does empower the previously described Small Business Administration’s Office of Advocacy to monitor compliance with the law. The Office of Advocacy now boasts that its “efforts to have agencies comply with the Regulatory Flexibility Act have saved small businesses billions of dollars in regulatory costs” (Small Business Administration, Office of Advocacy n.d.).

⁴¹ Rebecca Dixon and colleagues at the National Employment Law Project convincingly argue that designing policy to benefit the most marginalized populations is likely to have beneficial impacts across the population, without leaving anyone behind—as is too often the case. Janelle Jones makes a similar point in the context of economic policy, coining the phrase “Black women best”: “If the economy is working well for Black women, what does that mean for literally every other group of people in the economy? It means everyone else is doing absolutely fine. And it is a way to center the folks who have been completely left out, completely marginalized . . .” (“Transcript | Episode 26: Angela Hanks and Janelle Jones” 2019). PolicyLink founder Angela Glover Blackwell uses the concrete example of curb-cuts, which were a key demand of disability rights protesters in the 1970s, to enable basic mobility for people who use wheelchairs (Blackwell 2017). Activists in Berkeley, California, famously made their own curb-cuts at key intersections to prove their point. But once they became the norm, curb-cuts became important to others who were outside their original core demographic: workers pushing carts, travelers with luggage, and young parents navigating baby strollers. In this case, designing sidewalks to be accessible to people who used wheelchairs had spillover benefits for society as a whole.

CREATE INCENTIVES TO ENGAGE IMPACTED COMMUNITIES

In addition to measuring the impact of policies on marginalized communities, OIRA can advance equity and inclusion by creating incentives for rulemaking agencies to engage affirmatively with communities impacted by their regulations, especially those that lack the resources and expertise to proactively get involved.

The rulemaking process generally provides opportunities for public input, usually including a period during which members of the public can comment on a proposed rule. As a practical matter, industry groups have long used this process to provide their input. Well-organized advocates have increasingly used this process as well. But notice-and-comment rulemaking remains a process focused on insiders.

Even less known, stakeholders have the opportunity to provide input on the general topic of rules while they are under review at OIRA. Any stakeholder can ask for a meeting to provide their input, though they are not given additional information about the rule under review (e.g., a draft). In practice, industry representatives that both know about the process and have the resources and staff power get the lion's share (as much as 73 percent) of OIRA's time (Steinzor, Patoka, and Goodwin 2011). If these meetings cannot be made more even, this practice should end; regulated industries should not be given special access because of their resources and knowledge of the system.

OIRA should create incentives for rulemaking agencies to consult with impacted communities, and give seats at the table to communities that tend to be marginalized by the policymaking process.

Indeed, OIRA should create incentives for rulemaking agencies to consult with impacted communities, and give seats at the table to communities that tend to be marginalized by the policymaking process. For example, agencies can be asked to check a box when they submit rules for review indicating that they consulted impacted communities, and those rules could be moved into a queue for priority review absent other circumstances.

In addition to promoting equity, this step also promises improvements in policy design, a better chance for successful policy implementation, and enhanced civic participation, given that individuals and communities impacted by laws and rules often bring a

MORE PARITY NEEDED BETWEEN WORKER AND BUSINESS INTERESTS

The challenge of businesses being given disproportionate access goes beyond OIRA. The Regulatory Flexibility Act created a quasi-independent (but taxpayer-funded) Office of Advocacy within the Small Business Administration, with that office playing an outside role in opposing regulations from within the government. OIRA shares draft rules with SBA Advocacy to review their impact on “small businesses,” often defined to be businesses with 1,000 or fewer employees, depending on the industry.⁴² The agency convenes regular roundtables with business stakeholders around the country. It tends to take issue with rules that create costs for businesses (including transfers away from businesses), and it routinely issues public statements (usually letters) opposing proposed rules, as described above with the Obama administration’s overtime rule. The process of “resolving” these concerns in OIRA’s interagency review process can involve both significant delays and potentially consequential policy changes that actually run counter to the regulation’s underlying goals.

There is of course no corresponding taxpayer-funded office to advocate for the interests of working people, and this creates a significant asymmetry. Either an analogous office should be created to advocate for workers, or Congress should amend the Regulatory Flexibility Act to dissolve SBA Advocacy (Block 2019). Alternatively, decision-making principles should empower OIRA not to allow SBA Advocacy’s input to delay rulemaking once key decisions to pursue policy have been made. This is especially the case when there is no principled reason for exempting small business. This dynamic was on display during the March 2020 debates on extending paid sick leave to workers during COVID-19, where small (and large) businesses were exempted from complying. If the policy goal is to ensure that sick workers’ need or desire to go to work doesn’t have the externality of infecting colleagues or customers, then there is no principled reason for exempting small business.

⁴² See (Small Business Administration 2019). Sen. Elizabeth Warren has proposed legislation creating a similar Office of Public Advocate as well (Warren 2018). See also (Nader 2000).

particular expertise that is too often missed by (or even undervalued by) policymakers (Bergstrom et al. 2012, 4–5). Particularly when it comes to Native peoples, such a new process could be a way to codify their rights under the emerging international law of prior informed consent (Ward 2011).

K. Sabeel Rahman has taken a step further by arguing to codify “interest representation” in policymaking, not to mention expanding other opportunities for meaningful participation in the development and implementation of policy (Rahman 2017). Drawing upon current examples of participatory governance, Rahman recommends the following policy reforms relevant to OIRA in a 2016 white paper for Roosevelt:

1. Institutionalizing stakeholder representation within regulatory agencies, including by creating proxies for particular stakeholder groups;
2. Issuing an executive order on participatory regulation, tasking OIRA with assessing whether agencies have adequately engaged stakeholders; and
3. Staffing agencies with appointees who will prioritize participation.⁴³

To be sure, some scholars have analyzed data on earlier efforts to codify input and questioned the effectiveness of more formal participatory rulemaking efforts, at least in speeding up rulemaking or insulating it from litigation.⁴⁴ Regardless, there are other important goals behind public participation. Agencies can reach more responsive policy outcomes—and potentially even better assess the impact of regulation—by tapping into the expertise of those who are impacted by government policy but often least likely to have the opportunity to make their voices heard. Institutionalizing the role of organized communities also builds power in those communities, which should be a core goal of any progressive administration.

