
OPENING KEYNOTE ADDRESS

THE REGULATORY LOOKBACK

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Technocratic judgments can have a cooling function. An insistent focus on the facts, and on the likely consequences of policies, might soften political divisions and produce consensus. Within the federal government, cost-benefit analysis is a prominent example of the cooling function of technocracy. But when undertaken prospectively, such analysis is sometimes speculative and can be error prone. Moreover, circumstances sometimes change, sometimes in unanticipated ways. For this reason, retrospective analysis, designed to identify the actual rather than expected effects, has significant advantages. The “regulatory lookback,” first initiated in 2011 and undertaken within and throughout the executive branch, has considerable promise for simplifying the regulatory state, reducing cumulative burdens, and increasing net benefits. It

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deserves a prominent place in the next generation of regulatory practice. Recent history also suggests that it might well soften political divisions.

I. THE COOLING FUNCTION OF TECHNOCRACY

In 2013, the Federal Aviation Administration (FAA) eliminated certain restrictions of the use of electronic technologies – tablets, cell phones, and computers – at various stages of flight.¹ The FAA's decision was widely hailed;² it did not provoke partisan divisions. Across the United States, travelers agreed that the decision would significantly increase convenience and remove irritating restrictions that had significant aggregate costs.³ The scientific evidence also seemed clear: The restrictions that the FAA eliminated were pointless and did not contribute to safety.⁴ The FAA's deregulatory efforts, part of the continuing "regulatory lookback," created substantial benefits without imposing significant costs.

Amidst political polarization, it is often helpful to focus on facts – on what, exactly, is known or at least knowable. Careful assessment of facts, and projection of likely consequences, can have a *cooling function*. That assessment can help to reduce political divisions, even in periods of intense polarization. Under favorable conditions, technocrats inform and discipline politicians and their constituents by clarifying the stakes. To be sure, it is not impossible to argue with numbers, but it can be hard to do so, and once that particular argument begins, people tend to know what it is that they are arguing about. By itself, that is important progress.

From 2009 to 2012, I was privileged to serve as Administrator of the Office of Information and Regulatory Affairs. In that capacity, I learned that close attention to the human consequences, and indeed to costs and benefits, can help to promote both consensus and progress in domains in which both might otherwise prove difficult to achieve. President Obama's Executive Order 13,563,⁵ ratifying and intensifying the longstanding American commitment to careful analysis of costs and benefits,⁶ can be understood as an attempt to shift the attention of public officials away from intuitions, dogmas, political

¹ See Information for Operators Memorandum, Fed. Aviation Admin., Expanding Use of Passenger Portable Electronic Devices (PED) (Oct. 31, 2013), *archived at* <http://perma.cc/D6MV-AVWK>.

² See Matthew L. Wald, *F.A.A. Moves to Ease Electronics Ban, Opening the Runways to Angry Birds*, N.Y. TIMES, Nov. 1, 2013, at B1.

³ See, e.g., *id.*

⁴ *Id.*

⁵ Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601, at 816-17 (2012).

⁶ See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601, at 802-06 (2012); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601, at 431-34 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601, at 802-06 (2012).

posturing, and interest groups, and toward what matters – the effects of potential policies on the human beings who are subject to them.⁷

Some people are likely to doubt that technocracy has or could have a cooling effect, insisting instead that debates about policies and regulations center not on facts but on values. When people disagree, for example, about a rule that would protect clean air or increase highway safety, their disagreement might turn on values, not evidence. Facts are not irrelevant, of course, but they are hardly the main event.

A great deal of evidence does show that values sometimes take priority.⁸ If people have certain predispositions, they will be inclined to believe that climate change is a serious problem, that nanotechnology is dangerous, that nuclear power is a bad idea, and that gun control saves lives. If they have different predispositions, they may be inclined to different beliefs. Predispositions with respect to values help to account for people's factual judgments on these and many other questions. If we are asking what, in fact, explains people's disagreements about facts, one answer would be their disagreements about values.

But it is important not to overstate the point. Most people's values do not lead to clear judgments about whether, for example, to ban the use of tablets aboard airplanes or to require rearview cameras in cars. (Do they reduce accidents? If so, by how much?) By themselves, values do not tell us whether we should reduce levels of ozone in the ambient air from 75 parts per billion to 70 parts per billion or 65 parts per billion, or for that matter to 20 parts per billion. (Would such reductions have significant health benefits?) Taken by themselves, values do not answer the question whether we should increase the fuel economy of cars to 40 miles per gallon (MPG) or 50 MPG or 60 MPG or 70 MPG, and whether we should do so by the year 2020 or the year 2025.

To answer these questions, facts are indispensable. For fuel economy, it is necessary to know what consumers will gain, what they will lose, and what the likely effects will be on air quality and energy security. Abstractions, intuitions, party affiliation, dogmas, and inclinations are hopelessly inadequate. This is an opportunity, not a problem. If regulators discover that a proposed fuel economy rule would not much benefit consumers or the environment but would add \$900 to the cost of every new car, they have learned enough to know that the rule will be exceedingly hard to defend. After they learn such facts, those previously inclined to favor the rule might well change their minds. And if we know (hypothetically) that a rule requiring rearview cameras in cars would prevent a number of deaths (say, 100 per year) and injuries (say, 20,000

⁷ For a more complete discussion of this topic, see CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013).

⁸ Dan Kahan and his coauthors have done a great deal of valuable work on this topic. See CULTURAL COGNITION PROJECT AT YALE L. SCH., <http://www.culturalcognition.net> (last visited Nov. 26, 2012), archived at <http://perma.cc/W3WL-DQMW>.

per year), and cost very little (say, less than a dollar per car), the argument for that rule would be hard to resist.

Of course, any such judgments will depend on at least some kind of consensus about values. Suppose that some people have extreme or idiosyncratic values – suggesting, for example, that increased costs are independently and intrinsically good, or that exceedingly high monetary values should be given to even very small improvements in air quality, or that what most matters is the downfall of capitalism. In the face of such values, agreement will be difficult to achieve. And in the real world, of course, people’s values do differ even if no one is being extreme or idiosyncratic. In some cases, their values, and their competing political allegiances, will lead in different directions no matter what the evidence says.

What I am emphasizing here is the opposite point, and the more interesting and neglected one: when the evidence is clear, it will often lead people to the same conclusion – even if those very people differ intensely with respect to values. If a regulation would save many lives and cost very little, people are likely to support it regardless of their party identification. And if a regulation would produce little benefit but impose significant costs, people are likely to oppose it regardless of whether they like elephants or donkeys. A great advantage of careful analysis is that it can weaken the hold of antecedent convictions, which sometimes operate in a factual vacuum.

