ADDRESS

RETAIKING RATIONALITY TWO YEARS LATER

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I. INTRODUCTION

In May 2008, we published Retaking Rationality: How Cost–Benefit Analysis Can Better Protect the Environment and Our Health. In that book, we argued that cost–benefit analysis as a tool of government decisionmaking was “here to stay” and that, to be successful in promoting stronger environmental and public-health regulation, advocacy groups should focus on “mend[ing], not end[ing]” cost–benefit analysis. By learning how to use cost–benefit analysis to advance their agendas, protection-oriented groups (such as environmentalists, labor unions, and consumer groups) could help correct historical biases and bad practices that have crept into the methodology of cost–benefit analysis. We argued for a new approach that was neither antiregulatory nor anti-cost–benefit analysis, but rather embraced both strong government protections and cost–benefit analysis as a tool to provide solid foundations for government choices.

Since we began working on Retaking Rationality, much has changed in the American political landscape. When we began drafting the book, then-Senator Barack Obama was little known outside of his home state of Illinois and the small cadre of party loyalists who were inspired by his opening address at the Democratic National Convention in 2004. Sarah Palin had just been elected governor of the fifth least populated state after making a name for herself locally on Alaska’s Oil and Gas Conservation Commission. At the start of May 2008, the month that Retaking Rationality was published, shares of Lehman Brothers were trading at over $45. At that time, the Deepwater Horizon was more than a year away from drilling what would

2. Id. at 10.
become the deepest oil well in history at a vertical depth of over 35,000 feet.\textsuperscript{4}

Given these political shifts, it is worth asking whether the arguments in \textit{Retaking Rationality} are still valid.\textsuperscript{5} This question is especially pertinent to us because the book is not a project that we have put down in the intervening years. Indeed, shortly after the publication of \textit{Retaking Rationality}, we founded the Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law to promote and test some of the ideas we discussed in the book.\textsuperscript{6} At Policy Integrity, we work closely with nongovernmental organizations to help them use cost–benefit analysis in their advocacy and we also participate directly in the regulatory process with the goal of promoting balanced economic analysis of administrative decisions. Reflecting on \textit{Retaking Rationality} is also an opportunity to evaluate Policy Integrity, its successes, and continued challenges.

This paper proceeds in four additional parts. Part II provides a brief overview of the central arguments introduced in \textit{Retaking Rationality}. Part III argues that cost–benefit analysis has been heartily embraced by the Obama Administration, indicating that, whatever one thinks of it, cost–benefit analysis is even more likely here to stay than when \textit{Retaking Rationality} was published. Part IV discusses the relationship of protection-oriented interest groups to cost–benefit analysis over the last two years: what has changed; what has stayed the same since the publication of \textit{Retaking Rationality}. Part V provides a brief reply to comments offered by Professors Douglas Kysar and Alexander Volokh in this volume.

\section*{II. THE \textit{RETAKING RATIONALITY} ARGUMENT}

As U.S. regulatory agencies were granted new and expansive powers over large portions of the economy through regulation of widespread environmental, public-health, and workplace risks, there were increasing efforts to exert centralized executive

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\item \textit{About Us}, INST. FOR POL’Y INTEGRITY, http://policyintegrity.org/about/ (last visited Jan. 6, 2011).
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control over administrative decisionmaking. President Richard Nixon initiated a requirement of interagency comment for certain types of rules and President Gerald Ford created the Council on Wage and Price Stability, which increased central control over agency rulemaking. President Jimmy Carter went even further with Executive Order 12,044, which required the newly-created Regulatory Analysis Review Group to perform an economic analysis for any regulation with a likely impact of more than $100 million. But it was President Ronald Reagan’s Executive Order 12,291 that placed centralized review and cost–benefit analysis at the heart of regulatory decisionmaking.

The Reagan executive order created what has become the persistent architecture of regulatory review at the federal level. Utilizing the newly created Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), Executive Order 12,291 required agencies to conduct cost–benefit analysis of proposed rules, adopt only those rules with net benefits, and submit their analyses to OIRA for review. If OIRA found that a rule was not sufficiently justified, the rule could be sent back to the agency for further analysis.

This executive order was issued very shortly after Reagan took office, when a troubled economy was characterized by inflation, unemployment, and oil shocks. The 1980 election focused heavily on these economic issues and regulatory reform was included as an important plank in both of the major party platforms.

The Republican Party, in particular, focused on regulation as a key cause of economic difficulty, declaring a “war on

7. REVESZ & LIVERMORE, supra note 1, at 24.
government overregulation. In a colloquy on regulation during the second presidential debate, which commentators have flagged as the key turning point in the race, President Reagan summarized his position:

I am suggesting that there are literally thousands of unnecessary regulations that invade every facet of business, and indeed, very much of our personal lives, that are unnecessary; that Government can do without; that have added $130 billion to the cost of production in this country; and that are contributing their part to inflation. And I would like to see us a little more free, as we once were.

Discussing his opposition to proposed national air quality regulations while he was California Governor, Reagan provided the following characterization of the Environmental Protection Agency’s (EPA) action:

[T]he Federal Government tried to impose on the State of California—not a law, but regulations—that would have made it impossible to drive an automobile within the city limits of any California city, or to have a place to put it if you did drive it against their regulations. It would have destroyed the economy of California . . .

President Carter provided the counterargument: “We cannot cast aside these regulations” that “protect the purity of our air and the quality our water and our land.” One week later, Reagan won the presidency in a landslide election. Immediately upon taking office, he went on to “assert[] vigorous centralized control over the regulatory process” through regulatory review and cost–benefit analysis. Protection-oriented interest groups like environmental organizations and labor unions had cause to be concerned.

The criticism began almost immediately following Executive Order 12,291 amid fears of regulatory delays and a deregulatory

18. Id.
19. Id.
Protection-oriented groups initiated a long-term trend of criticizing cost–benefit analysis in starkly moral terms, condemning any methodology that “prices out human life.” This basic political dynamic, which was present at the founding moment of aggressive cost–benefit analysis-based regulatory review, informed the development of cost–benefit analysis in the United States for at least three decades and continues to exert considerable pull today.

An important inflection point came during the presidency of Bill Clinton. After twelve years of Republican administration, many protection-oriented groups saw Clinton’s presidency as an opportunity for a radical departure on regulatory issues. Many commentators believed he would issue a new executive order, one that abandoned both the executive-review process and potentially even cost–benefit analysis altogether.

This scenario did not come to pass. Instead, President Clinton issued Executive Order 12,866, which replaced and updated Executive Order 12,291 but maintained the same architecture of cost–benefit analysis-based regulatory review. Several important reforms were also made, including adding transparency requirements, clarifying the importance of unquantified costs and benefits, and creating a place for

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23. Revesz & Livermore, supra note 1, at 26 (quoting Saul Miller, spokesman for the AFL-CIO).

24. Id.


26. See James A. Dunn, Jr., Policy-Level Partnerships and Project-Based Partnerships, in PUBLIC–PRIVATE POLICY PARTNERSHIPS 77, 81–82 (Pauline Vaillancourt Rosenau ed., 2000) (stating that many saw the Clinton era as an opportunity to tighten environmental regulations); Pildes & Sunstein, supra note 21, at 6–7 (“Many observers were extremely curious to see how President Clinton would reform the Reagan initiatives.”).

27. Cf. Pildes & Sunstein, supra note 21, at 6–7 (stating that President Clinton’s first step was “surprising” because it maintained the basic process instituted by Reagan).

distributional analysis. But these changes largely represented a continuity of approach, rather than a break from the past.

Perhaps unsurprisingly then, environmentalists and other protection-oriented interest groups maintained a hostile relationship to cost–benefit analysis and regulatory review during the Clinton Administration. They failed to participate in key forums where cost–benefit analysis methodology was determined. Sally Katzen, OIRA Administrator for much of Clinton’s presidency, has characterized the attitude of these groups at the time as “[w]e don’t like cost–benefit analysis, full stop.”

With the presidency of George W. Bush, the bipartisan presidential consensus in favor of cost–benefit analysis continued. The Clinton executive order stood relatively unchanged with only two minor reforms introduced during the Bush Administration. OIRA also produced guidance for agencies on conducting cost–benefit analysis, termed the A-4 Circular, which expanded on the requirements of the executive order while codifying and clarifying the long-standing practices of OIRA when reviewing agency analyses.