Our proposal will also socialize a variety of metrics and consultation procedures, which will themselves have spillover effects. For one thing, a broad variety of agencies would begin to develop expertise in areas such as equity, which will inform other policy processes, too. Second, experts and affected communities will be invested and mobilized in a process that they would defend against rollbacks. In other words, our reforms would be expected to be “sticky” in a way that other ideas like “deregulation” or elimination of OIRA would not be.

⁴³ See (Rahman 2016).

⁴⁴ For example, see (Coglianese 1997).

OIRA could strike a balance in promoting public participation without bogging down the rulemaking process by creating incentives for agencies to pursue a streamlined participatory process. For example, when President Obama directed his labor department to update the overtime threshold, he pledged to “do this the right way,” consulting with both workers and businesses to update the overtime rules (The White House 2014). As a result, the Department of Labor not only solicited public comments, but prior to issuing its proposed rule, it held no less than dozens of roundtables with key stakeholders including individual workers, worker advocates, individual employers, and industry groups, all of which represented a wide range of industries: construction, higher education, energy, financial services, health care, hospital, information technology, professional and technical services, retail, restaurant, telecommunications, transportation, and wholesale trade industries. OIRA could encourage agencies to take further steps to solicit input with an eye toward equity, and further use that input to shape their regulatory proposals. Congress should consider APA reforms to ensure that this sort of experimentation is not discouraged.

Alternatively, agencies could actually institutionalize a rotating set of directly impacted individuals within the government. For over a decade, the Department of Education has managed a (paid) fellowship program to bring teachers, principals, school counselors, and librarians into government with yearlong fellowships designed in part to bring their voices into national policy discussions (United States Department of Education 2019). Other agencies could host similar programs to engage leaders from communities that are impacted by the policies they are creating. For example, the Department of Labor could bring domestic workers and movement leaders into government to assist in the development and implementation of new policies that affect those workers.

Given that background, OIRA could encourage agencies to apply the following key principles for implementing proactive engagement, perhaps by providing technical assistance to agencies in coordination with the White House Office of Public Engagement:

Design proactive outreach with an equity lens:

Agencies should conduct proactive outreach to stakeholders representing marginalized communities in particular. They should reach out broadly, with the recognition that marginalized communities are not homogenous. At the same time, engagement strategies must be streamlined and finite simply to balance the importance of engagement versus the imperative for action, understanding that a more expedient regulatory process can lower the barriers to future corrective rulemaking as needed.

Simplify engagement:

Agencies should design engagement mechanisms that make participation easier, including by publishing plain language policy descriptions and language-appropriate documents and by creating opportunities for conversations in addition to written comments. The goal is not to place the burden on communities to build the same kinds of analysis that industry representatives can create, but for the agency to engage them to better understand their experiences.

Develop data sets:

Agencies should attempt to use input provided through these affirmative engagement efforts to build data sets that could help quantify benefits.⁴⁵ For example, stakeholders could be asked experimental questions to help quantify (or at least estimate) the potential impact of proposed policies on their communities, not unlike the exercises used to develop the valuation of statistical life estimates. Admittedly, these efforts may require OIRA clearance under the Paperwork Reduction Act, or even a statutory fix that allows agencies to more freely seek voluntary feedback.⁴⁶

Seek feedback on priorities:

Agencies should conduct outreach to stakeholders representing marginalized communities not only to shape each particular policy reform but also to help prioritize which policy reforms to pursue in which order. Any administration will have limited resources, and the choice of which policies to pursue has a necessary impact on which policies are actually implemented. Meanwhile, the sequencing of priorities has an important impact on power-building efforts in communities.

Engage around implementation:

Agencies should seek input both on policy priorities and design choices and on policy implementation, in order to ensure that resulting programs are accessible to intended beneficiaries (Herd and Moynihan 2019).

By implementing simple prioritization of rules that are shaped by public participation, and by offering technical assistance, OIRA can encourage agencies to deepen engagement with a broad variety of key stakeholders.

⁴⁵ We appreciate David Weil's input on this suggestion.

⁴⁶ For an explanation, see (Nayak 2019).

Enhancing International Competitiveness

In the last several decades, the US has, in effect, exported our model for regulatory review to other countries through international trade and investment agreements. Going forward, OIRA could be tasked with exporting this reimagined rulemaking instead, effectively locking in and reinforcing an updated model for reviewing everything from consumer safety to environmental protection.

RECOMMENDATIONS:

- Identify changes to international rules
- Study best practices overseas

IDENTIFY CHANGES TO INTERNATIONAL RULES

The domestic rulemaking process does not take place in a vacuum. Rather, a network of (often pro-deregulation) treaties constrains the scope for government action—and trade and foreign policy officials can use the rulemaking process to water regulations down in the name of compliance. Contemporary trade agreements have relatively little to do with traditional matters, such as tariffs, and much more to do with how countries regulate within their borders. For instance, a burgeoning number of “trade” disputes are actually about bank and financial regulations (Lupo-Pasini 2018).

Take the area of food and product safety. In the coming years, climate change will damage food systems and introduce new types of crop contamination and disease (World Health Organization 2018). Chapter 9 (“Sanitary and Phytosanitary Measures”) of the recently passed US-Mexico-Canada Agreement (USMCA) generally requires that countries pick food safety regulations that are least restrictive to trade flows and based on scientific and international consensus. Yet there is an asymmetry between the issues regulators must consider. On the one hand, agribusiness industries have ample experience intervening in the regulatory process to share readily quantified and quantifiable (usually negative) impacts of regulation on their business models. On the other, regulators face substantial uncertainty surrounding new food safety risks,

some of which are not easily quantified.⁴⁷ This amounts to a bias against experimental and precautionary regulations. Indeed, the chapter requires countries to consider not regulating as an option.⁴⁸

Likewise, the USMCA has a dedicated chapter on regulatory review that reinforces this overall approach. This commits all three governments to have in perpetuity OIRA 1.0-like offices that support compliance with international trade and investment obligations and encourage regulatory approaches that avoid burdening commerce and small business. As a condition of USMCA membership, each party will have to publish a list of anticipated regulations every year, identifying whether and how they will affect international trade. As many international treaties give foreign investors legal standing to challenge regulations for cash compensation, publication of this list is like creating a target list for international litigation.⁴⁹ With COVID-19 leading policymakers to fundamentally rethink public health and rapid response to crisis, 2020 is the time for significant flexibility in this space.