The executive branch has particular advantages here because of the existence of institutional arrangements that have long emphasized such analysis.⁹ Insofar as executive agencies have a degree of policymaking discretion under relevant statutes, their ability to investigate the facts, consider a range of options, and assess the costs and benefits of each can make the cooling functioning of technocracy an institutional reality.

II. LOOKING FORWARD, LOOKING BACK

It is unfortunate but true that if undertaken in advance, projections of costs and benefits will sometimes rest on highly speculative assumptions. This is a significant qualification to the claim that technocratic judgments can have a cooling function, and it helps to account for contemporary divisions in the regulatory domain.

In important cases, public officials may not be able to specify with confidence the costs of a rule that would require reductions in air pollution, or the benefits of a rule that would reduce risks of injuries in coalmines. Sometimes the most that can be done is to identify “ranges” for both costs and benefits, and those ranges can be fairly wide. Cost estimates of \$200 million to

⁹ See John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008); Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

\$400 million are not unusual.¹⁰ Benefits estimates on the order of one thousand lives saved to two thousand lives saved are not hard to find.¹¹ In addition, the ranges themselves may be either too optimistic or too pessimistic. The costs may turn out to be far higher than anticipated, and so may the benefits.¹² In addition, circumstances might change. Reasonable assumptions, accepted by relevant officials in advance, might be undermined by technological changes, private adaptation, or other factors.

When the relevant ranges are narrow, or when agencies can come up with something close to point estimates, technocracy can indeed have a cooling effect. But when ranges are wide, a degree of political argument may turn out to be inevitable, and disagreements may become heated and difficult to resolve. With respect to assumptions that generate either low or high benefits or costs, many people will be mind-numbingly predictable (especially in Washington, D.C., and especially if their economic self-interest or ideological goals are at stake) – with industry groups regularly contending that the benefits are at the low end of the range and costs at the high end, and with public interest groups just as regularly arguing exactly the opposite. In part because such groups almost always reach the anticipated conclusions, they cannot be entirely trusted.

A. *Inconsistent Dogmas*

As OIRA administrator, I was often told that with respect to costs and benefits, regulators err in predictable directions. The problem is that the people who told me that offered radically (and almost comically) inconsistent stories when making their point.

Within the business community, not to mention the Republican Party and conservative think tanks, many intelligent people share a single view: government agencies are far too optimistic, even self-serving, about both costs and benefits.¹³ When I spoke on one occasion to a group of small businesses,

¹⁰ For many examples, see Cass R. Sunstein, Essay, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167 (2013).

¹¹ *Id.* at 181-88.

¹² See OFFICE OF MGMT. & BUDGET, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 41-46 (2005), archived at <http://perma.cc/R8LX-BQMJ> (collecting studies comparing ex ante and ex post analyses of regulations' costs and benefits, including examples where cost and benefit estimates were off by more than a factor of ten).

¹³ See, e.g., Si Kyung Seong & John Mendeloff, *Assessing the Accuracy of OSHA's Projections of the Benefits of New Safety Standards*, 45 AM. J. INDUS. MED. 313, 324-28 (2004) (finding that the Occupational Safety and Health Administration consistently overestimates regulatory benefits); Sherzod Abdukadirov, *Regulatory Benefits: Examining Agency Justification for New Regulations* 22-23 (Mercatus Ctr., Paper No. 12-37, 2012) (stating that many regulations overestimate benefits).

an executive asked me, with complete exasperation, “How can we possibly trust cost-benefit analysis, when agencies keep lowballing the costs?” Many conservatives told me (and continue to tell me) that agencies cook their numbers so as to make their rules appear far better than they actually are. In their view, agencies are irredeemably self-interested. They want to justify their rules, and so tweak or twist the numbers to provide that justification. In short, regulators cannot be trusted. Their policy preferences are driving their numbers, rather than vice versa.

Within the public interest community (especially among environmentalists), not to mention the Democratic Party and liberal think tanks, many intelligent people hold precisely the opposite beliefs. When I was speaking on one occasion to a group of committed environmentalists, one of them asked me, with real frustration, “How can we rely on cost-benefit analysis, when the costs are always inflated?” Many progressives believe that agencies systematically underestimate the benefits and exaggerate the costs.¹⁴

Time and again, environmentalists told me that the real benefits are far greater than agencies estimate and that the real costs are a great deal lower. They pointed out that agencies have to rely on industry for cost estimates. (This is true; industries often have most of the relevant data, and the government may have to rely on what industries tell them, at least initially.) This reliance, many environmentalists contend, results in significant overstatements of what companies will actually pay after rules are placed on the books. To public interest groups, agency cost estimates sometimes amount to, or at least draw on, industry scare tactics. In the real world, rules will impose only a small fraction of the projected costs.

Both camps can cite apparently convincing examples. In the Obama Administration, some proposed rules were withdrawn because agencies were ultimately convinced that the costs would be considerably higher than they expected. For example, the Occupational Safety and Health Administration withdrew a highly controversial rule designed to protect workers from excessive noise.¹⁵ It did so in part on the ground that it appeared to have underestimated the costs.¹⁶

On some occasions, other agencies have given unrealistically low estimates of the burdens imposed by paperwork and reporting requirements. Real people

¹⁴ See, e.g., Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 *FORDHAM URB. L.J.* 1071, 1082-84 (2006) (“The evidence is clear: the costs of environmental protection are much more often overestimated, rather than underestimated, in advance.” *Id.* at 1083.); David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 *ECOLOGY L.Q.* 545, 600 (1997) (“Studies comparing regulatory cost estimates with *actual* compliance costs show that regulators consistently overestimate costs.”).

¹⁵ See Press Release, U.S. Dep’t of Labor, U.S. Department of Labor’s OSHA Withdraws Proposed Interpretation on Occupational Noise (Jan. 19, 2011), *archived at* <http://perma.cc/C8LP-QDKD>.