At the same time that this bipartisan consensus was crystallizing, cost–benefit analysis and regulatory review remained anathema among much of the advocacy community. Nomination and confirmation fights over President Bush’s appointees to head OIRA provide illustrative examples. When President Bush moved to appoint John Graham, pro-regulatory groups fought vehemently against the appointment, questioned Graham’s academic credentials, criticized his ties with regulated industries, and worked with several Democratic Senators to

30. REVESZ & LIVERMORE, supra note 1, at 32–36.
31. Id. at 32.
32. See infra text accompanying notes 77–78.
35. See PUB. CITIZEN, SAFEGUARDS AT RISK: JOHN GRAHAM AND CORPORATE AMERICA’S BACK DOOR TO THE BUSH WHITE HOUSE (2001), available at http://www.citizen.org/documents/grahamrpt.pdf (“Graham is certain to favor the regulated industries that have handsomely supported his Center . . . . Although he often calls himself a ‘scientist,’ . . . [Graham] does not in fact hold any degrees in the hard science disciplines . . . .”).
oppose his nomination. In turn, the appointment of Graham's successor was carried out during a recess to avoid a fight with the Senate, a move that again outraged many groups.

*Retaking Rationality* provides more detail on this political history and focuses on a particularly important fact—that protection-oriented groups largely absented themselves from debate over how cost–benefit analysis should be conducted. The book goes on to argue that this absence had consequences both for regulatory policy and the methodological and institutional context of cost–benefit analysis. Specifically, by failing to embrace a methodology that acknowledges both the advantages and disadvantages of government protections, environmentalists and others allowed themselves to be portrayed as regulatory zealots seeking ever-higher standards no matter the costs. At the same time, a number of what we call substantive and institutional fallacies arose within cost–benefit analysis—biases that tended to point in an antiregulatory direction. The prominence of these fallacies, we argue, stems in some part from the failure of protection-oriented groups to engage seriously in debates over how best to conduct regulatory review and cost–benefit analysis. These fallacies, several of which had been discussed in greater detail in prior academic work by Dean Revesz and his co-authors, covered a number of topics that are often central to conducting cost–benefit analysis, including indirect effects of regulation, how life-saving protections are valued, and discounting.

The first fallacy is titled “All Unintended Consequences Are Bad.” In the chapter discussing this fallacy, we summarize an


38. REVESZ & LIVERMORE, supra note 1, at 32–36.

39. *Id.* at 11, 51.


41. REVESZ & LIVERMORE, supra note 1, at 55–65.
insight discussed in greater detail in *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, by Dean Revesz and a co-author, Samuel Rascoff. The chapter and article point out that a substantial literature has emerged around the notion of “countervailing risks.” The basic idea in this literature is that, when the government intervenes in the marketplace, there are likely to be a number of different effects, not only on the targeted risk, but potentially on other risks as well. A classic example is asbestos regulation. A ban on asbestos may decrease certain kinds of health risks associated with asbestos exposure, but it may also increase other risks if a less effective substitute is used in place of the banned product: if brake pads have less stopping power or alternative building materials are less fire-retardant. These effects should be taken into account by regulators, and should have an appropriate place in cost–benefit analysis. The classic work that describes this concept is *Risk vs. Risk: Tradeoffs in Protecting Health and the Environment*, edited and written in part by John D. Graham (later OIRA Administrator) and Jonathan Wiener, now a professor at Duke Law School and a well-respected regulatory scholar. It has played a prominent role in regulatory decisionmaking, among other places, as the principal reason to overturn increased fuel-efficiency standards in a key D.C. Circuit ruling by Judge Stephen Williams.

*Retaking Rationality* argues that the flip side of the coin had been given considerably less attention, though the ancillary benefits of regulation can be significant. For example, measures to reduce greenhouse gas emissions, such as a carbon tax or cap-and-trade system, would have the effect of significantly reducing emissions of other pollutants that have serious health consequences, like sulfur dioxide and particulate matter (and

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42. *Id.*; Rascoff & Revesz, supra note 40.
43. *Revesz & Livermore, supra note 1*, at 55; Rascoff & Revesz, *supra note 40*, at 1765.
44. See Rascoff & Revesz, *supra note 40*, at 1765 (“Regulations undertaken to minimize or eliminate certain health risks often have the perverse effect of promoting other risks.”); *Revesz & Livermore, supra note 1*, at 55.
45. Rascoff & Revesz, *supra note 40*, at 1772 (stating that government risk regulation often creates countervailing risks).
vice versa). Estimates of the value of these ancillary benefits have shown that they may be very high, perhaps even enough to offset the entire cost of greenhouse gas reductions for some of the major emitters.

Another fallacy that we discuss is the health–wealth tradeoff, which we describe as the idea that “Wealth Equals Health.” Again, in this case, we were responding to a significant academic literature that examines correlations between income and health at the individual level. Finding strong correlations, some academic commentators, advocates, and government officials came to the conclusion that there was an implicit tradeoff between wealth and health, so that regulations that imposed social costs by decreasing wealth would have the effect of reducing health as well. W. Kip Viscusi, an accomplished scholar in the area of regulation, even developed a rough cost estimate of the point at which a life-saving regulation would actually turn into a rule with net negative effects on mortality risk.

In the book, we point to two key considerations when evaluating this literature. One is elementary and widely recognized by the scholars undertaking this research, but nevertheless centrally important and often underemphasized in policy discussions of the issue: correlation is not causation. The research relied on for the health–wealth tradeoff shows only correlations; it is left to intuitive extrapolation to identify a causal story. To date, the most sophisticated empirical attempts to tease out the relationship between wealth and health have shown that causation tends to run in the opposite direction—unhealthy people make less money—or that both wealth and health are associated with a third variable, like education. Second, we note

50. Revesz & Livermore, supra note 1, at 67–76.
53. Revesz & Livermore, supra note 1, at 67.
54. Id. at 69, 72.
that even taking the causal story as true on its own terms, the effect is much greater at lower income levels. The distribution of costs is therefore central. The appropriate remedy for a rule that imposes costs on low-income people may not be to reduce regulatory stringency, but to provide compensation for the negatively affected population.

*Retaking Rationality* also discusses institutional fallacies associated with how cost–benefit analysis is situated in the administrative process, including one we term “Shaky Foundation.” This fallacy is associated with the notion that agencies systematically have a tendency to overregulate, to impose unjustified costs, and to be captured by protection-oriented interest groups like environmental organizations or consumer groups. This concern motivates the desire to impose a check on regulatory action in the form of OIRA review and cost–benefit analysis.

Just as countervailing risks are a legitimate concern, these bureaucratic failures may indeed be real. But bias also arises if we do not recognize that some agencies could have a tendency to underregulate, to fail to provide adequate protections, and to be captured by antiregulatory interest groups like regulated industry. While some bureaucracies may be influenced by powerful leaders seeking self-aggrandizement, as in the classic formulation, others may be risk-averse actors unwilling to act and face the risk of congressional or judicial sanction. While agencies may overreact to news reports of catastrophes, they may fail to address well-known risks until catastrophe strikes.

Perhaps the British Petroleum (BP) oil disaster of 2010 has become the archetype for this concern. Massive environmental damage may have been avoided by a more robust regulatory approach and better enforcement. Many accounts of the spill have focused on what has come to be seen as an overly cozy

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56. REVESZ & LIVERMORE, supra note 1, at 73–75.
57. Id. at 163–69.
58. Id. at 163.
relationship between regulators and the regulatory industry. Regardless of whether the conventional wisdom about the BP spill is correct, the spill provides a stark illustration of the concern that agency inaction can lead to high social costs. Regulatory oversight that focuses exclusively on checking agency behavior fails to look for missed opportunities when net benefits can be increased by more robust agency protection.

Ultimately, we argue that these fallacies helped promote a practice of cost–benefit analysis and regulatory review over the past thirty years that tended to overstate costs and understate benefits; that focused on tamping down overzealous agencies but did not adequately ward against inertia; and that ultimately failed to maximize social well-being through efficient levels of environmental and public health protection. Responsibility for this state of affairs is, of course, widespread, but one of the central arguments in Retaking Rationality is that protection-oriented interest groups are partly to blame for engaging in a losing strategy of fighting against cost–benefit analysis, rather than fighting to improve it.