One function of the Regulation Planning Office will be to identify international rules (like those outlined above) that should be changed in order to make these experimental policies work better. One concrete step that the Planning Office could take would be to design more robust “public policy” exceptions to trade and other international agreements. These refer to provisions that allow a country to break its obligations toward unfettered commerce for (say) environmental policy reasons if certain (usually quite onerous) requirements are met. There has been a live debate for decades among public interest advocates about how to have more generous exceptions. Currently, their interlocutor for these questions is the Office of the US Trade Representative, which by its mission focuses on trade over public interest questions. Coming up with more and better exceptions would be a natural fit for this new OIRA subagency.

STUDY BEST PRACTICES OVERSEAS

It’s not enough that the international rules be more accommodating of structural policy reform on paper. At both the domestic and international levels, the US should follow through by institutionalizing the learning of best practices and making sure that governments follow them.

⁴⁷ (Ackerman and Heinzerling 2005).

⁴⁸ Article 9.6.9: “Each Party shall consider, as a risk management option, taking no measure if that would achieve the Party’s appropriate level of protection.”

⁴⁹ Academic research shows that this so-called “chilling effect” of international rules is particularly effective in developing countries where the culture of rulemaking is toward compliance with any and all applicable rules. See (Berge and Berger, n.d.).

For example, other developed countries generally put fewer procedural and legal hurdles in the way of structural change. This was especially evident in the response to the COVID-19 crises, when many Asian and European economies quickly instituted quarantine, industry nationalization, and other measures to safeguard public health. OIRA 2.0 should learn from best practices of other countries. Policies should be evaluated by how well they position the US relative to other competitors that engage or have engaged in economic planning, such as China, Japan, and the EU. For instance, in the pivotal years of Japan's industrial policy, the government controlled access to all foreign exchange, and used this lever (and regulatory approvals more generally) to direct investment into favored sectors (Johnson 1982). China's policy banks, to cite another example, have played a leading role in promoting decarbonization at home and abroad (Kong and Gallagher 2017). It seems unlikely that the US would adopt such extensive control over the access to capital, so one job for a reworked OIRA would be to identify alternative carrots and sticks the public sector can use to achieve similar objectives.

In addition to quantifying benefits for domestic policy based on international experiences, OIRA can help improve analysis of costs and benefits of the US's international policies. As noted above, the official government estimates for the USMCA only showed positive income effects because of the assumption that Canada and Mexico would be barred from changing regulatory policy in the future (USITC 2019). There is no reason policy lock-in should be seen as positive for the world. If Canada or Mexico were to come up with some bold new way of regulating the fossil fuel or pharmaceutical industry, that should be calculated as a benefit. Thus, the Planning Office can help ensure that government estimates of new trade deals should factor in a range where the possibilities of under-regulation as a result of regulatory chill are taken into account.

Likely Objections

There are two classes of objections to our proposal: first, that they go too far, and second, that they don't go far enough.

Many proponents of pre-Trump regulatory review would contend that OIRA works best when operating in a narrow technical capacity that is apolitical. As former Administrator Cass Sunstein says, "most of the OIRA process is technical, not political" (Sunstein 2013, 1871). OIRA's career analysts and economists are public servants who are deeply dedicated to their mission of administering Executive Order 12866, the core focus of which is cost-benefit analysis. But as described at length here, traditional cost-benefit analysis is an important tool, but no more "neutral" or "nonpolitical" in its considerations than any other tool of analysis. Cost-benefit analysis cannot be neutral when it centers neither equity nor transfers in a nation whose economy is marked by surging inequality with undeniable race-specific impacts.

Likewise, progressives may worry that expanding OIRA provides additional opportunities for business to capture the regulatory process. Put more simply, the Regulatory Planning Office gives well-resourced industry groups a clearer agenda-setting target in the White House. Meanwhile, it dilutes the resources of progressive advocates who are already stretched thin advocating before other agencies. Beyond that, this office could be harnessed by anti-regulatory advocates to advance a proactive anti-regulatory agenda. While these are all reasonable concerns, they apply equally to OIRA as it exists today. The biggest difference is that the Regulatory Planning Office establishes a countervailing institution within OIRA that does not currently exist.

Other proponents of traditional cost-benefit analysis might argue that radically revamping the types of metrics used in regulatory review takes us beyond the best economics research. Yet this elevates the tools of just one academic discipline above others, and so also reflects the biases and blind spots of the economic profession. Since the 2008 financial crisis and the #MeToo movement, new research has shown that the demographics of the overwhelmingly male and white economics discipline bias what kinds of questions are even asked (Fourcade, Ollion, and Algan 2015) (Appelbaum 2019). Sociologists specializing in sociotropic community impacts of job loss, anthropologists and psychologists knowledgeable about the subjective experience of pain and disempowerment, and political scientists researching how inequality leads to political

polarization and breakdown—these experts all have insights that should be incorporated into any comprehensive regulatory review process. Moreover, as we showed above, even within economics, there are different estimates of the optimal valuation of life and the future. Our call for more research is consistent with the goal of putting regulatory review on sound footing. Of course, the lack of additional research cannot in the meantime grind the administrative state to a halt, so we should put some default estimates in place as a transitional measure.

Critics of regulatory review might argue we do not go far enough. Given that they place blame on OIRA for delaying, rejecting, or even watering down new regulations, these critics might argue that it would be better to dismantle the body altogether. The international experience shows that agencies should be given free rein and limited constraints—think the industrial policy and planning apparatus in Japan’s famous Ministry of International Trade and Industry (MITI). And, to many, accepting the premise of metrics like the value of a statistical life is inherently morally objectionable.

While we are sympathetic to the motivations behind these critiques, we find them unpersuasive. As noted above, in a state apparatus with dozens of different agencies, regulatory review has to happen, and it has to live somewhere. Having it be near the White House in the office responsible for management and budget concerns (OMB) is the most logical place for this function to be housed. This is unlike some other agencies that operate from similar chokepoints in the interagency process but for which there is no strong functional justification for the arrangement.⁵⁰ OIRA’s role in ensuring consistency with administration objectives will be even more important to any administration that turns to ambitious rulemaking in an effort to address the structural challenges facing our nation.