¹⁶ *Id.*

have to spend real time on those requirements, even if they seem simple and easy to navigate to those who wrote them. There have been significant efforts to reform the Free Application for Federal Student Aid (FAFSA) and thus to increase the likelihood that students who need financial help will be able to attend college.¹⁷ But some specialists argue that those efforts do not go nearly far enough and that, even now, the FAFSA form requires significantly more time and effort than the Department of Education projects.¹⁸

On the other hand, agencies have sometimes offered inflated cost estimates. For example, the Clean Air Act Amendments require companies to reduce acid rain.¹⁹ Originally the Environmental Protection Agency (EPA) projected that this requirement would impose high costs, and industry contended that the costs would be actually much higher than the EPA projected. It turned out that the costs were significantly lower.²⁰

In many cases, moreover, industries learn a great deal over time, and costs fall for that reason, in ways that agencies may not be able to anticipate. The expense of a requirement today may be much higher than the expense of the same requirement tomorrow, in part because of cost-reducing innovations, often technological in character, spurred by the regulation itself. Focusing on just this point, the Department of Energy has been rethinking its cost projections for rules requiring energy efficiency.²¹ In its view, a “learning curve” analysis is needed to produce accurate numbers. Because industry learns how to do things more efficiently, innovation often drives anticipated costs way down.

Without a doubt, those with an incentive to oppose rules will tend to overstate the costs and perhaps even claim that if rules are finalized, terrible dislocations will occur. I saw such overstatements at least once a month. I also saw professional civil servants at agencies, working with OIRA and other offices within the government, trying to generate the right numbers. But if industry overstates costs, regulators may not have enough information to make a correction.

While the polarized positions divide most often on costs, benefits matter too, and produce parallel disagreements. Do government agencies overstate or underestimate them? Industry representatives frequently argue that benefits are

¹⁷ See Susan Dynarski & Mark Wiederspan, *Student Aid Simplification: Looking Back and Looking Ahead* (Nat'l Bureau of Econ. Research, Paper No. 17,834, 2012), archived at <http://perma.cc/T7Y5-EKJD>.

¹⁸ *Id.* at 8.

¹⁹ See A. DENNY ELLERMAN ET AL., *MARKETS FOR CLEAN AIR* 4 (2000).

²⁰ See *id.* at 234.

²¹ See Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57,516 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430); Paul Voosen, *For Energy Efficiency, Chu's Law Is on the Way*, GREENWIRE (June 14, 2012), <http://eenews.net/public/Greenwire/2012/06/14/1>, archived at <http://perma.cc/7RVY-XAJ8>.

wildly exaggerated and highly speculative.²² Public interest groups frequently argue that benefits are underestimated, especially in light of the fact that many are hard to quantify and are based on evolving scientific information.²³

B. *Data*

Whether agencies systematically understate or overstate benefits and costs is an empirical question. In principle, the answer to that question is knowable. Researchers have started to try to answer it. A great deal remains to be learned, but current findings do not support either of the polar positions. It turns out that both industry and the public interest community have a great deal of confidence in evidence-free dogmas.

Consider, for example, Winston Harrington's careful study.²⁴ Building on previous work, Harrington explored sixty-one rules for which benefit-cost ratios could be compared before and after the fact – and found no systematic bias.²⁵ In his account, agencies overestimated both benefits and costs with about equal frequency. Specifically, in sixteen of the sixty-one cases, the ratios were found to be essentially accurate.²⁶ In twenty-four cases, the ratio was better, not worse, than the agency had anticipated.²⁷ In twenty-one cases, the ratio was worse than anticipated.²⁸ Harrington's general conclusion is that while both costs and benefits tend to be lower than estimated, no bias can be found in estimates of benefit-cost ratios.²⁹

While highly illuminating, Harrington's study leaves many questions unanswered. The sample size is very small. It investigates benefit-cost ratios, which is certainly a relevant question but not the central one. Agencies should focus not on such ratios but on *net benefits* and whether they have been accurately calculated.³⁰ Nor does Harrington specify the degree to which

²² See, e.g., Mark Drajem, *Obama Agrees to Open Carbon-Cost Estimate to Outside Comment*, BLOOMBERG (Nov. 4, 2013), <http://www.bloomberg.com/news/2013-11-04/obama-agrees-to-open-carbon-cost-estimate-to-outside-comment.html>, archived at <http://perma.cc/A8UY-4H5V> (describing complaints by industry lobbyists that the government's estimate of the benefits of reducing carbon pollution is exaggerated).

²³ See, e.g., Laurie T. Johnson & Chris Hope, *The Social Cost of Carbon in U.S. Regulatory Impact Analyses: An Introduction and Critique*, 2 J. ENVTL. STUD. SCI. 205, 207 (2012) (finding, in an article coauthored by a Natural Resources Defense Council economist, that the government underestimates the benefits of limiting carbon).

²⁴ Winston Harrington, *Grading Estimates of the Benefits and Costs of Federal Regulation* (Res. for the Future, Paper No. 06-39, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937357.

²⁵ *Id.* at 34.

²⁶ *Id.* at 33.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 34.

³⁰ See Sunstein, *supra* note 10, at 198-99.

benefits and costs were underestimated or overestimated. Other studies do explore the question of underestimation or overestimation. One such study analyzed twenty-one environmental and occupational safety regulations for which retrospective estimates could be found.³¹ The basic conclusion is that agencies display a modest tendency to overestimate costs (a finding in support of the progressive view).³² For thirteen rules, agencies overestimated costs; they estimated costs accurately for four; they underestimated costs for three; and the conclusion was indeterminate for one.³³

In 2005, the Office of Management and Budget, and in particular the OIRA staff, provided an overview of many retrospective analyses based on an examination of forty-seven case studies.³⁴ The overview offers three key conclusions. First, agencies were far more likely to overestimate benefits than to underestimate them.³⁵ More particularly, agencies overestimated benefits forty percent of the time, whereas they underestimated benefits only two percent of the time.³⁶ Second, agencies tended to overestimate the benefit-cost ratio, and in that sense to be a bit too optimistic about the consequences of their rules. Agency estimates were accurate twenty-three percent of the time, while the ratio was overestimated forty-seven percent of the time and underestimated thirty percent of the time.³⁷ Third, agencies were slightly more likely to overestimate than to underestimate costs. Agencies were accurate twenty-six percent of the time, overestimated costs thirty-four percent of the time, and underestimated costs twenty-six percent of the time.³⁸

From existing work, the most sensible general conclusion is that neither of the competing dogmas can be supported by the evidence. Agencies do make many mistakes, but there does not appear to be a systematic bias in any one direction. That is useful and important to know. But it is even more important to acknowledge that we need to know a great deal more than we now do. The existing studies cover only a trivially small fraction of rules on the books. Much more can and should be done to compare prospective estimates to what actually happens in the world. We certainly know that some rules work less well than anticipated and that others work much better. Armed with an understanding of how rules are working in fact, we should be in a much better

³¹ Winston Harrington et al., *On the Accuracy of Regulatory Cost Estimates*, 19 J. POL'Y ANALYSIS & MGMT. 297 (2000).