III. COST–BENEFIT ANALYSIS IN THE OBAMA ADMINISTRATION

Despite the important role cost–benefit analysis has played over the past few decades, when President Obama took office some groups advocated for a major departure from the prior consensus. This shift has not occurred; the Obama Administration's regulatory decisions, policy initiatives, and administrative appointments have indicated that cost–benefit analysis will continue to play an important role within the administrative state. And the current Administration has not simply maintained the status quo. In a wide range of areas, the Administration has broken new ground through expanded use of insights from behavioral economics, by developing a cross-cutting and coordinated regulatory response to climate change, and with a recently released update of EPA guidance on conducting economic analysis of environmental policy.
A. Cost–Benefit Analysis Is Here to Stay

Just as when President Clinton took office in early 1993, when President Obama began his Administration there was hope in certain circles that cost–benefit analysis was not long for this world. Some advocates saw the turnover in the White House as an opportunity to make progress toward their goal of reducing the role of cost–benefit analysis and regulatory review. But any hope of this sort evaporated quickly, as President Obama took several steps shortly after taking office that continued to cement the bipartisan consensus in favor of regulatory review and cost–benefit analysis, keeping these institutions at the heart of regulatory decisionmaking in his Administration.65

There were two early moves that the President made on matters concerning regulatory review. Soon after taking office, President Obama issued a memorandum to the heads of executive departments and agencies asking for recommendations to guide the development of an updated executive order on regulatory review.66 The memorandum targeted numerous issues for potential improvement, seeking “guidance on disclosure and transparency”67 and potential means of achieving greater “public participation in agency regulatory processes.”68 The hope expressed in the memorandum was that “[y]ears of experience . . . about how to improve the process of regulatory review” could be used to make needed changes.69 The President also directly signaled a desire to continue the practice of regulatory review:

While recognizing the expertise and authority of executive branch departments and agencies, I also believe that, if properly conducted, centralized review is both legitimate and appropriate as a means of promoting regulatory goals.70

There was some interest in the President’s move, although it never rose to a matter of high political salience. During the 100 day notice-and-comment period, 183 public comments were submitted by academics, think tanks, trade associations, labor

67. Id.
68. Id.
69. Id.
70. Id.
unions, and individual citizens. The suggested revisions ranged from incorporating distributional and equity concerns into the analysis, to allowing more public input to the review process as a means of addressing agency inaction, to creating a centralized database of valuations that all agencies should be required to use.

The President has not yet issued a new executive order and it has become increasingly clear that the Clinton order, now in place for nearly two decades, will govern for the foreseeable future. If the President does ultimately issue a revised order, it is likely to build on, rather than replace, the Clinton order, which has served as the basis for a lasting bipartisan consensus. While we have suggested improvements that could be made to the order, many of the most important reforms can be undertaken under the current order through guidance documents and changes in institutional culture and practices. The Clinton order, it seems, has proven flexible enough to accommodate the needs of several different administrations and the current President may be hesitant to make unnecessary changes that upset that continuity.


75. Two months after the lecture upon which this Address is based was delivered, President Obama did issue an Executive Order along with two accompanying presidential memoranda on regulation and regulatory review. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Regulatory Compliance: Memorandum for the Heads of Executive Departments and Agencies, 76 Fed. Reg. 3825 (Jan. 18, 2011); Regulatory Flexibility, Small Business, and Job Creation: Memorandum for the Heads of Executive Departments and Agencies, 76 Fed. Reg. 3827 (Jan. 18, 2011). As anticipated above, the order largely “repeats, clarifies, or modestly expands language from President Clinton’s Executive Order 12,866,” while the memoranda create small additional procedures dealing with small businesses and increased transparency in regulatory enforcement. Michael A. Livermore, A Brief Comment on Humanizing Cost–Benefit Analysis, 2011 EUR. J. RISK REG. 13.

A second move that could have signaled a shift was the repeal on February 3, 2009, of two Bush-era amendments to the Clinton order.\textsuperscript{77} The Bush amendments made several relatively minor changes to the Clinton order: creating a requirement that a “specific market failure” be identified prior to regulation; creating a formal “regulatory policy officer”; and subjecting guidance documents to OIRA review.\textsuperscript{78} These orders were heavily criticized by some protection-oriented groups.\textsuperscript{79} The change by President Obama was hailed by some as an indication that major procedural reforms could be on the way.\textsuperscript{80}

But the move, if anything, was in keeping with the idea that structural changes could be made outside the context of changes to the executive order. Shortly after the President’s rescission order, OMB Director Peter Orszag issued a memorandum to agencies clarifying that OIRA would continue to review “all significant proposed or final agency actions, including significant policy and guidance documents.”\textsuperscript{81} Officials within agencies continue to work closely with OIRA officials, and market failures remain a central element of regulatory impact analysis. While the early repeal of the Bush orders on regulatory review can be spun as a large departure, in reality the more accurate characterization is one of continuity with both the Clinton and Bush Administrations.

Other telling indications of the Obama Administration’s commitment to cost–benefit analysis and regulatory review can be found in its choice of appointments, the most obvious of which is Cass Sunstein as Administrator of OIRA.\textsuperscript{82} Sunstein is both a

\textsuperscript{80} Robin Bravender, Obama Tosses Bush Order, Eases OMB Grip on Rulemaking, GREENWIRE (Feb. 4, 2009), http://www.eenews.net/public/Greenwire/2009/02/04/1 (“President Obama's decision to revoke [Executive Order] 13422 so early in his administration sends a clear signal that he hopes to limit the role of politics in the regulatory process,” said Rick Melberth, director of federal regulatory policy at OMB Watch. ‘President Obama should continue to tear down the political and procedural hurdles that prevent regulatory agencies from quickly and effectively addressing threats to the public.’”)
\textsuperscript{82} Office of the Press Sec'y, White House, President Obama Announces Another Key OMB Post, WHITEHOUSE.GOV (Apr. 20, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Another-Key-OMB-Post (noting Sunstein’s
leading expert in and ardent supporter of cost–benefit analysis, and was a colleague of then-state senator Obama while they were both teaching at the University of Chicago Law School. One need not look far to discover Sunstein’s views on cost–benefit analysis: he has been writing about the subject for nearly two decades. Sunstein has argued in favor of cost–benefit analysis as a needed corrective to public misperception of risk, as a tool for clarifying the consequences of action, and as a counterbalance against wild administrative action in the face of sometimes irrational public demands.

Sunstein’s confirmation process was closely watched. He was supported by conservatives like the National Association of Manufacturers and the U.S. Chamber of Commerce, while the Wall Street Journal editorial page hailed him as a “promising sign” for the Obama Administration. On the other hand, some progressives feared the consequences of Sunstein’s “insistence on tying regulations to cost–benefit analysis.” Unsurprisingly, the

expertise in “administrative law and policy, environmental law, and behavioral economics” and his unique qualifications for leading Obama’s regulatory agenda).


85. See SUNSTEIN, RISK AND REASON, supra note 84, at 291 (“The great virtue of cost–benefit analysis is that it promotes a better understanding of the actual consequences of regulation. When availability bias makes people excessively concerned with trivial risks, cost–benefit analysis is a useful corrective.”); Cass R. Sunstein, Probability Neglect: Emotions, Worst Cases, and Law, 112 YALE L.J. 61, 87 (2002) (“A more deliberative democracy would attempt to create institutions that have a degree of immunity from short-term public alarm. Cost–benefit analysis, for example, might serve as a check on regulation that would accomplish little good, or less good than is justified by the facts.”).


87. Carey, supra note 83; see Tom Hamburger & Christi Parsons, Left Not Sold on Obama’s Regulation Czar Pick, CHI. TRIB., Jan. 25, 2009, at 7 (quoting Frank O’Donnell, president of Clean Air Watch, as saying that if Sunstein was a Republican nominee, “the environmental community would be screaming for his scalp”); see also Rena Steinzor, Cass Sunstein and OIRA, CENTER FOR PROGRESSIVE REFORM (Jan. 26, 2009), http://www.progressivereform.org/CPRBlog.cfm?idBlog=1024E113-1E0B-ES03-
public discussion over Sunstein’s confirmation played into traditional associations of cost–benefit analysis with less stringent regulatory control, although some recognized that as both “a liberal activist and a free market cheerleader,” he was something of a “wild card.”88 Strangely enough, the sticking point for much of the process, at least on the surface, was the issue of animal rights.89

The Obama Administration also brought in several prominent academic environmental economists for key political appointments within the White House and at agencies. Michael Greenstone, an economics professor at the Massachusetts Institute for Technology, was brought in as Chief Economist at the White House Council of Economic Advisors. Richard G. Newell, a professor of energy and environmental economics at Duke University, was named Administrator of the Energy Information Administration at the Department of Energy.90 William A. Pizer, a former research director at the environmental economics think tank Resources for the Future (RFF), was appointed as the Deputy Assistant Secretary for Environment and Energy at the Treasury Department in August 2008.91 Joseph Aldy, another former RFF Fellow, was named Special Assistant to the President for Energy and Environment, reporting through the National Economic Council and the Office of Energy and Climate Change, until he subsequently became an Assistant Professor of Public Policy at

CA21979C057DC516 (predicting that Sunstein would continue applying cost–benefit analysis to evaluation of proposed regulations); Richard Lacayo, Why Obama’s Regulatory Czar Makes Liberals Nervous, Time (Feb. 24, 2009), http://www.time.com/time/policy/article/0,8599,1881473,00.html (noting fears surrounding Sunstein’s support for cost–benefit analysis); John S. Applegate et al., Reinvigorating Protection of Health, Safety, and the Environment (Ctr. for Progressive Reform, White Paper No. 901, 2009) available at http://www.progressivereform.org/articles/SunsteinOIRA901.pdf (“Professor Sunstein would seem to represent ‘more of the same,’ when the last 30 years of regulatory dysfunction . . . demonstrate that OIRA and regulatory review need to head in a new, progressive direction.”).