Why not an American MITI? There would undoubtedly be benefits to a comprehensive reorganization of the American state so that it more closely mirrors innovation structures in our high-performing European and Asian counterparts. Yet the long history of failed reorganization attempts—even under presidents who ran on transformational change agendas—indicates that the veto actors that characterize American life (namely, congressional committees invested in holding onto their jurisdictional oversight over agencies) would be likely to block any such attempts

⁵⁰ For instance, the US Trade Representative negotiates trade treaties, a task that can be and was previously done by the State Department. It also is the lead on trade litigation and monitoring of trade policy, which could easily be housed elsewhere. See (Meyer and Sitaraman 2018).

to change statutes in major ways. Indeed, transformational presidencies can waste substantial political capital fighting over structure and process, when substantive policy change that improves people’s lives is vastly more important for their reelection prospects (March and Olsen 1983) (Ilias 2012). Our proposals are thus a way to do structural change “the American way”—requiring few if any changes to congressional committee jurisdictions. By attaching this agenda to an agency, a process, and metrics that already exist (OIRA, regulatory review, and cost-benefit analysis), a new administration would minimize transition costs.

Our proposals are thus a way to do structural change “the American way”—requiring few if any changes to congressional committee jurisdictions.

Furthermore, personnel is policy (Warren 2020). If the next administration prioritizes placing committed personnel into key positions in existing agencies like OMB and OIRA, they will be well-positioned to implement the reforms laid out in this paper. This strategy is inherently less risky than starting with a reorganization, which risks placing key appointees into the wrong parts of the structure.

Relatedly, this proposal allows us to sidestep the governance challenges of setting up a whole new body. Some have proposed setting up a new development bank for the US modeled on the Reconstruction Finance Corporation of the 1930s. This body could raise money by issuing bonds to the buying public and invest in decarbonization and other industrial initiatives, with a government backstop to ensure solvency. This idea has a lot to recommend it, especially by circumventing the problem of having to secure congressional appropriations every year. However, because it would be independent, it would be beyond the control of the president and their agenda. We assume that a policy shift of the kind we are advocating would have to be embodied by progressive elected officials—not independent technocrats who might revert to small-c conservative fiduciary stewardship of their resources. It is possible (and even desirable) to have such a body that can continue to make investments in quadrennials when progressives are not in government, but it is vital as a matter of sequencing that an administration move first with levers it can more directly control. In the process, it can generate new data and technical practices of the kind we outline here, which could in time help influence the way a new independent body would conduct its lending operations.

One weakness of our proposal would be that it could be easily utilized by a conservative administration to delay regulation or pursue deregulatory actions. However, this vulnerability is already present. Nonetheless, the new OIRA substructures and the new metrics we propose benefit from being stickier than simply hiring a specific OIRA administrator.

The new OIRA substructures and the new metrics we propose benefit from being stickier than simply hiring a specific OIRA administrator.

As to the moral objection to cost-benefit analysis per se, again, we are very sympathetic to these claims. However, it seems far more preferable to quantify the community and ecological benefits of regulation than to attempt no accounting at all, especially in light of *Michigan v. EPA*, a recent Supreme Court decision holding that the Environmental Protection Agency could not find a rule “appropriate and necessary” when the agency deemed costs irrelevant in deciding whether to regulate power plants.⁵¹ Judicial review of regulation benefits immensely from having numbers to look at—as judges are ill-equipped to weigh and balance delicate normative questions or the underlying science (Revesz 2014).

As we argued above, new metrics of the kind we propose would also create a new political and policy vocabulary that makes further structural change more likely. Candidates for office in, say, 2040 could then make a robust case for the benefits of policy in terms of their boost to union density or carbon reductions, rather than remaining stuck in an old debate about whether regulation will hinder growth, or whether government has the capacity to execute on such a vision. A new OIRA can promote new ways of thinking throughout the executive branch, and by extension, the broader policymaking community.

Finally, a more general objection either proponents or critics of modern regulatory review could make is that our proposals slow down the regulatory process even further, by adding additional consultation and research requirements, at a time when many want to see the regulatory process go faster. We are also sympathetic to this criticism,

⁵¹ But note that even Sunstein, a longtime advocate of cost-benefit analysis, counsels against reading *Michigan* as creating “a presumptive duty both to quantify benefits and costs and to demonstrate that the benefits justify the costs” in the APA (Sunstein 2018, 151). Not only would that be ahistorical, given that cost-benefit analysis was not widely used until decades after the APA was enacted in 1946, but Congress has not explicitly required balancing in this law as it has elsewhere.

which is why the various planks of our proposal incorporate flexibilities depending on data availability or defaults that can guide action while better metrics are being developed. Meanwhile, we fully support parallel efforts to streamline the rulemaking process alongside our recommendations largely for improving the substance of cost-benefit analysis. Indeed, with a streamlined and lighter-lift rulemaking process in place, agencies could more effectively consult with those who are impacted by rules on an ongoing basis and make incremental changes as needed.

Conclusion

Nearly four decades after the Reagan administration's formalizing of cost-benefit analysis in regulatory review, the Trump administration has perhaps done more to systematically and methodically erode core aspects of cost-benefit analysis than any previous president of either party. The Trump administration has dismantled much of the EPA's advisory committee and is now using discount rates and lower life valuations to block progress on needed environmental regulations (Boyle and Kotchen 2019).

There will doubtless be advocates who seek to take advantage of the dire situation to abolish regulatory review altogether. On the other hand, there will be others who reasonably argue that the next administration should rebuild cost-benefit analysis just as it previously was, reanimating Executive Order 12866, Circular A-4, and other longstanding OIRA policies that have served as bedrocks of rulemaking for the last generation (or more).

But we urge the next administration to do neither. As described above, OIRA and our regulatory review process can help ensure sound policy. But we do think it is important to acknowledge that our collective assessment of good policy has changed significantly in the nearly 30 years since Executive Order 12866 was signed. Our regulatory process should reflect the latest research methods and stakeholder engagement practices, not to mention the long overdue equity revolution underway that promises to bolster our democracy by finally empowering those who have been systematically left behind over time.

OIRA and our regulatory review process can help ensure sound policy. But we do think it is important to acknowledge that our collective assessment of good policy has changed significantly in the nearly 30 years since Executive Order 12866 was signed.