³² *Id.* at 307.

³³ *Id.*

³⁴ See OFFICE OF MGMT. & BUDGET, *supra* note 12, at 46-47.

³⁵ As in the Harrington study, see Harrington, *supra* note 24, at 22, OMB's 2005 report used the term "accurate" to mean "that the post-regulation estimate is within +/- 25 percent of the pre-regulation estimate." OFFICE OF MGMT. & BUDGET, *supra* note 12, at 42.

³⁶ OFFICE OF MGMT. & BUDGET, *supra* note 12 at 47.

³⁷ *Id.*

³⁸ *Id.*

position to decide how to proceed – and in many cases, to streamline, improve, and even eliminate existing requirements.

III. THE REGULATORY LOOKBACK

A sensible regulatory system, dedicated to empirical analysis and designed to transcend partisan divisions, would go beyond the competing dogmas. It would track reality. A key question is whether particular rules should be revised, simplified, strengthened, expanded, or eliminated in light of what we learn about what those rules are actually doing. It is an astonishing fact that until very recently, there has been no sustained effort to gather, let alone act on, that information – and that existing efforts remain highly preliminary and partial. Such an effort might well help agencies to simplify the system by eliminating unjustified burdens and a great deal of pointless red tape.

A. *The Problem of Cumulative Burdens*

A special problem, and one that makes the project of simplification all the more imperative, is that agencies currently impose high cumulative burdens on the private sector. Requirements may be sensible taken individually, but taken as a whole, they might be redundant, inconsistent, overlapping, and immensely frustrating, even crazy-making (to use the technical term). In fact the problem of cumulative burdens may have been the most common complaint that I heard during my time in government. Why, people asked, are agencies unable to coordinate with one another, or to simplify their own overlapping requirements, or to work together with state and local government, so that we do not have to do the same thing two, five, or ten times? This question was raised by multiple actors, including state and local governments and small businesses, and it did not have any kind of partisan valence.

It is important to distinguish the concept of *cumulative* burdens from that of *aggregate* burdens. One rule might cost \$100 million, and another \$200 million, and yet another \$300 million; those costs can easily be aggregated. With respects to benefits, the aggregation is similarly straightforward, a mere matter of arithmetic. So long as the aggregates are accurate, the questions of costs and benefits are symmetrical.

But the concept of cumulative burdens is different. It points not to a simple aggregation, but to the fact that if a public official, a small business, or an individual is asked to engage in tasks *A*, *B*, *C*, and *D*, there may be little room for other tasks, simply because of the scarcity of time and attention.³⁹ The opportunity costs of a large set of overlapping, inconsistent, or redundant rules might turn out to be large. The effects of four tasks must include the opportunity costs, which may spiral out of control.

³⁹ See generally SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

In principle, a competent analysis of costs might be able to capture those costs, but it is exceedingly hard to do so in the context of particular rules. I issued a guidance document designed to draw attention to cumulative burdens and reduce them.⁴⁰ To reduce cumulative burdens, the document states that agencies should engage affected parties in advance of proposed rulemaking; harmonize inconsistent or redundant requirements; and consider whether federal regulation is needed in light of requirements at the state and local levels. It must be acknowledged that, to date, the project of reducing cumulative burdens remains a work in progress.

Some business groups objected to cumulative burdens while focusing particularly on the need for international regulatory cooperation. They contended that just as it usually makes no sense to have to meet redundant requirements from the federal government and California and Georgia and New York, it also makes little sense for companies to have to absorb and meet complex and overlapping requirements from the United States, Canada, Mexico, the United Kingdom, and France. If nations do not really disagree about facts or values, should they not attempt to harmonize their requirements, if only to promote trade and growth?

One representative of a large business organization went so far as to say to me, early on, that while domestic regulation from the Obama Administration was a concern, the problem of unnecessary international differences was a much larger one, and that if we could do something to reduce that problem, we would make a major contribution. When I worked in government, we took these concerns very seriously.⁴¹

B. *Retrospective Analysis*

In January 2011, focusing directly on the issue of simplification, President Obama called for a government-wide “retrospective analysis” of existing rules and required agencies to produce, in short order, preliminary plans for such analysis.⁴² If it could be firmly institutionalized,⁴³ the requirement of retrospective analysis would count as the most important structural change in regulatory policy since the original requirement of prospective analysis during the Reagan Administration.⁴⁴

⁴⁰ See Memorandum from Cass R. Sunstein, Adm’r Office of Info. & Regulatory Affairs (Mar. 20, 2012), archived at <http://perma.cc/G4ZJ-R8H4>.

⁴¹ See discussion *infra* Part V.B.

⁴² See Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601, at 816-17 (2012).

⁴³ This is the goal of Executive Order 13,610. See Exec. Order No. 13,610, 3 C.F.R. 258 (2012), reprinted in 5 U.S.C. § 601, at 820-21 (2012).

⁴⁴ See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601, at 431-34 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601, at 802-06 (2012).

Motivated above all by the general goal of streamlining the regulatory system, the requirement had a particular origin. In the midst of a serious economic crisis, there was a great deal of interest within the Executive Office of the President in taking all reasonable steps to promote economic growth. Eliminating costly regulatory burdens certainly counts as such a step. At the same time, everyone knows that during the first term of the Obama Administration, Congress enacted and the President signed the Affordable Care Act, perhaps the most important social legislation since the 1960s.⁴⁵ Also during the first term, Congress enacted and the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act,⁴⁶ which amounted to the most important financial legislation since the 1930s. And while we focused on net benefits and tried to keep costs down, we also issued a number of important rules to protect public safety, health, and the environment. Some of those rules were both contentious and expensive, and it must be acknowledged that they were not exactly simple.⁴⁷

At the same time that we moved forward in these ways, we believed that in a difficult economic period, there was a pressing need to eliminate unjustified requirements and to reassess rules on the books. Doing so, we knew, would be a significant step toward making the whole system simpler and could have substantial benefits for the economy. We also heard this suggestion, loud and clear, from businesses both large and small. Some expensive rules, even if well-motivated when issued, probably never made a great deal of sense. Other old rules, sensible when issued, do not make sense today. Changed circumstances can make rules ripe for reassessment and trimming, or maybe deletion. Perhaps new technologies make such rules obsolete. Perhaps there is a problem of redundancy and overlap. Perhaps states are also imposing requirements, and federal regulations are no longer needed. Perhaps the private market is now working well enough, and old regulations no longer have a point, because there is no market failure for them to address.