89. Both Senators Saxby Chambliss (Ga.) and John Cornyn (Tex.) placed separate “holds” that prevented a vote on Sunstein, citing to this very issue as their primary concern. Vlahos, supra note 88; Rachel Weiner, Cass Sunstein Nomination Blocked by Saxby Chambliss, HUFFINGTON POST (June 29, 2009, 9:12 AM), http://www.huffingtonpost.com/2009/06/29/cass-sunstein-nomination_n_222196.html.


the Harvard Kennedy School. His replacement, Nathaniel Keohane, is a former Associate Professor of Economics at the Yale School of Management and Chief Economist of the Environmental Defense Fund.

These individuals have conducted important scholarship on a variety of issues central to cost–benefit analysis, including discounting under conditions of uncertainty, the compliance costs of air quality regulation, the ability of environmental rules to spur technological development, and the value of a statistical life. It is worth emphasizing that these scholars were brought in not merely to provide technical assistance, but in key policymaking roles within the Administration.

Of course, there are also examples of the Obama Administration appointing individuals who had not favored the use of cost–benefit analysis. Shortly after the President took office, Lisa Heinzerling, a noted critic of cost–benefit analysis, joined EPA as senior climate policy counsel and was later selected by EPA Administrator Lisa Jackson to be the Associate

Administrator of EPA’s Office of Policy. In that capacity, Heinzerling supervised EPA’s National Center for Environmental Economics (NCEE), which “specializes in analyzing the economic and health impacts of environmental regulations and policies, and assists EPA by informing important policy decisions with sound economics” as well as “contributing to and managing EPA’s research on environmental economics.” Heinzerling played a key role in the day-to-day integration of economic analysis into EPA decisionmaking. During her tenure, EPA showed no sign of reversing course to reduce the role of cost–benefit analysis in regulatory decisionmaking.

B. Pushing Ahead: Behavioral Economics, the Social Cost of Carbon, and the New EPA Guidelines

In many respects the Obama Administration has continued the practices of past administrations concerning regulatory review and cost–benefit analysis; at the same time, it has also sought to deepen the practice of cost–benefit analysis. Through a range of guidance documents, Sunstein and other key figures in the Administration have aimed to incorporate findings from the natural and social sciences; use cost–benefit analysis to harmonize agency responses to climate change; and update guidance on conducting economic analysis of environmental regulation.

Immediately prior to taking his current position with the Obama Administration, Sunstein’s academic work focused on the usefulness of behavioral economics for designing public policy. In their book, Nudge: Improving Decisions About Health, Wealth, and Happiness, Sunstein and co-author Richard Thaler put forward a vision of “libertarian paternalism” in which the state achieves social goals not through coercive control, but by


100. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (2008) (explaining how people can be encouraged or “nudge[d]” into making different decisions).
structuring the choices that people are given to “nudge” them in the right direction—the one they likely would have chosen given full information. In this account, “choice architecture” can be used to overcome some of the behavior quirks—like cognitive heuristics—that interfere with people’s ability to satisfy their long-term preferences. Through this framework, Sunstein and Thaler seek to attain many of the traditional goals of the regulatory state (like protecting workers or providing for retirement savings) without the threat to liberty that is associated with direct coercion.

Within the Obama Administration, Sunstein has taken several steps to integrate insights from behavior economics into regulatory decisionmaking. As early as the President’s memorandum requesting comment on the regulatory review process, the Administration was discussing “the role of the behavioral sciences in formulating regulatory policy.” This preliminary step was followed by more concrete moves.

A key document in the process of regulatory review is OIRA’s annual report to Congress on the costs and benefits of federal regulation. In that document, OIRA reviews rules adopted in the past year, examines the regulatory impact analyses that were conducted, provides rough estimates of aggregate costs and benefits, and puts forward a set of recommendations to agencies for improving their decisionmaking process. The document provides a formal summary for Congress, but is also a mechanism to establish administrative policy and communicate to agencies the priorities of OIRA for improving regulatory decisionmaking.

In each of the annual reports issued under Sunstein, there has been a prominent discussion of how behavioral sciences can inform agency decisionmaking. In the 2009 report, a section of

101. Id. at 4–6.
102. See id. at 11, 22–37 (describing different cognitive tools that can help people make more effective decisions).
105. Id. at 3–4.
106. Id. at 35–44.
107. Id. at 40, 42–44; OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL
recommendations is titled “Behaviorally Informed Approaches to Regulation.”\textsuperscript{108} The report reviews a recent trend by “a number of social scientists [to] incorporate[] findings about human behavior from psychology into economic models, providing a new set of insights for thinking about regulations and their likely consequences.”\textsuperscript{109} After discussing some of the key findings of this literature—such as the widespread use of cognitive heuristics and the effects of inertia on human behavior—the report goes on to list several ways in which these insights can help inform regulatory policy.\textsuperscript{108}

Four key areas are targeted: disclosure; default rules and simplification; salience; and social norms.\textsuperscript{110} In each area, the report recommends that existing obligations be met in ways that are based on accurate models of how people will respond—for example, by designing disclosure requirements that could actually be helpful for consumers.\textsuperscript{112} As agencies are evaluating regulatory alternatives, the report recommends that the latest experimental data be used to determine sound options.\textsuperscript{113} The report also suggests where behavioral sciences offer tools to meet regulatory goals through simple, straightforward, and low-cost steps that will generate large net benefits.\textsuperscript{114}

The 2010 report discusses several steps that agencies had taken in the past year to implement the recommendations of the 2009 report and continues to add guidance on several issues related to behavioral economics.\textsuperscript{115} In the area of disclosure, OIRA notes new initiatives by the Occupational Safety and Health Administration to publish “a significant subset of its fatality, illness, and injury data online” and by EPA to implement its greenhouse gas reporting rule, which OIRA anticipates will “help businesses to track their own emissions, to compare them to similar facilities, and eventually to identify low-cost reductions.”\textsuperscript{116} The report also calls attention to another example of “efforts to improve the quality of disclosure, with reference to empirical findings”:

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\textsuperscript{108} 2009 OIRA Report to Congress, supra note 107, at 35–40.
\textsuperscript{109} Id. at 35.
\textsuperscript{110} Id. at 35–37.
\textsuperscript{111} Id. at 37.
\textsuperscript{112} Id. at 37–38.
\textsuperscript{113} Id. at 44.
\textsuperscript{114} Id. at 35–37.
\textsuperscript{115} 2010 OIRA Report to Congress, supra note 104, at 40–49.
\textsuperscript{116} Id. at 41.
\end{flushleft}
March 2010 return letter to the National Highway Traffic Safety Administration (NHTSA) on its tire-labeling initiative. The letter “urged NHTSA to conduct consumer testing to identify a label that is clear, comprehensible, and meaningful to consumers,” resulting in NHTSA “undertaking further investigation before committing to a final decision on the design of the label.”

Another section of the report is devoted to the issue of childhood obesity and how behavioral sciences can be marshaled to address that risk. Noting that “[o]besity is a public health problem that imposes significant private and social costs,” the report discusses several ways in which the behavioral sciences can inform government efforts to “reduce those costs.” Recommendations include encouraging “clarity, simplicity, and salience” in labeling and advertising, and “the identification of a specific, unambiguous path” rather than providing “general education or ambiguous instructions (such as ‘obesity creates health risks’ or ‘eat healthy’).”

A second key document produced by Sunstein that focuses on the use of behavioral economics in regulation is a memorandum to agency heads on “Disclosure and Simplification as Regulatory Tools.” This memorandum examines the different approaches that agencies can take with disclosure and simplification and offers a set of principles to guide agency decisions. In the area of summary disclosure, the memorandum recommends adopting meaningful scales, keeping disclosure uncluttered and in plain language, considering costs and benefits, and doing both advanced and follow-up testing of the effects of the disclosure on behavior. For full disclosure, the emphasis is on the availability of data; OIRA encourages reliance on the Internet and the use of “electronic format[s] that do[] not require specialized software.” In the area of simplification, the guidance memorandum suggests consideration of default rules “as a substitute for, or as a supplement to, mandates or bans” and also recommends

117. Id.
118. Id.
119. Id. at 57.
120. Id. at 59.
122. Id. at 3–6.
123. Id. at 6–8.
examination of “active choosing as an alternative to a specified default rule.” The memorandum also specifies that “agencies should attempt to specify [a potential default rule’s] likely effects, and should identify the rule that would most benefit the relevant population.”