Whether the next administration is rebuilding our tattered public health infrastructure, implementing a version of the Green New Deal, or building out a real vision for industrial policy, it is long past time to build new models of public accounting into our formal decision-making—and the Trump administration's attacks on cost-benefit analysis provide an opportune window to take on that challenge. We urge the next OIRA to consider this report a roadmap for crafting successors to Executive Order 12866 and

Circular A-4, both to provide OIRA staff clear guidance and to help agencies produce richer versions of cost-benefit analyses, balanced against the imperative to act swiftly and a commitment to revisit regulations as needed.

In short, what comes next—specifically, how the next administration strikes the balance in rebuilding or reimagining the regulatory review process—will have important consequences. This effort could mean the difference between years of frustration and wasted opportunity ahead, and the advancement of a proactive agenda for workers' rights, climate justice, consumer protections, access to health care, and even an industrial policy that will create new jobs to support our nation through the remainder of the century.

Bibliography

- Ackerman, Frank, and Lisa Heinzerling. 2005. *Priceless: On Knowing the Price of Everything and the Value of Nothing*. New York: New Press.
- Adler, Matthew D. 2008. "Future Generations: A Prioritarian View." *Geo. Wash. L. Rev.* 77: 1478.
- Alberini, Anna. 2019. "Revealed versus Stated Preferences: What Have We Learned About Valuation and Behavior?" *Review of Environmental Economics and Policy* 13 (2): 283–98. <https://doi.org/10.1093/reep/rez010>.
- Appelbaum, Binyamin. 2019. *The Economists' Hour: False Prophets, Free Markets, and the Fracture of Society*. New York: Little, Brown and Company.
- Arkush, David J. 2013. "Direct Republicanism in the Administrative Process." *Geo. Wash. L. Rev.* 81: 1458.
- Autor, David H., David Dorn, and Gordon H. Hanson. 2016. "The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade." *Annual Review of Economics* 8: 205–240.
- Berge, Tarald Laudal, and Axel Berger. n.d. "Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation." In *PluriCourts-ICourts Workshop*.
- Bergstrom, Danielle, Kalima Rose, Jillian Olinger, and Kip Holley. 2012. "The Community Engagement Guide for Sustainable Communities." The Sustainable Communities Initiative. https://www.policylink.org/sites/default/files/COMMUNITYENGAGEMENTGUIDE_LY_FINAL%20%281%29.pdf.
- Blackwell, Angela Glover. 2017. "The Curb-Cut Effect (SSIR)." *Stanford Social Innovation Review*. https://ssir.org/articles/entry/the_curb_cut_effect.
- Block, Sharon. 2019. "Advocating for a Workers' Advocate | On Labor." June 2019. <https://onlabor.org/advocating-for-a-workers-advocate/>.
- . 2020. "Why American Workers Have Been Left Out of Our Life-and-Death Decision-Making." *The American Prospect*, March 30, 2020. <https://prospect.org/api/content/6f888186-7161-11ea-9c9c-1244d5f7c7c6/>.
- Bolton, Alex, Rachel Augustine Potter, and Sharece Thrower. 2014. "Presidential Oversight and Regulatory Delay: How Politics and Organizational Capacity Influence OIRA Rule Review," May, 42.
- Bonfield, Arthur Earl. 1972. "Military and Foreign Affairs Function Rule-Making Under the APA." *Michigan Law Review* 71 (2): 221–358.
- Bossie, Andrew, and J.W. Mason. 2020. "The Public Role in War Production: Lessons from WWII." New York: Roosevelt Institute.
- Boushey, Heather. 2019. *Unbound: How Inequality Constricts Our Economy and What We Can Do about It*. New York: Harvard University Press.
- Boyle, Kevin J., and Matthew J. Kotchen. 2019. "Policy Brief—The Need for More (Not Less) External Review of Economic Analysis at the US EPA." *Review of Environmental Economics and Policy* 13 (2): 308–316.
- Brown, Dana, and Steph Sterling. 2020. "In the Public Interest: Democratizing Medicines through Public Ownership." New York: Roosevelt Institute.
- Carey, Maeve P. 2019. "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register." Congressional Research Service. <https://fas.org/sgp/crs/misc/R43056.pdf>.
- Cassella, Megan. 2020. "The Disappearing Defense Production Act." *POLITICO*, March 25, 2020. <https://politi.co/2Uyxng>.
- CEA. 2017. "DISCOUNTING FOR PUBLIC POLICY: THEORY AND RECENT EVIDENCE ON THE MERITS OF UPDATING THE DISCOUNT RATE." Washington, DC: Council of Economic Advisors. https://obamawhitehouse.archives.gov/sites/default/files/page/files/201701_cea_discounting_issue_brief.pdf.
- Coglianesse, Cary. 1997. "Assessing Consensus: The Promise and Performance of Negotiated Rulemaking." *Duke Law Journal* 46 (6): 1255–1349.
- . 2012. "Moving Forward with Regulatory Lookback." *Yale J. Reg. Online* 30: 57.
- Cowen, Tyler. 2007. "Caring about the Distant Future: Why It Matters and What It Means." *U. Chi. L. Rev.* 74: 5.