Consider this important suggestion from MIT economist Michael Greenstone, former chief economist at the Council of Economic Advisers: “The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. This is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions.”⁴⁸ By contrast, retrospective analysis can help show what actually works and what does not. In

⁴⁵ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26 and 42 U.S.C.).

⁴⁶ See Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12 and 15 U.S.C.).

⁴⁷ For a catalog, see Sunstein, *supra* note 10.

⁴⁸ Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in *NEW PERSPECTIVES ON REGULATION* 111, 113 (David Moss & John Cisternino eds., 2009).

the process, it can promote the repeal or streamlining of less effective rules and the strengthening or expansion of those that turn out to do more good than harm. In a valuable essay, Greenstone outlines a series of ambitious reforms designed to promote a culture of experimentation and evaluation.⁴⁹ These reforms include an effort to ensure that regulations are written and implemented so as to facilitate reliable evaluation.

In my own experience – and I know that Greenstone agrees – agencies are highly professional, and they work hard to get the analysis right. Those who do the analysis are civil servants, not political appointees. They may be responsive, in appropriate ways, to their department’s political leadership, but that responsiveness does not compromise their efforts to produce sound analysis (which is very much in the interest of any administration, in part because it can avoid political embarrassment, and in part because it can reduce the risk of judicial invalidation).

In addition, there are many checks on what agencies do. If an agency’s estimates are doubtful, OIRA will raise questions, as will the Council of Economic Advisers, the National Economic Council, the Office of Scientific and Technology Policy, and others.⁵⁰ On numerous occasions, the agency’s draft analysis of costs and benefits is altered and improved because of this process of close scrutiny.⁵¹ And if an agency proposes a rule with an implausible or doubtful analysis, members of the public will raise questions, and those questions will receive a serious hearing.⁵² Critics frequently neglect or understate the effect of these safeguards,⁵³ which often produce significant changes in the agency’s original analysis. I saw many such cases.

But Greenstone’s central point remains. When agencies issue rules, they have to speculate about benefits and costs. After rules are in place, they should test those speculations, and they should use what they learn when revisiting a regulation or issuing a new one. This is a central point for the future of regulatory reform. Indeed, it is one of the most important steps imaginable, not least because it can reduce cumulative burdens and promote the goal of simplification.

⁴⁹ *Id.* at 118-22 (proposing four steps to reform our existing regulatory scheme).

⁵⁰ *See* Sunstein, *supra* note 9, at 1867.

⁵¹ *See, e.g., id.* at 1847 (reporting that seventy-six percent of rules sent to OIRA during a two-and-a-half-year period were approved “consistent with change”); *see also* John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *FORDHAM URB. L.J.* 953, 971-74 (2006).

⁵² *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (2012); Sunstein, *supra* note 9, at 1863 (discussing the importance of public comments).

⁵³ *See, e.g.,* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 *DUKE L.J.* 1490, 1492 (1992) (analogizing public comments during rulemaking to “Japanese Kabuki theater” because they are merely symbolic, while admitting that the public can still have influence through other methods, including informal meetings).

IV. THE REGULATORY LOOKBACK IN ACTION

After the issuance of Executive Order 13,563, the initial step was the production of preliminary plans for retrospective review, which the President required within 120 days.⁵⁴ This was an aggressive timeline, especially considering the fact that public officials have numerous responsibilities. Many agencies began by asking for suggestions from the public, requesting ideas about which regulations must needed to be revisited. For example, the Environmental Protection Agency and the Departments of Commerce, Transportation, Interior, Homeland Security, State, and Treasury posted notices in the Federal Register, asking for comments about how the process should work and which rules should be streamlined or repealed.⁵⁵ Several agencies held public meetings nationwide.⁵⁶

In the early days of the process, there was a great deal of skepticism, from those outside of government, about the President's initiative. Critics in the business community contended that this was a symbolic or political exercise that was unlikely to produce anything significant or real.⁵⁷ Those in the public interest community agreed. They added that the idea of a regulatory lookback was a distraction from what was important, which was to look forward by issuing long-overdue public safeguards.⁵⁸ But within the government itself, President Obama's clear commitment to the project, expressed in his 2011

⁵⁴ Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601, at 816-17 (2012).

⁵⁵ *See, e.g.*, Reducing Regulatory Burden; Retrospective Review Under E.O. 13563, 76 Fed. Reg. 17,572 (Mar. 30, 2011) (Dep't of the Treasury).

⁵⁶ *See, e.g.*, EPA, IMPROVING OUR REGULATIONS: A PRELIMINARY PLAN FOR PERIODIC RETROSPECTIVE REVIEWS OF EXISTING REGULATIONS 34 (2011), *archived at* <http://perma.cc/ZZZ9-AEQE> ("Verbal comments were solicited at a series of twenty public meetings. . . . Additionally, EPA held nineteen more town halls and listening sessions targeting specific program areas (e.g. solid waste and emergency response) and EPA Regions.").

⁵⁷ *See, e.g.*, *The Views of the Administration on Regulatory Reform: An Update: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy & Commerce*, 112th Cong. 54, 67 (2011) (statement of William Kovacs, Senior Vice President, U.S. Chamber of Commerce) (saying that while the Obama Administration's regulatory lookback was "a very positive first step . . . we have got a long way to go," and that, "in the case of EPA, its look-back does little to nothing in the way of addressing the bulk of rulemakings of significant concern to the Chamber and its members").

⁵⁸ *See, e.g.*, Press Release, Ctr. for Effective Gov't, Federal Agencies Release Retrospective Reviews: Preliminary Plans Appear Reasonable, but Proof Will Be Final Product (May 26, 2011), *archived at* <http://perma.cc/T3Z2-ZV8R> (expressing the concern that "the more agencies look back the less they will be able to look forward," while also noting positive aspects of the review).

State of the Union Address⁵⁹ and in highly publicized remarks to the U.S. Chamber of Commerce,⁶⁰ had a significant impact.

Throughout the federal government, agencies were energized. A number of officials, at a wide range of agencies, had long wanted to engage in an initiative of this sort, but time is limited and officials have to set priorities. Now the President himself had directed them to act. The lookback requirement gave real space to officials who were already excited about the basic idea, and for officials who had not thought about it, the requirement spurred genuine creativity. In the end, every agency met the President's deadline.⁶¹

In May 2011, the agencies released their preliminary plans, identifying hundreds of reforms, many of which would streamline or delete regulatory requirements.⁶² Recognizing the importance of public participation, every agency made these plans publicly available and requested comments and suggestions.⁶³ I issued a guidance document, which is binding on agencies, directing them to address the comments they received and to make their plans final within eighty days.⁶⁴

Twenty-six such plans were issued in August 2011. They included over 580 initiatives, filling more than 800 pages. The initiatives promised billions of dollars of savings and tens of millions of hours of reductions in annual paperwork and reporting requirements.⁶⁵ Within a short period, over a hundred of the initiatives were finalized or formally proposed to the public.⁶⁶

One of these enjoyed short-term fame, not only because it eliminated unnecessary costs but also because it had the dubious honor of being the most

⁵⁹ See President Barack Obama, Address Before a Joint Session of the Congress on the State of the Union, 2011 DAILY COMP. PRES. DOC. 47 (Jan. 25, 2011).