Another important cost–benefit analysis reform initiated by the Obama Administration involved the setting of a universal set of social cost of carbon estimates for use in regulatory impact analysis of rules that have effects on greenhouse gas emissions. The task force charged with this responsibility included representatives of multiple White House offices, including OIRA, the Council of Economic Advisors, and the Office of Energy and Climate Change, as well as several agencies, including the Department of Energy, EPA, and the Department of Transportation. These agencies met over several months to examine information on economic models that attempt to quantify and monetize the effects of climate change on a range of economic variables. This literature, which centers around the construction of complex integrated assessment models (IAMs), while incomplete, has been used in the past by researchers and agencies in the United States and elsewhere to estimate a marginal social cost associated with a ton of greenhouse gas emissions. The purpose of the interagency task force was to develop a common estimate that would be used across agencies to set regulatory policy and could serve as the basis for a consistent,

124. Id. at 9–12.
125. Id. at 10.
127. See id. at 1 (providing a list of all the groups participating in the interagency working group).
129. INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, supra note 126, at 1, 5.
administration-wide regulatory approach to addressing climate change.\textsuperscript{130}

Interagency coordination is especially important in the context of climate change because the actions of many agencies influence greenhouse gas emissions. Department of Energy policies on appliance efficiency, EPA controls on wetlands protection or non-greenhouse gas air pollutants, Department of Transportation policies on public transit, Federal Energy Commission rules that affect the electricity grid, Department of Agriculture subsidy programs, and Forestry Service rules on timber harvesting all have the potential to reduce (or increase) greenhouse gas emissions from the current baseline. Determining the social cost of carbon helps ensure that the lowest cost abatement opportunities within the federal government are exploited.

The task force undertook an extensive literature review drawing on the work of the most preeminent scholars in the area, discussed shortcomings in their approach, and stated a goal of continually improving the damages estimates.\textsuperscript{131} This ongoing effort is important because there are many shortcomings in the social cost of carbon estimates that the task force generated.\textsuperscript{132} Limitations of IAMs mean that estimates of the social cost of carbon likely omit effects that are known to be important—like ocean acidification—but that are hard to quantify.\textsuperscript{133} Catastrophic risk is likely to be inadequately dealt with in current models, and there are several technical choices—such as the choice of damage functions—that are not properly justified.\textsuperscript{134} Some of the most important choices, like the choice of a discount rate or how equity should be factored into the estimate, are heavily value laden, but the process did not adequately incorporate a literature review beyond the field of economics.\textsuperscript{135} Despite these flaws, however, the

\begin{itemize}
  \item \textsuperscript{130} Id. at 1.
  \item \textsuperscript{131} See id. at 1, 30–31 (summarizing how technical experts from multiple agencies met to explore relevant technical research and also openly discussing the shortcomings in the analysis).
  \item \textsuperscript{132} Id. at 30–31.
  \item \textsuperscript{133} Id. at 30.
  \item \textsuperscript{134} See id. at 30, 32 (noting the incomplete consideration of catastrophic damages and how the damage functions used in the analysis must be viewed cautiously in the higher temperatures). For a lengthy discussion of some of the shortcomings with the first proposed task force report, see Letter from Richard L. Revesz, Faculty Dir., Inst. for Pol’y Integrity, & Nathaniel Keohane, Dir., Econ. Pol’y & Analysis, Envtl. Def. Fund, to Carol M. Browner, Assistant to the President, Office of Energy & Climate Change Pol’y, et al. (Sept. 11, 2009), [hereinafter Letter from Revesz & Keohane], available at http://policyintegrity.org/documents/Letter_on the_ Interagency_SCC_9-11-09.pdf.
  \item \textsuperscript{135} Letter from Revesz & Keohane, supra note 134, at 2, 9–10.
\end{itemize}
social cost of carbon process represented a genuine attempt to deal in a serious way with a very complex social question and created much needed consistency across agencies.  

Another place to look for how political appointees in the Obama Administration are leaving their imprint on the practice of cost–benefit analysis and regulatory review is an update to the NCEE Guidelines for Preparing Economic Analyses. First published in 2000 and developed largely during President Clinton’s second term, the Guidelines provide an extensive set of recommendations and best practices for conducting cost–benefit analysis of environmental regulation and recommend a range of default values for key inputs (like the value of a statistical life) that have gained widespread use. The Guidelines have been in the process of reform for several years—a draft for public comment was released in 2007 and a final version was issued December 2010. The updated Guidelines expand on the prior version in a number of important respects, while maintaining the same essential framework of applying cost–benefit analysis to environmental problems.

A further example of the continual process of updating EPA’s approach to economic analysis is a recent examination of cancer risk valuation. Cancer risks can be distinguished from the accidental, workplace risks that dominate the valuation literature by a variety of characteristics, including their involuntary, latent nature and the dread associated with cancer risk. These differences have generated calls for mortality-risk valuation particular to cancer risks.

136. Some commentators who generally support cost–benefit analysis have argued that the challenges posed by climate change for the technique are insurmountable. Susan Rose-Ackerman, Putting Cost–Benefit Analysis in Its Place: Rethinking Regulatory Review, 65 U. MIAMI L. REV. 335, 348–51 (2011); Jonathan S. Masur & Eric A. Posner, Climate Regulation and the Limits of Cost–Benefit Analysis (John M. Olin Law and Econ. Working Paper No. 525, Aug. 2010), available at http://ssrn.com/abstract=1662147. Indeed, given the scale and complexity of the issue, comprehensive cost–benefit analysis of climate change policy is likely an unachievable goal. Nevertheless, there are important advantages to investigating and quantifying in economic terms, to the extent possible, the threats posed by climate change. Perhaps more than in other contexts, however, it is important to remember that cost–benefit analysis is not a “master decisionmaking procedure” or the “alpha and omega of policy analysis,” but rather “one input into public policy.” See REVESZ & LIVERMORE, supra note 1, at 15.


138. EPA, 2010 GUIDELINES, supra note 64.

139. Id. at 7-12 to 7-13.

EPA recently assessed the current state of research on mortality-risk valuation, producing a new draft white paper and soliciting input from its Science Advisory Board.\textsuperscript{141} The white paper included an extensive discussion of valuation issues specific to cancer risks, including a review of recent comparisons of cancer and non-cancer risk values derived through a variety of different analytic methods.\textsuperscript{142} The draft emphasized the need for further study but proposed the use of a 50% “cancer differential” as a placeholder to account for individual preferences for reducing cancer risks relative to other health risks.\textsuperscript{143} This guidance, while preliminary, represents another effort to incorporate new research and improve the rigor of cost–benefit analysis.

In summary, in the relatively short period of time that the Obama Administration has been in office, there has been a flurry of activity that has had the effect of deepening the executive branch’s commitment to cost–benefit analysis. The Administration has continued the prior consensus in favor of using cost–benefit analysis as an important norm for the evaluation of regulation. But it has also gone further, expanding the scope of cost–benefit analysis to include modern behavioral insights and applying it in key areas like climate change.

\textbf{IV. INTEREST GROUPS AND THE FUTURE OF COST–BENEFIT ANALYSIS}

The analysis in \textit{Retaking Rationality} of the dynamic between protection-oriented interest groups and cost–benefit analysis is now two years old. In that time, there have been several important developments that have shifted, somewhat, the traditional wariness with which such groups have approached cost–benefit analysis. Most important has been the embrace by the Obama Administration of both cost–benefit analysis and an aggressive regulatory agenda, easing old fears that the two are necessarily at odds. The financial collapse of 2008 and subsequent recession have also created a political environment in which groups have incentives to emphasize the

\begin{itemize}
\item \textsuperscript{141} Notification of a Public Meeting of the Environmental Economics Advisory Committee Augmented for Valuing Mortality Risk Reductions, 75 Fed. Reg. 80,048, 80,049 (Dec. 21, 2010).
\item \textsuperscript{142} NAT’L CTR. FOR ENVTL. ECON., EPA, VALUING MORTALITY RISK REDUCTIONS FOR ENVIRONMENTAL POLICY: SAB REVIEW DRAFT 20–26 (2010), available at \url{http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0563-1.pdf/$file/EE-0563-1.pdf}.
\item \textsuperscript{143} \textit{Id.} at 25–26.
\end{itemize}
economic value of their regulatory agendas. Many groups responding to these changes have begun to use cost–benefit analysis more robustly in their own advocacy and to engage proactively in discussion over how cost–benefit analysis should be done.