- Cropper, Maureen, Arthur Fraas, and Richard Morgenstern. 2017. "Looking Backward to Move Regulations Forward." *Science* 355 (6332): 1375–1376.
- CUNY Institute for State & Local Governance. n.d. "Equality Indicators." Institute for State and Local Governance. Accessed March 16, 2020. <https://islg.cuny.edu/sites/our-work/equality-indicators/>.
- Dean, Adam. 2018. "NAFTA's Army: Free Trade and US Military Enlistment." *International Studies Quarterly* 62 (4): 845–856. <https://doi.org/10.1093/isq/sqy032>.
- Ehrlich, Sean D. 2011. *Access Points: An Institutional Theory of Policy Bias and Policy Complexity*. 1 edition. New York: Oxford University Press.
- Eilperin, Juliet. 2018. "The Trump Administration Keeps Losing Environmental Court Cases." *Washington Post*, August 18, 2018. <https://www.washingtonpost.com/energy-environment/2018/08/18/trump-administration-keeps-losing-environmental-court-cases/>.
- EPA. 2016. "Recommended Income Elasticity and Income Growth Estimates: Technical Memorandum." Washington, DC: Environmental Protection Agency Office of Air and Radiation and Office of Polic. [https://yosemite.epa.gov/sab/SABPRODUCT.NSF/81e39f4c09954fcb85256ead006be86e/0CA9E925C9A702F285257F380050C842/\\$File/Income+Elasticity+Technical+Memorandum_final_2_5_16_docx.pdf](https://yosemite.epa.gov/sab/SABPRODUCT.NSF/81e39f4c09954fcb85256ead006be86e/0CA9E925C9A702F285257F380050C842/$File/Income+Elasticity+Technical+Memorandum_final_2_5_16_docx.pdf).
- "Executive Order 12630 of 1988, Governmental Actions and Interference with Constitutionally Protected Property Rights." 1988. <https://www.archives.gov/federal-register/codification/executive-order/12630.html>.
- "Executive Order 12866 of September 30, 1993, Regulatory Planning and Review." 1993. <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.
- "Executive Order 12988 of February 5, 1996, Civil Justice Reform." 1996. <https://www.govinfo.gov/content/pkg/WCPD-1996-02-12/pdf/WCPD-1996-02-12-Pg189.pdf>.
- "Executive Order 13045 of April 21, 1997, Protection of Children from Environmental Health Risks and Safety Risks." 1997. <https://www.govinfo.gov/content/pkg/FR-1997-04-23/pdf/97-10695.pdf>.
- "Executive Order 13132 of August 4, 1999, Federalism." 1999. <https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf>.
- "Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments." 2000. <https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf>.
- "Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." 2001. <https://www.govinfo.gov/content/pkg/WCPD-2001-05-21/pdf/WCPD-2001-05-21-Pg769.pdf>.
- "Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review." 2011. <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.
- Farber, Daniel A., and Paul A. Hemmersbaugh. 1993. "Shadow of the Future: Discount Rates, Later Generations, and the Environment, The." *Vanderbilt Law Review* 46 (2): 267–304.
- Farber, Henry S., Daniel Herbst, Ilyana Kuziemko, and Suresh Naidu. 2018. "Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data." National Bureau of Economic Research. <http://www.nber.org/papers/w24587>.
- Feigenbaum, James, Alexander Hertel-Fernandez, and Vanessa Williamson. 2018. "From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws." National Bureau of Economic Research.
- Flynn, Andrea, Susan Holmberg, Dorian Warren, and Felicia Wong. 2016. "Rewriting the Racial Rules: Building an Inclusive American Economy." <https://rooseveltinstitute.org/wp-content/uploads/2016/06/Structural-Discrimination-Final.pdf>.
- Fourcade, Marion, Etienne Ollion, and Yann Algan. 2015. "The Superiority of Economists." *Journal of Economic Perspectives* 29 (1): 89–114.
- Galbraith, John Kenneth. 1956. *American Capitalism*. New York: Houghton Mifflin.
- GAO. 1989. "Regulatory Review: Information on OMB's Review Process : Fact Sheet for the Chairman of the Committee on Government Operations, House of Representatives." Government Accounting Office.
- Giridharadas, Anand. 2019. *Winners Take All: The Elite Charade of Changing the World*. Vintage.
- Government Accountability Office. 2020. "IRS Successfully Implemented Tax Law Changes but Needs to Improve Service for Taxpayers with Limited-English Proficiency." <https://www.gao.gov/assets/710/703851.pdf>.
- Hacker, Jacob S., and Paul Pierson. 2019. "Policy Feedback in an Age of Polarization." *The ANNALS of the American Academy of Political and Social Science* 685 (1): 8–28. <https://doi.org/10.1177/0002716219871222>.

- Harvey, Chelsea. 2017. "CLEAN POWER PLAN: Trump Team's Wonky CO2 Calculation Is a Big Deal." *EE News*, October 25, 2017. <https://www.eenews.net/stories/1060064593>.
- Hauser, Jeff. 2019. "The Little Agency That Could (Block All Good Regulations)." *The American Prospect*, September 25, 2019. <https://prospect.org/api/content/93bebd9e-df1d-11e9-a546-12f1225286c6/>.
- Hendricks, Bracken, Rhiana Gunn-Wright, and Sam Ricketts. 2020. "The Greatest Mobilization Since WWII." *Democracy Journal*, no. 56 (March). <https://democracyjournal.org/magazine/56/the-greatest-mobilization-since-wwii/>.
- Herd, Pamela, and Donald Moynihan. 2019. *Administrative Burden: Policymaking by Other Means*. Russell Sage Foundation.
- Hudson, David. 2014. "Action for Our Workers: President Obama Signs Memorandum to Update Overtime Pay." *Whitehouse.Gov* (blog). March 13, 2014. <https://obamawhitehouse.archives.gov/blog/2014/03/13/action-our-workers-president-obama-signs-memorandum-update-overtime-pay>.
- Ilias, Shayerah. 2012. "Trade Reorganization: Overview and Issues for Congress." R42555. Washington, DC: Congressional Research Service. <https://fas.org/sgp/crs/misc/R42555.pdf>.
- Johnson, Chalmers A. 1982. *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975*. Redwood City, Calif.: Stanford University Press.
- Kaplow, Louis, and Steven Shavell. 1994. "Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income." *The Journal of Legal Studies* 23 (2): 667–681.
- Kong, Bo, and Kevin P. Gallagher. 2017. "Globalizing Chinese Energy Finance: The Role of Policy Banks." *Journal of Contemporary China* 26 (108): 834–851.
- Leiserson, Greg, and Adam Looney. 2018. "A Framework for Economic Analysis of Tax Regulations." https://www.brookings.edu/wp-content/uploads/2018/12/ES_20181220_Looney-OIRA-Tax-Regs.pdf.
- Lind, Michael, and James Galbraith. 2020. "Needed: A Finance Agency to Handle the Financial Meltdown from the Coronavirus." *Boston Globe*, March 12, 2020. <https://www.bostonglobe.com/2020/03/13/opinion/needed-finance-agency-handle-financial-meltdown-coronavirus/>.
- Lindhjem, Henrik, Ståle Navrud, Vincent Biousque, and Nils Axel Braathen. 2012. "Mortality Risk Valuation in Environment, Health and Transport Policies." Text. Paris: OECD. https://www-oecd-ilibrary-org.proxy1.library.jhu.edu/environment/mortality-risk-valuation-in-environment-health-and-transport-policies_9789264130807-en.
- Liscow, Zachary. 2018. "Is Efficiency Biased?" *The University of Chicago Law Review* 85 (7): 1649–1718.
- Listokin, Yair. 2019. *Law and Macroeconomics: Legal Remedies to Recessions*. New York: Harvard University Press.
- Lukes, Steven. 2004. *Power: A Radical View*. Second Edition. London: Palgrave Macmillan.
- Lupo-Pasini, Federico. 2018. "Financial Disputes in International Courts." *Journal of International Economic Law* 21 (1): 1–30.
- Mamone, Tris. 2019. "For Trans Men Seeking Reproductive Health Care, There Are Barriers Every Step of the Way." *Rewire.News*, July 3, 2019. <https://rewire.news/article/2019/07/03/trans-men-reproductive-health-care/>.
- March, James G., and Johan P. Olsen. 1983. "Organizing Political Life: What Administrative Reorganization Tells Us about Government." *American Political Science Review* 77 (2): 281–96. <https://doi.org/10.2307/1958916>.
- Masur, Jonathan S., and Eric A. Posner. 2015. "Unquantified Benefits and Bayesian Cost-Benefit Analysis."
- . 2018. "Cost-Benefit Analysis and the Judicial Role." *The University of Chicago Law Review* 85 (4): 935–86.
- Mazzucato, Mariana, and Gregor Semieniuk. 2017. "Public Financing of Innovation: New Questions." *Oxford Review of Economic Policy* 33 (1): 24–48. <https://doi.org/10.1093/oxrep/grw036>.
- McCluskey, Martha T. 2016. "Constitutional Economic Justice: Structural Power for We the People." *Yale L. & Pol'y Rev.* 35: 271.
- "Memorandum of Agreement Between Treasury and OMB on Implementation of Executive Order 12291." 1983. <https://www.treasury.gov/FOIA/Documents/OMB%20MOA%2083-93.pdf>.
- "Memorandum of Agreement Between Treasury and OMB on Review of Tax Regulations Under Executive Order 12866." 2018. <https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf>.
- Meyer, Timothy, and Ganesh Sitaraman. 2018. "A Blueprint for a New American Trade Policy." New York: Great Democracy Initiative.
- Michaels, David. 2020. *The Triumph of Doubt*. Oxford University Press.
- Mikati, Ihab, Adam F. Benson, Thomas J. Luben, Jason D. Sacks, and Jennifer Richmond-Bryant. 2018. "Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status." *American Journal of Public Health* 108 (4): 480–85. <https://doi.org/10.2105/AJPH.2017.304297>.