⁶⁰ See President Barack Obama, Remarks to the United States Chamber of Commerce, 2011 DAILY COMP. PRES. DOC. 72 (Feb. 7, 2011).

⁶¹ See Kori Schulman, *A 21st Century Regulatory System*, WHITE HOUSE BLOG (May 26, 2011), <http://www.whitehouse.gov/blog/2011/05/26/21st-century-regulatory-system>, archived at <http://perma.cc/TK5G-B3HY>.

⁶² See *Regulation Reform*, WHITE HOUSE, <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system> (last visited Feb. 3, 2014), archived at <http://perma.cc/7725-8LJW> (providing links to each agency's preliminary plan to reform their regulations).

⁶³ See Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep'ts & Agencies (Apr. 25, 2011), archived at <http://perma.cc/X9MQ-K88W>.

⁶⁴ *Id.*

⁶⁵ The final plans can be viewed on the White House's website. *Regulation Reform*, *supra* note 62.

⁶⁶ See Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57, 58 (2013).

twittered moment of the 2012 State of the Union Address.⁶⁷ It took a village, but I share the responsibility for that particular honor.

Since the 1970s, milk had been defined by law as an “oil” and potentially subject to costly rules designed to prevent oil spills. This was silly. While oil spills can be really bad for the environment, milk spills are pretty innocuous, and they really should not be subject to the same restrictions. (As one skeptic said, people don’t confuse “Got Milk?” with “Got Oil?”) The agricultural community, including many small businesses, had long asked the EPA to repeal these restrictions. As a key part of its retrospective review plan, the EPA concluded that the regulatory requirements placed unjustifiable burdens on dairy farmers, and it issued a final rule to exempt them.⁶⁸ The projected five-year savings are over \$700 million.⁶⁹

Inside the government we liked to say, a bit sheepishly (and maybe with a trace of self-loathing), that this deregulatory initiative gave new meaning to the phrase, “Don’t cry over spilled milk.” The President made a joke in this vein in his State of the Union Address. People groaned a lot – hence the twittering.

Here are just a few other examples, none of which easily gives rise to any kind of joke, but each of which is having a real impact:

- The Department of Health and Human Services finalized several rules to remove unnecessary regulatory and reporting requirements previously imposed on hospitals and other health care providers, thus saving about \$5 billion over the next five years.⁷⁰ These streamlining initiatives were received with great enthusiasm by nurses and doctors, who had long urged the government to eliminate pointless red tape.
- HHS finalized a rule to eliminate certain restrictions on the use of telemedicine,⁷¹ particularly helping hospitals in rural areas. This rule provides a significant benefit to patients as well as doctors. By removing an anachronistic restriction, people in rural areas are more likely to obtain quality care with the aid of computers and telephones. The five-year savings are \$67 million, and the dollar figure does not fully capture the benefits that doctors and patients are receiving.⁷²
- The Department of Labor finalized a rule to harmonize hazard warnings for workers with those of other nations, producing savings in excess of \$2.5

⁶⁷ *Some Sour Over ‘Spilled Milk’ Line in State of the Union Address*, NBC POLITICS (Jan. 25, 2012), http://nbcpolitics.nbcnews.com/_news/2012/01/25/10229627-some-sour-over-spilled-milk-line-in-state-of-the-union-address, archived at <http://perma.cc/D925-DZE4>.

⁶⁸ See EPA, *supra* note 56, at 13.

⁶⁹ *Id.*

⁷⁰ DEP’T OF HEALTH & HUMAN SERVS., PLAN FOR RETROSPECTIVE REVIEW OF EXISTING RULES 3, 8-17 (2011), archived at <http://perma.cc/5BQC-RTBC>.

⁷¹ Changes Affecting Hospital and Critical Access Hospital Conditions of Participation: Telemedicine Credentialing and Privileging, 76 Fed. Reg. 25,550 (May 5, 2011) (to be codified at 42 C.F.R. pts. 482, 485).

⁷² SUNSTEIN, *supra* note 7, at 182.

billion over the next five years – most of it for employers.⁷³ The basic idea is that many employers do business in more than one nation, and if they have to alter their hazard warnings whenever they cross national borders, they will incur pointless costs. (Recall the importance of international regulatory cooperation.) A significant advantage of this rule is that it promotes trade and exports. In addition, the new warnings are simpler and easier to understand, and lives are expected to be saved as a result.

- The Department of Transportation finalized a rule to simplify a railroad safety regulation, producing savings of between \$620 million and \$818 million and avoiding the risk that such costs will be passed on to consumers.⁷⁴
- The Occupational Safety and Health Administration issued a final rule to remove over 1.9 million annual hours of redundant reporting burdens imposed on employers, thus saving more than \$45 million in annual costs.⁷⁵
- EPA finalized a rule to eliminate the requirement, imposed in some states, that gas stations place air pollution controls on the nozzles that people use to put gas into their tanks.⁷⁶ Because modern cars and trucks already have effective air pollution control technologies, the required controls were redundant and could be eliminated without increasing pollution. The anticipated five-year savings are about \$300 million.⁷⁷
- The Departments of Commerce and State identified a series of steps to eliminate barriers to exports, including duplicative and unnecessary regulatory requirements, with the goal of reducing the cumulative burden and uncertainty faced by American companies and their trading partners.⁷⁸

A small subset of these initiatives, finalized or formally proposed to the public, is producing savings of more than \$10 billion in a short period.⁷⁹ This figure is a small fraction of the eventual savings. Many of the lookback initiatives also provide benefits that are hard to monetize but likely to be significant. For example, it is not easy to quantify the economic benefits, including the jobs potentially created, of reducing restrictions on exports and

⁷³ U.S. DEP'T OF LABOR, PRELIMINARY PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 8-9 (2011), *archived at* <http://perma.cc/X945-R6CJ>.

⁷⁴ Positive Train Control Systems, 77 Fed. Reg. 28,285 (May 14, 2012) (to be codified at 49 C.F.R. pt. 236).