At the same time, other organizations and commentators remain strongly opposed to regulatory review and cost–benefit analysis. Consistent with the traditional paradigm, they continue to look for evidence that OIRA review and cost–benefit analysis have undercut stronger environmental or public health protections. Interestingly, in several cases where they have raised public cries against OIRA on specific regulatory issues, the antiregulatory bias they complained about turned out to be a mirage.

A. Promoting an Aggressive Regulatory Agenda with Cost–Benefit Analysis

After taking office, the Obama Administration moved quickly to reenergize regulatory agencies. The paradigmatic example of the new direction of the Administration has been in the area of environmental regulation by EPA, especially with respect to greenhouse gas rules. Whereas the Bush Administration had delayed any significant action on climate change—even after Massachusetts v. EPA made clear that EPA had both the authority and obligation to act—the Obama Administration has made several early moves to begin the process of coming into compliance with the Supreme Court’s ruling and to exercise its authority to regulate greenhouse gases.

A more aggressive approach to regulation has not been limited to the area of greenhouse gas emissions. Rules on

144. See Lacayo, supra note 87 (voicing concerns that cost–benefit analysis can be used to prevent regulation).

145. See id. (opining that cost–benefit analysis was previously used to stop protective regulation).


interstate emissions of conventional pollutants (upd


150. See, e.g., Press Release, EPA, DOT, EPA Propose the Nation’s First Greenhouse Gas and Fuel Efficiency Standards for Trucks and Buses: A Win for Environment, Economy, and Energy Efficiency (Oct. 25, 2010), http://yosemite.epa.gov/opa/admpress.nsf/is/7f7d4f5af88a3852576b3505a5a04f9b370662f4ac5608525777c7005e140?OpenDocument (“Overall, NHTSA and EPA estimate that the heavy-duty national program would provide $41 billion in net benefits over the lifetime of model year 2014 to 2018 vehicles.”), Press Release, EPA, EPA Sets First National Limits to Reduce Mercury and Other Toxic Emissions from Cement Plants (Aug 9, 2010), http://yosemite.epa.gov/opa/admpress.nsf/is/7f7d4f5af88a3852576b3005a504f6e62ba1cb3c8079b6572777a005a9a5!OpenDocument (“EPA estimates that the rules will yield $6.7 billion to $18 billion in health and environmental benefits, with costs estimated at $926 million to $950 million annually in 2013.”).
At the same time, many protection-oriented groups have also recently begun to use cost–benefit analysis more forcefully to their advantage. One example came in the context of a rule to expand protections for medical professionals who refuse to provide certain kinds of care for reasons of conscience. In late 2008, the outgoing Bush Administration issued a series of “midnight regulations”\(^{151}\)—a common practice for an exiting president to leave one final stamp on the regulatory system. Several of these rules were extremely controversial and, because of the hurried nature of the regulatory development process, were accompanied by inadequate support and analysis. One such rule was issued by the Department of Health and Human Services (HHS): “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices.”\(^{152}\)

The rule defined protections under the Church Amendment,\(^ {153}\) which was passed by Congress in 1973 in the wake of *Roe v. Wade*\(^ {154}\) and prohibited individuals or entities receiving various forms of federal assistance from requiring their employees to perform medical procedures that are “contrary to [their] religious beliefs or moral convictions.”\(^ {155}\) The Bush rulemaking defined various terms in the Act in relatively expansive ways,\(^ {156}\) which had the effect of potentially bringing a larger number of procedures, and more categories of medical personnel, under the protections of the Church Amendment.\(^ {157}\) While the move was hailed by groups opposed to abortion,\(^ {158}\) women’s health groups and others were quick to condemn the rule for limiting access to reproductive health care services.\(^ {159}\)

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156. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies, 45 C.F.R. § 88.2 (2009).


159. Robert Pear, *Protests over a Bush Rule to Protect Health Providers*, N.Y. TIMES, Nov. 18, 2008, at A14 (“The Ohio Health Department said the rule ‘could force
This rule was adopted shortly after we founded Policy Integrity and was one of the first matters that the new institute took up. Responding to a request from the Center for Reproductive Rights, Policy Integrity prepared an assessment of the cost–benefit analysis that had been conducted by HHS in support of the rule. HHS had declared the rule a “significant regulatory action” and, therefore, the rulemaking was subject to the Executive Order’s requirements for cost–benefit analysis. Our assessment found severe shortfalls in the HHS analysis. Neither the costs nor the benefits of the rule were adequately characterized. Most importantly, the negative consequences of the rule were omitted, other than with respect to its administrative requirements: the negative impacts on patients were wholly ignored.

During the notice-and-comment rulemaking process, a coalition of over fifty women’s health groups used our analysis as the basis for public comments opposing the rule. These groups included organizations like the American Civil Liberties Union and Planned Parenthood. In addition to raising traditional constitutional and rights-based objections to the regulation, these groups relied on administrative law doctrine to argue that the agency’s flawed cost–benefit analysis justified rejection of the regulation.

Worker safety organizations have also begun to engage in methodological debates concerning cost–benefit analysis. In November 2008, the Bush Administration issued a regulation

family planning providers to hire employees who may refuse to do their jobs—a concern echoed by Cecile Richards, president of the Planned Parenthood Federation of America.


163. Id. at 5–6.


165. Id. at 12.


167. Letter from Ctr. for Reprod. Rights et al. to Dep’t of Health & Human Servs., supra note 164, at 2 (including as an appendix a memo from the Institute for the Study of Regulation, now the Institute for Policy Integrity).
allowing truckers to spend longer hours behind the wheel. Public Citizen and a coalition of health and union organizations filed suit against the Department of Transportation, challenging the deregulation. Public Citizen concurrently approached Policy Integrity to evaluate the rule's underlying cost–benefit analysis. Policy Integrity subsequently filed an amicus brief in the case, highlighting that the agency's cost–benefit analysis failed to consider driver health or the industry's ability to mitigate compliance costs. After identifying numerous flaws in the underlying analysis, the brief concluded that the court should reject the regulation because it was based on an arbitrary and capricious analysis.

In the environmental area, Policy Integrity has worked with the National Wildlife Federation (NWF) on flood insurance policy. NWF has long been concerned that the National Flood Insurance Program, a government-subsidized program to provide flood insurance to homeowners and businesses located in flood plains, encourages development in environmentally sensitive areas. From an economic perspective, insurance subsidies can be expected to result in inefficient behavior, compounding moral hazards to shift risks away from individuals and businesses in the best position to avoid costs associated with natural disasters. NWF was also interested in whether the flood insurance program primarily benefits relatively wealthy homeowners—for example, owners of second homes in risk-prone coastal regions.

Policy Integrity helped team NWF with economists from Resources for the Future and several other research institutions, building a long-term project to collect data on the flood insurance program, study its impact on development incentives, and assess the distributional impacts of the program. In addition, using existing data on claims and coverage, Policy Integrity conducted an initial assessment of the distribution of benefits from the program, finding a U-shape distribution: at the county level,

relatively wealthy and relatively less wealthy people were most likely to benefit from the program, with counties in the middle least likely to benefit.\(^ {172} \) This effect occurs because in normal years, the program tends to benefit relatively more wealthy areas, but during major loss events, like Hurricane Katrina, counties at the lower end of the income spectrum are more likely to benefit.\(^ {173} \)

An area where cost–benefit analysis can help forge coalitions between traditionally conservative groups and progressive organizations is in the context of criminal justice reform. Building on scholarship conducted by Professor Rachel Barkow, among others, advocacy organizations with a variety of backgrounds have recognized that cost–benefit analysis can be used to rein in wasteful spending in the area of criminal justice, where incarceration or other state expenditures produces little result in terms of public safety or reduced violence.\(^ {174} \) By focusing government resources on those interventions that deliver the greatest public benefit at the lowest expense, cost–benefit analysis can provide a much-needed corrective to criminal justice expenditures that pose a significant drag on state budgets. The introduction of risk-analysis, evidence-based decisionmaking, and indicators for evaluation—all core elements of cost–benefit analysis—can help rationalize criminal justice policy. Policy organizations and advocacy groups like the Pew Center on the States and the Vera Institute are helping to educate policymakers and the public about the potential to increase the effectiveness of the criminal justice system while cutting costs.\(^ {175} \) Research by Policy Integrity has stressed that federal rulemakings on prisoner safety must consider the benefits of avoided recidivism, litigation, and health care costs alongside the costs of compliance.\(^ {176} \)


\(^{173}\) Id.