- Nader, Ralph. 2000. "Consumer Protection Agency." July 26, 2000. <https://nader.org/2000/07/26/consumer-protection-agency/>.
- Nayak, Rajesh. 2019. "Want More Public Participation in Rulemaking? Fix the Paperwork Reduction Act." Rethinking Admin Law: From APA to Z. American Constitution Society. <https://www.acslaw.org/wp-content/uploads/2019/06/Rethinking-Admin-Law-From-APA-to-Z.pdf>.
- Office of Information and Regulatory Affairs. n.d. "OIRA Prompt Letters." Accessed March 16, 2020. <https://www.reginfo.gov/public/jsp/EO/promptLetters.myjsp>.
- Office of Management and Budget. 2003. "Circular A-4." <https://www.reginfo.gov/public/jsp/Utilities/a-4.pdf>.
- "Office of Management and Budget: Information and Regulatory Affairs." n.d. Office of Management and Budget. Accessed March 16, 2020. <https://www.whitehouse.gov/omb/information-regulatory-affairs/>.
- Phillips, Todd. 2020. "Rethinking OIRA: Laying the Groundwork for a Progressive Presidency." *The American Prospect*, February 25, 2020. <https://prospect.org/api/content/ffbbd484-5752-11ea-b2e8-1244d5f7c7c6/>.
- Piketty, Thomas. 2014. *Capital in the Twenty-First Century*. Edited by Arthur Goldhammer. Cambridge Massachusetts: Harvard University Press.
- PolicyLink. n.d. "Overview of National Equity Atlas." Accessed March 16, 2020. <https://nationalequityatlas.org/about-the-atlas>.
- Posner, Eric A., and E. Glen Weyl. 2014. "Benefit-Cost Paradigms in Financial Regulation." *The Journal of Legal Studies* 43 (S2): S1–S34.
- Posner, Richard A. 2004. *Catastrophe: Risk and Response*. Oxford: Oxford University Press.
- Rahman, K. Sabeel. 2016. "Rethinking Regulation." The Roosevelt Institute. <https://rooseveltinstitute.org/wp-content/uploads/2016/04/Rethinking-Regulation.pdf>.
- . 2017. "Policymaking as Power-Building." *S. Cal. Interdisc. LJ* 27: 315.
- Regulatory Working Group. 2015. "Regulatory Working Group Guidelines: Executive Order 13609, 'Promoting International Regulatory Cooperation.'" https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/eo_13609/eo13609-working-group-guidelines.pdf.
- Revesz, Richard L. 2014. "Quantifying Regulatory Benefits." *California Law Review* 102 (6): 1423–56.
- . 2018. "Regulation and Distribution." *NYUL Rev.* 93: 1489.
- Revesz, Richard L., and Michael A. Livermore. 2008. *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*. Oxford University Press.
- Rodgers, Claudia. 2015. "Letter from the Acting Chief Counsel for Advocacy to the Secretary of Labor," September 4, 2015. <https://www.sba.gov/advocacy/942015-defining-and-delimiting-exemptions-executive-administrative-professional-outside>.
- Rogers, Heather. 2017. "The Secretive Office Lobbyists Use to Block Regulation." *Pacific Standard*, May 3, 2017. <https://psmag.com/news/secretive-white-house-office-lobbyists-use-block-government-regulation-87408>.
- Rosenfeld, Jake. 2014. *What Unions No Longer Do*. Boston: Harvard University Press.
- Saez, Emmanuel, and Gabriel Zucman. 2019. *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay*. 1 edition. New York, NY: W. W. Norton & Company.
- Shierholz, Heidi. 2019a. "More Than Eight Million Workers Will Be Left Behind by the Trump Overtime Proposal: Workers Would Receive \$1.2 Billion Less Than Under the 2016 Rule." *Economic Policy Institute* (blog). April 8, 2019. <https://www.epi.org/publication/trump-overtime-proposal-april-update/>.
- . 2019b. "The Trump Administration's Overtime Rule Leaves Millions of Workers behind." *Economic Policy Institute* (blog). September 24, 2019. <https://www.epi.org/press/the-trump-administrations-overtime-rule-leaves-millions-of-workers-behind/>.
- Slobodian, Quinn. 2018. *Globalists: The End of Empire and the Birth of Neoliberalism*. Cambridge, Massachusetts: Harvard University Press.
- Small Business Administration. 2019. "Table of Small Business Size Standards." https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019%2C%202019_Rev.pdf.
- Small Business Administration, Office of Advocacy. n.d. "Office of Advocacy: About." Accessed March 16, 2020. <https://advocacy.sba.gov/about/>.
- Steinzor, Rena. 2012. "The Case for Abolishing Centralized White House Regulatory Review." *Michigan Journal of Environmental & Administrative Law* 1 (1): 209–85.