⁷⁵ Standards Improvement Project, 76 Fed. Reg. 33,590 (June 8, 2011) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917-1919, 1926, 1928).

⁷⁶ Widespread Use for Onboard Refueling Vapor Recovery, 77 Fed. Reg. 28,772 (May 16, 2012) (to be codified at 40 C.F.R. pt. 51).

⁷⁷ *Id.* at 28,772.

⁷⁸ DEP'T OF COMMERCE, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 3-6 (2011), *archived at* <http://perma.cc/79D3-UU7R>.

⁷⁹ COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 6 (2012), *archived at* <http://perma.cc/NYA5-W9SE>.

simplifying the requirements imposed on those who do business across national borders. Nonetheless, those benefits might well be high.⁸⁰

V. TOWARD A CULTURE OF RETROSPECTIVE ANALYSIS

A. *A One-Time Endeavor?*

After the plans were finalized, we did a great deal to try to create a culture of retrospective analysis rather than just a one-time endeavor. In 2012, the President issued an Executive Order with three key components.⁸¹ First, agencies are required to reach out to the public, on a continuing basis, to solicit ideas about reforms.⁸² Second, agencies must give priority to reforms that would have a significant impact – for example, those with substantial economic savings.⁸³ New initiatives should make a real difference; they should not be symbolic measures or mere updating. Third, and perhaps most important, agencies are required to report on their progress to OIRA and to the public on a continuing basis.⁸⁴ This final step is designed to promote accountability – to ensure that if agencies are not doing much, the public will be able to see that and provide a corrective.

Here, as elsewhere, we attempted to enlist sunlight as a check on drift and inaction. It must be acknowledged that institutionalization of retrospective analysis is challenging. In view of the sheer number of tasks that agencies face, there is a risk of small steps and drift, certainly in the absence of strong leadership. But these various steps can be understood as an effort to establish a kind of “choice architecture” for the federal government itself, designed to reduce that risk.⁸⁵

⁸⁰ There is a large question about the extent to which independent agencies should be required to engage in a similar regulatory lookback. In Executive Order 13,579, President Obama said that they “should” do so without explicitly directing them to engage in that process. Exec. Order No. 13,579, 3 C.F.R. 256 (2011), *reprinted in* 5 U.S.C. § 601, at 817-18 (2012). Independent agencies generally did what the President said they “should” do, though their efforts were less ambitious than those of the executive agencies. *See, e.g.*, FED. COMM’NS COMM’N, FINAL PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES (2012), *archived at* <http://perma.cc/EL5S-42HK>; FED. TRADE COMM’N, REGULATORY REVIEW PLAN: ENSURING FTC RULES ARE UP-TO-DATE, EFFECTIVE, AND NOT OVERLY BURDENSOME (2011), *archived at* <http://perma.cc/S755-WTPV>; R.R. RET. BD., REGULATION AND REGULATORY REVIEW: RRB ACTION PLAN (n.d.), *archived at* <http://perma.cc/8WSS-QBQJ>.

⁸¹ Exec. Order No. 13,610, 3 C.F.R. 258 (2012), *reprinted in* 5 U.S.C. § 601, at 820-21 (2012).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See* SUNSTEIN, *supra* note 7, at 9-10.

B. *International Regulatory Cooperation*

Also in 2012, the President issued an Executive Order designed to reduce excessive costs and to increase simplification by promoting international regulatory cooperation.⁸⁶ The Executive Order explicitly links the lookback to such cooperation, calling for initiatives that will reduce costs and simplify the system by eliminating unnecessary disparities across nations.⁸⁷

There is a great deal more to do in this area, removing barriers to growth and trade. Through the work of the Regulatory Cooperation Council that I co-chaired, Canada and the United States worked productively together to do exactly that,⁸⁸ and we made significant progress with Mexico too.⁸⁹ Further steps, with considerable promise, might well involve Europe, which should be engaging in a lookback of its own.⁹⁰ International regulatory cooperation and reduction of cumulative burdens remain high priorities and major challenges for the future. We should expect bipartisan consensus on that point.

C. *Paperwork*

As an additional step, I directed agencies to undertake significant new initiatives to eliminate reporting and paperwork burdens. I called for simplified applications, short-form options, exemptions or streamlining for small business, electronic filing, and elimination of unnecessary requirements.⁹¹ More specifically, I directed the agencies that now impose the highest paperwork burdens to identify at least one initiative, or combination of initiatives, that would eliminate two million hours or more in annual reporting burdens.⁹² I also directed all agencies to identify at least one initiative, or combination of initiatives, that would eliminate at least fifty thousand hours in

⁸⁶ Exec. Order No. 13,609, 3 C.F.R. 255 (2012), *reprinted in* 5 U.S.C. § 601, at 819-20 (2012).

⁸⁷ *Id.*

⁸⁸ See REGULATORY COOPERATION COUNCIL, JOINT ACTION PLAN (2011), *archived at* <http://perma.cc/7EA4-5MAX>.

⁸⁹ For relevant documents, see *North America: United States-Mexico High-Level Regulatory Cooperation Council*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_irc_north_america#mexico (last visited Mar. 10, 2014), *archived at* <http://perma.cc/L7PX-NPJC>.

⁹⁰ See generally *United States-European Union High-Level Regulatory Cooperation Forum*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_irc_europe (last visited Mar. 10, 2014), *archived at* <http://perma.cc/D5PZ-TNZ4>.

⁹¹ See Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep'ts & Agencies (June 22, 2012), *archived at* <http://perma.cc/H2Y7-JPPR>.

⁹² *Id.*

annual reporting burdens.⁹³ Major results have come as a result, with savings in excess of 100 million annual burden hours.⁹⁴

As it happens, the Department of Treasury, and the Internal Revenue Service in particular, are responsible for nearly three-quarters of the total annual paperwork burden placed on the American people.⁹⁵ As many taxpayers reminded me while I was at OIRA, there are many opportunities here for making things easier and less frustrating. Often working with OIRA, the IRS has already done a great deal to simplify its forms – for example, with Form 1040-EZ and with the growth of electronic filing.⁹⁶ Other “EZ” forms are now available and in use, and they are greatly easing people’s burdens.⁹⁷ The Plain Writing Act of 2010⁹⁸ is helping to promote clarity, because it is designed to ensure that when government communicates with citizens, it does so in a way that people can easily understand.⁹⁹

D. *Expanding Regulation?*

The lookback has been focused, above all, on streamlining and eliminating rules, in part to reduce cumulative burdens. The President’s 2011 Executive Order has the same emphasis, but it explicitly acknowledges that agencies may “expand” their regulations if retrospective analysis supports that step.¹⁰⁰ We can easily imagine why this might be so – and why a careful lookback could justify expansion as well as elimination of rules. An agency might learn that a rule costs a great deal less than was anticipated and that more stringency is required by cost-benefit analysis. Or an agency might learn that with new technologies – electronic rather than paper reporting, for example – compliance is inexpensive and easy, and an exemption of (say) small businesses is no longer warranted. Or an agency might learn that a rule is working quite well, but its coverage is too narrow, and more people should be subject to it.