A final example of protection-oriented groups engaging in discussions over how best to conduct cost–benefit analysis arose in the context of the development of the social cost of carbon. As discussed above, this extensive interagency process took place over the course of several months. Drafts of the final guidance were released during the development of two rules with greenhouse-gas impacts: one concerning energy-efficiency standards for vending machines and the other on fuel-efficiency requirements for automobiles.¹⁷⁷

Several of the major environmental organizations submitted substantive comments on how the social cost of carbon should be set and how it should be used during regulatory decisionmaking. Two sets of comments were particularly detailed and significant, coming from the Environmental Defense Fund (in collaboration with Policy Integrity)¹⁷⁸ and the Natural Resources Defense Council.¹⁷⁹ These are among the most important environmental groups in the country, and their comments touched on a range of central questions: the kinds of discount rates to use; how equity should be considered; and mechanisms for incorporating catastrophic risk into the value. While not all of their suggestions were heeded, the participation of these groups in the process to try and improve how cost–benefit analysis weighs regulatory alternatives is significant.

B. Old Habits Die Hard

At the same time that these projects show some changes in how protection-oriented advocacy organizations approach cost–benefit analysis, there continue to be significant voices that oppose its use. Such opponents have called attention to several instances where there have been perceived moves by OIRA or OMB to scale back or undermine regulations using the vehicle of cost–benefit analysis. Upon closer examination, however, these controversies have turned out to be largely illusory.

In May 2009, a variety of news agencies picked up the story that OMB was highly critical of EPA’s “proposed finding that

¹⁷⁸. Letter from Revesz & Keohane, supra note 134.
greenhouse gases endanger public health and welfare.\textsuperscript{180} The initial story, written by Dow Jones reporter Ian Talley\textsuperscript{181}—which may have been kindled by a blog post from an advocate at OMB Watch, an organization with strong views against regulatory review\textsuperscript{182}—was based on an undated and unsigned government memo originating from OMB, claiming that EPA’s finding “was not based on a systematic analysis of costs and benefits and fell short of scientific rigor.”\textsuperscript{183} This perceived attack by OMB on EPA’s efforts to regulate carbon dioxide emissions generated suspicion of inconsistency within the Obama Administration and spurred several attacks against OMB for undercutting the Administration’s position on greenhouse gas emissions.\textsuperscript{184} Ultimately Peter Orszag, then director of OMB, responded with a posting on his blog.\textsuperscript{185} As Orszag clarified, the comments stemmed from an interagency memo, consisting of a collection of “disparate comments from different agencies” that “do not necessarily represent the views of either OMB or the Administration.”\textsuperscript{186} In fact, the comment came from a staffer in the Small Business Administration.\textsuperscript{187}

Another example of premature (and ultimately unfounded) antiregulatory accusations dealt with OMB’s valuations in an EPA rule on vehicle fuel efficiency. Several environmental groups claimed that OMB had skewed “cost–benefit analysis in a way that would undermine the final fuel economy and greenhouse gas rules . . . [and] undermin[e] historic clean vehicle standards.”\textsuperscript{188} While administrations typically discount by 3–7% the benefits of future actions, the letter claimed that OMB urged for “high


\textsuperscript{185} Peter Orszag, \textit{Clearing the Air}, WHITEHOUSE.GOV (May 12, 2009, 3:45 PM), http://www.whitehouse.gov/omb/blog/09/05/12/ClearingtheAir/.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{See} Roberts, supra note 182.

discount rates of 20, 35, and 50 percent.\textsuperscript{189} In a newspaper report of the incident, an environmental advocate was quoted stating that OIRA was “the viper in the bosom of the Obama administration.”\textsuperscript{190}

In reality, the comments arose from an interagency review, which (like the greenhouse gas issue) means that the comment could have come from any agency in the federal government.\textsuperscript{191} An e-mail from Cass Sunstein the following day included benefits calculated using discount rates ranging from 3–7%—and made no mention of any higher discount rates.\textsuperscript{192} The accusations that OMB was exhibiting antiregulatory bias were ultimately entirely unfounded.\textsuperscript{193}

A third example involves accusations that OIRA is biased toward industry and trade associations, as evidenced by the greater number of meetings they hold with such groups relative to advocacy groups and unions.\textsuperscript{194} OIRA has had approximately eight times as many meetings with industry representatives since President Obama has taken office.\textsuperscript{195} However, since OIRA has a policy of taking meetings requested to discuss regulations under review,\textsuperscript{196} the number of meetings held with OIRA is merely an indication of who is making requests and not any underlying administrative policy or bias.

\textsuperscript{189} Id.


\textsuperscript{191} See Roberts, supra note 182 (explaining that during interagency review, every federal department and agency is eligible to submit feedback on EPA's draft finding).


\textsuperscript{193} For more analysis of this issue, see Michael A. Livermore, No, Peter Orszag Is Not Declaring War on Green Regulations, NEW REPUBLIC (Mar. 24, 2010, 2:38 PM), http://www.tnr.com/blog/the-vine/no-peter-orszag-not-declaring-war-environmental-regs.

\textsuperscript{194} One example involves the meetings between EPA and industry over coal-ash waste. See, e.g., Matthew Madia, OIRA Meetings Stir Controversy over Coal Ash Regulation, OMB WATCH (Jan. 11, 2010), http://www.ombwatch.org/node/10684 (documenting that industry and private-interest representatives opposed to coal ash regulation met with OIRA nineteen times, while environmental advocates met with OIRA only four times); Neil King Jr. & Rebecca Smith, White House, EPA at Odds over Coal-Waste Rules, WALL ST. J., Jan. 9, 2010, at A6 (noting that Cass Sunstein’s office held almost twenty meetings with industry representatives regarding coal ash).

\textsuperscript{195} The list of all meetings held by OIRA is provided on their website at http://www.whitehouse.gov/omb/oira_meetings/. See Michael A. Livermore, Is It a Problem That More Industry Groups Are Meeting with Key Regulatory Officials than Enviros?, GRIST (Mar. 8, 2010, 6:25 PM), http://www.grist.org/article/2010-03-08-is-it-a-problem-that-industry-groups-are-meeting-with-regulators.

\textsuperscript{196} Livermore, supra note 195.
An example of substantive concern over OIRA’s role in the rulemaking process involved the modification of EPA’s desired pollution standard for roadside monitors of nitrogen dioxide. OMB advocated changing EPA’s population threshold from 350,000 to 500,000 based on an economic review of the standard. Initially, EPA disagreed with OIRA over the proposed change and concerns were raised that this was another example of OIRA using cost–benefit analysis to pursue a deregulatory agenda. However, further press scrutiny showed that OIRA did not generate the concern over the monitoring, but was calling attention to comments raised by states. The final regulation settled on OMB’s desire for a population threshold of 500,000. According to Gina McCarthy, the assistant administrator of EPA’s Office of Air and Radiation, this interchange between EPA and OMB actually resulted in “design[ing] the monitoring system in a better way than [EPA] proposed.”

V. A BRIEF REPLY TO PROFESSORS KYSAR AND VOLOKH

The comments presented by Professors Kysar and Volokh help crystallize some of the arguments made in this Address. We deal here only with two principal matters.

A. Progressives and Libertarians

We are encouraged by the divergent reactions of the two commenters on the relationship between interest groups and cost–benefit analysis. The commentators accept the core propositions of our approach: that cost–benefit analysis is here to stay, which is why having this colloquy is important, and that cost–benefit analysis can be a significant tool for protection-oriented advocacy groups.

Professor Kysar accepts our view that protection-oriented groups should engage in methodological discussions concerning

201. Johnson, supra note 199.
cost–benefit analysis.\textsuperscript{202} He is a member of the Center for Progressive Reform,\textsuperscript{203} an organization that has traditionally been extremely skeptical of cost–benefit analysis and opposed to its use in the regulatory process.\textsuperscript{204} But Professor Kysar understands—and we would like to think that our work had a role in persuading him—that it would be strategically unwise for environmental groups to absent themselves from the discussion of how federal agencies should conduct cost–benefit analysis.\textsuperscript{205}

Professor Kysar notes: “[A]ssuming Livermore and Revesz are correct that cost–benefit analysis is here to stay—and this Author has no reason to doubt their prediction—then proponents of environmental, health, and safety regulation would do well to start talking the talk as best they can.\textsuperscript{206}

He believes, however, that environmental groups should pursue a mixed strategy. He explains: “Ultimately, what appears most sensible is that some segments of the environmental, health, and safety advocacy community follow Livermore and Revesz’s advice and become adept at playing the cost–benefit game in hopes of upsetting the current dynamic, which heavily favors regulated entities.”\textsuperscript{207} But he adds: “Other segments, however, should continue to speak different truths to those same powers.”\textsuperscript{208} In contrast to the “cool language of costs and benefits,” these groups should continue to use “hot languages, such as religion and morality.”\textsuperscript{209} We agree with Professor Kysar that as long as some protection-oriented groups participate robustly in cost–benefit debates, a mixed strategy of this type might, indeed, be most effective.