- Steinzor, Rena, Michael Patoka, and James Goodwin. 2011. "Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment." White Paper 1111ES. Washington, DC: Center for Progressive Reform. <http://www.ssrn.com/abstract=2755651>.
- Stern, Nicholas. 2007. *The Economics of Climate Change: The Stern Review*. 1 edition. Cambridge, UK ; New York: Cambridge University Press.
- Sunstein, Cass R. 2013. "The Office of Information and Regulatory Affairs: Myths and Realities." *Harvard Law Review* 126 (7): 1838–78.
- . 2018. *The Cost-Benefit Revolution*. Cambridge: The MIT Press.
- The White House. 2014. "Remarks by the President On Overtime Pay." Whitehouse.Gov. March 13, 2014. <https://obamawhitehouse.archives.gov/the-press-office/2014/03/13/remarks-president-overtime-pay>.
- "Transcript | Episode 26: Angela Hanks and Janelle Jones." 2019. *Hidden Truths*. <https://insightcced.org/transcript-episode-26-angela-hanks-and-janelle-jones/>.
- Tsebelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton: Princeton University Press.
- Tsuda, Kenta. 2017. "Making Bureaucracies Think Distributively: Reforming the Administrative State with Action-Forcing Distributional Review." *Mich. J. Env'tl. & Admin. L.* 7: 131.
- Tucker, Todd N. 2018a. "Seven Strategies to Rebuild Worker Power for the 21st Century Global Economy: A Comparative and Historical Framework for Policy Action." New York: Roosevelt Institute. <http://rooseveltinstitute.org/seven-strategies-rebuild-worker-power/>.
- . 2018b. "Off-Balance: Five Strategies for a Judiciary That Supports Democracy." New York: Roosevelt Institute. <http://rooseveltinstitute.org/off-balance-five-strategies-judiciary-supports-democracy/>.
- . 2019a. "Fixing the Senate: Equitable and Full Representation for the 21st Century." New York: Roosevelt Institute.
- . 2019b. "Industrial Policy and Planning: What It Is and How to Do It Better." New York: Roosevelt Institute. <https://rooseveltinstitute.org/industrial-policy-and-planning/>.
- United States Department of Agriculture. 2019a. "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents - Regulatory Impact Analysis." <https://www.regulations.gov/contentStreamer?documentId=FNS-2018-0004-6000&contentType=pdf>.
- . 2019b. "Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents." Federal Register. <https://www.federalregister.gov/documents/2019/12/05/2019-26044/supplemental-nutrition-assistance-program-requirements-for-able-bodied-adults-without-dependents>.
- United States Department of Education. 2019. "School Ambassador Fellowship Program." School Ambassador Fellowship. US Department of Education (ED). February 5, 2019. <https://www2.ed.gov/programs/schoolfellowship/index.html>.
- United States Department of Labor, Occupational Safety and Health Administration. 2016. "OSHA Proposes Rule to Improve Provisions in Its Standards." Press Release. October 4, 2016. <https://www.osha.gov/news/newsreleases/trade/10042016>.
- United States Department of Labor, Wage and Hour Division. 2016. "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." <https://www.govinfo.gov/content/pkg/FR-2016-05-23/pdf/2016-11754.pdf>.
- . 2019. "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." <https://www.federalregister.gov/documents/2019/09/27/2019-20353/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>.
- US Government. 2016. "Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866." Washington, DC: USG. https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf.
- USITC. 2019. "United States-Mexico-Canada Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors." 4889. Washington, DC: U.S. International Trade Commission. https://www.usitc.gov/press_room/news_release/2019/er0418ll1087.htm.
- Vogel, Steven K. 2018. *Marketcraft: How Governments Make Markets Work*. New York: Oxford University Press.
- Ward, Tara. 2011. "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law." *Northwestern Journal of International Human Rights* 10 (2): 32.
- Warren, Elizabeth. 2016. "Corporate Capture of the Rulemaking Process." *The Regulatory Review*, June 14, 2016. <https://www.theregview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process/>.
- . 2018. "Anti-Corruption and Public Integrity Act." <https://www.warren.senate.gov/imo/media/doc/Master%20Summary%20of%20Anti%20Corruption%20Act%20-%20FINAL.pdf>.

- . 2019. "A Plan For Economic Patriotism." *Medium* (blog). June 4, 2019. <https://medium.com/@teamwarren/a-plan-for-economic-patriotism-13b879f4cfc7>.
- . 2020. "Restoring Integrity and Competence to Government After Trump." <https://elizabethwarren.com/plans/after-trump>.
- Williams, Sean Hannon. 2013. "Statistical Children." *Yale J. on Reg.* 30: 63.
- Wilson, James Q. 1991. *Bureaucracy: What Government Agencies Do And Why They Do It*. 1st edition. New York, NY: Basic Books.
- Wolverton, Ann, Ann E. Ferris, and Nathalie B. Simon. 2019. "Retrospective Evaluation of the Costs of Complying with Light-Duty Vehicle Surface Coating Requirements." *Journal of Benefit-Cost Analysis* 10 (1): 39–64. <https://doi.org/10.1017/bca.2018.25>.
- Wong, Felicia. 2020. "The Emerging Worldview: How New Progressivism Is Moving Beyond Neoliberalism." New York: Roosevelt Institute. <https://rooseveltinstitute.org/emerging-worldview-new-progressivism-moving-beyond-neoliberalism/>.
- World Health Organization. 2018. "Food Safety, Climate Change, and the Role of WHO." World Health Organization. https://www.who.int/foodsafety/Climate_Change.pdf.

THE
GREAT
DEMOCRACY
INITIATIVE

 ROOSEVELT
INSTITUTE