Professor Volokh candidly acknowledges that libertarians have traditionally supported cost–benefit analysis because they

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\textsuperscript{203} Id. at 43 (unnumbered footnote).

\textsuperscript{204} Cost–Benefit Analysis: Over-Reliance on a Flawed Approach, Center for Progressive Reform, http://www.progressivereform.org/costBenefit.cfm (last visited Mar. 16, 2011) (“CPR’s Member Scholars have written extensively on the many methodological and conceptual deficiencies built into the way cost–benefit analysis is applied to regulations aimed at protecting the health, safety and the environment. The distortion and over-reliance on cost–benefit analysis is just one of several problems with the way the White House Office of Management and Budget (OMB) exercises its control over the federal regulatory process.”).

\textsuperscript{205} See Kysar, supra note 202, at 43–44.

\textsuperscript{206} Id. at 76.

\textsuperscript{207} Id. at 48.

\textsuperscript{208} Id.

\textsuperscript{209} Id at 47.
assumed that it would lead to less regulation: “Free-market advocates have mostly gone along with cost–benefit analysis because of a belief that it would serve as a brake on regulation.”\textsuperscript{210} He suggests that libertarians rethink their view, recognizing that cost–benefit analysis could well point in the direction of more stringent regulation: “If Dean Revesz is right—if cost–benefit analysis, neutrally applied, can easily be proregulatory—perhaps natural-rights libertarians should reconsider their tolerance of cost–benefit analysis and focus more on making their case for deregulation in moral terms.”\textsuperscript{211} Volokh goes on to say that the support of libertarians for cost–benefit analysis was a “marriage of convenience” that libertarians might need to “rethink.”\textsuperscript{212}

In summary, our argument appears to have had the effect of shifting the response toward cost–benefit analysis across the political spectrum. As the comments reveal, progressives appear to be coming to understand its usefulness and, conversely, libertarians are seeing its dangers. We regard these developments as extremely salutary.

B. Justifying Cost–Benefit Analysis

Neither Retaking Rationality nor this Address purport to provide a sustained defense of the use of cost–benefit analysis in the regulatory process. Instead, the core of our argument is far narrower. We maintain that cost–benefit analysis is likely to continue playing a key role in the review of federal regulations and, therefore, that the failure of protection-oriented groups to engage in methodological discussions is shortsighted and has had pernicious effects. Nonetheless, Professor Kysar and Volokh both raise significant criticisms against cost–benefit analysis.\textsuperscript{213} They appear to be presented as criticisms of our work, though instead they should be read as criticisms of the key regulatory decision of every President of the United States in the last thirty years.

In the coming years, we may provide a sustained defense of the use of cost–benefit analysis as a means of evaluating regulation, but we can respond briefly now to some of the commenters’ arguments. Professor Volokh devotes considerable

\begin{itemize}
\item \textsuperscript{211} Id. at 80–81.
\item \textsuperscript{212} Id. at 97.
\item \textsuperscript{213} Kysar, \textit{supra} note 202, at 66–76; Volokh, \textit{supra} note 210, at 84–88.
\end{itemize}
attention to raising questions about valuing environmental benefits using the contingent valuation methodology (CVM). This technique is based on surveys in which the interviewee values environmental resources in the abstract; the valuation decision has no consequence in that the interviewee never has to pay anything for protecting such resources. The hypothetical nature of the inquiry does raise significant concerns. Of course, CVM is not the major or preferred technique for valuing environmental resources. The other significant technique, the revealed preference method, relies on actual valuations observed in markets and therefore does not exhibit the shortcomings that Professor Volokh attributes to CVM. Moreover, despite the acknowledged shortcomings of CVM, the methodology received the cautious endorsement of a blue-ribbon panel established by the National Oceanic and Atmospheric Administration, chaired by Nobel Prize-winning economists Kenneth Arrow and Robert Solow, and composed of some of the country’s leading economists.

Provocatively, Professor Volokh takes issue with our example of the ancillary benefits of carbon monoxide reductions in the form of a smaller number of suicides by individuals leaving their cars running in their garages. He sees governmental measures designed to reduce suicides as an affront on individual autonomy, rather than as beneficial. But the very same source on which he relies for this proposition, in the very same section, casts serious doubt on his argument: “A person’s choice to undertake suicidal behavior may not be a reflection of her true self and her self-inflicted death could be an act that she would, in calmer and clearer moments, recoil at.” The source goes on to point out that “there are numerous factors that may compromise a person’s rational autonomy and hence make the decision to engage in suicidal behavior not a reflection of one’s considered values or aims.” Further, it explains that “[p]articularly worrisome is

214. See Volokh, supra note 210, at 84–87.
215. See Revesz & Livermore, supra note 1, at 48–49 (noting that valuations are derived from actual market transactions).
216. See id. at 128–29 (“The panel recommended that stated-preference studies continue to be used to estimate existence value, provided that they were designed properly and were understood to be the result of an imperfect measuring process.”).
217. See Volokh, supra note 210, at 88–89 (reasoning that a determination of what constitutes a cost and a benefit varies based on who is making the analysis).
219. Id.
the evident link between suicidal thoughts and mental illnesses such as depression."\(^{220}\)

In turn, Professor Kysar takes issue with two of the Obama Administration’s decisions, dealing with the regulation of coal ash and with the determination of the social cost of carbon, the latter of which we discuss above.\(^{221}\) He complains that EPA determined not to regulate coal ash as a hazardous waste based on studies of the negative effects of the stigma that could come from such a determination, despite the low likelihood of such a stigma scenario.\(^{222}\) We wholeheartedly agree with Professor Kysar. In fact, Livermore has filed comments on behalf of Policy Integrity taking issue with EPA’s stigma argument.\(^{223}\)

Similarly, Professor Kysar takes issue with a number of steps in the Obama Administration’s study on the social cost of carbon, particularly the use of a discount rate to reduce the benefits that accrue to future generations.\(^{224}\) Here, too, we agree with Professor Kysar. As Professor Kysar notes, Dean Revesz has written extensively about this issue, criticizing the standard discounting models.\(^{225}\) We are quite certain that the best approach for dealing with these problems is to engage in the details, as Professor Kysar has done, rather than to rail against the evils of cost–benefit analysis. Our argument that the Obama Administration has deepened the use of cost–benefit analysis in the administrative state should be read as a descriptive claim, not an evaluative claim. We are certain that its methodological decisions, like those of prior administrations, can be improved upon through sustained scrutiny.

VI. CONCLUSION

After two years, the arguments in Retaking Rationality have held up well and, if anything, have even more relevance today. It is worth considering what those two years have taught us. With

\(^{220}\) Id.

\(^{221}\) See supra text accompanying notes 126–128.

\(^{222}\) See Kysar, supra note 202, at 52–56 (concluding that empirical evidence for the stigma effect is “surprisingly thin”).

\(^{223}\) See, e.g., Letter of Michael Livermore et al., Inst. for Policy Integrity, to EPA (Nov. 19, 2010), available at http://policyintegrity.org/documents/Policy_Integrity_Final_Comments_on_Coal_Ash.pdf (describing EPA’s presentation of the “stigma scenario” as “misleading and inaccurate”).

\(^{224}\) Kysar, supra note 202, at 57.

\(^{225}\) See Richard L. Revesz & Matthew R. Shahabian, Climate Change and Future Generations, 84 U.S.C. L. REV. (forthcoming 2011); Revesz, supra note 40, at 998 (describing discount models as “ethically compromised”).
the election of Barack Obama to the presidency, and his subsequent moves to maintain regulatory review and place Cass Sunstein in charge of OIRA, it is even clearer that cost–benefit analysis is here to stay. Interest groups not traditionally associated with cost–benefit analysis, from environmentalists to advocates for the rights of women and criminal defendants, have begun to take up the charge of using cost–benefit analysis in their advocacy. Many of these organizations are now working to improve the process of calculating costs and benefits, rather than arguing that it cannot and should not be done. Where groups have clung to the traditional position that cost–benefit analysis is always opposed to aggressive regulation, a small amount of investigation shows that, for the past two years, they have largely been boxing with shadows. While it may be impossible to prove conclusively, we continue to believe that as protection-oriented interest groups begin to participate in a robust way in conversations over cost–benefit analysis, they will help balance a conversation that has traditionally tilted in one direction and, in the process, help improve a methodology and institutional structure that will be with us for a long time to come.