⁹³ *Id.*

⁹⁴ OFFICE OF MGMT. & BUDGET, INFORMATION COLLECTION BUDGET 16-20 (2012), archived at <http://perma.cc/R9CG-4KU7>.

⁹⁵ *Id.* at v.

⁹⁶ See *Choose the Simplest Tax Form for Your Situation*, IRS (Jan. 5, 2011), <http://www.irs.gov/uac/Choose-the-Simplest-Tax-Form-for-Your-Situation>, archived at <http://perma.cc/RC5V-2WFC>.

⁹⁷ *E.g.*, Form 990-EZ, Short Form Return of Organization Exempt from Income Tax, IRS, archived at <http://perma.cc/7F7P-D4US>.

⁹⁸ Pub. L. No. 111-274, 124 Stat. 2861 (codified at 5 U.S.C. § 301 (2012)).

⁹⁹ See Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep’ts & Agencies (Apr. 13, 2011), archived at <http://perma.cc/9JD3-743V>.

¹⁰⁰ See Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601, at 816-17 (2012).

All of these points are right and even important, but in the lookback process we did not emphasize them, and I do not expect that they will be the emphasis in the future. The reason is that in the Obama Administration, most agencies were already working diligently to fill regulatory gaps, to expand regulatory safeguards, and to build on what was working. They did not need the lookback to engage in that endeavor. Gap-filling and increased protection are exceedingly important, but for this initiative, we found it best to focus on streamlining and burden reduction, not on gap-filling. While expansion is not off the table, simplification has been and will continue to be the principal concern.

One final point: It is ironic but true that the procedural safeguards that are built into the fabric of administrative law, designed to discipline the rulemaking process, create significant barriers to the project of simplification and indeed to the regulatory lookback. Changes in existing rules are subject to the rulemaking requirements of the Administrative Procedure Act¹⁰¹ as well as to judicial review and the OIRA review process.¹⁰² Whether or not these safeguards are excessive, optimal, or insufficient, they do ensure that the regulatory lookback is not as expeditious as many would like. Rules may be excessive or unjustified, but in most cases, their simplification and repeal requires use of a time-consuming process.

VI. EXPERIMENTS AND TRIALS

To get the facts right, it is important to engage in far more evaluation and experimentation. This is not a point about retrospective review, but it is closely related. It is a central part of the future of reform not only of regulation but of policymaking in general.

In the past decade, there has been growing interest in the use of randomized controlled trials as a means of identifying the effects of policy initiatives.¹⁰³ In medicine, of course, it is standard to rely on such trials to see if a drug is safe and effective. For drugs, it would not make a great deal of sense simply to guess, rely on informed hunches, or even make simple “before and after” assessments. Suppose we learn that people who use a certain asthma medicine do better after taking the medicine than before. If so, we know something important – but we do not know nearly enough. The risk with before-and-after assessments is that they may not control for confounding variables. Perhaps people are doing better because of some change in the environment that is not adequately understood by those who are making the assessment.

In the medical domain, the value of randomized controlled experiments is that they have the potential to provide a clear sense of the actual effects of the intervention. Esther Duflo, along with many others, has pioneered the use of randomized controlled trials for purposes of policy evaluation. Duflo has

¹⁰¹ See 5 U.S.C. §§ 551(5), 553 (2012).

¹⁰² See generally Sunstein, *supra* note 9.

¹⁰³ See, e.g., ABHIJIT BANERJEE & ESTHER DUFLO, POOR ECONOMICS (2011).

shown that in many cases, small measures, even nudges, can have big effects – especially in helping poor people.¹⁰⁴

In the regulatory area, the use of randomized controlled trials has been quite rare. Such trials rarely inform the cost-benefit analysis. But it is easy to imagine serious evaluations. Consider a few examples:

- Would states really save lives by banning the use of cell phones while driving? How many? These are disputed questions. Laboratory experiments, showing that people's reaction times slow down when they are distracted, strongly suggest that the life-saving potential is significant, and indeed that driving while talking on a phone – like driving while drunk – produces a fourfold increase on relative crash risk.¹⁰⁵ But perhaps those experiments are an insufficiently reliable guide to the real world. We could test whether a ban on cell phone use would have major effects on safety by comparing similarly situated localities, one with such a ban and one without. Or we could test whether accidents increase in periods in which cell phone use goes up – for example, when rates decrease after 9 p.m.¹⁰⁶
- What are the effects of different methods of increasing rear visibility in cars? If cameras are placed in the dashboard, do accidents drop? How much, and compared to what? Do improved mirrors have an effect? What about sonar devices that beep? Do they work as well as cameras?¹⁰⁷ Randomized trials might help.
- It is important to evaluate different disclosure requirements.¹⁰⁸ We might test whether different fuel economy labels have different effects on similarly situated consumers.¹⁰⁹ Does one label produce different choices? How different? If labels draw attention to annual fuel costs, are people affected? Do people care about environmental factors? How much? The same kinds of questions might be asked about disclosure requirements for credit cards, mortgages, cell phones, and school loans.

In important areas, experimentation might take the form of advanced testing of regulatory alternatives through randomized controlled trials. A movement in this direction would have major advantages over current approaches, such as

¹⁰⁴ See *id.*

¹⁰⁵ See CHARLOTTE L. BRACE ET AL., ANALYSIS OF THE LITERATURE: THE USE OF MOBILE PHONES WHILE DRIVING (2007), archived at <http://perma.cc/M33J-DWV3>.

¹⁰⁶ See Saurabh Bhargava & Vikram S. Pathania, *Driving Under the (Cellular) Influence: The Link Between Cell Phone Use and Vehicle Crashes*, 5 AM. ECON. J.: ECON. POL'Y 92 (2013).

¹⁰⁷ Cf. Federal Motor Vehicle Safety Standard, Rearview Mirrors, 75 Fed. Reg. 76,186 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585).

¹⁰⁸ See George Loewenstein et al., *Disclosure: Psychology Changes Everything* (Harvard Law Sch. Working Paper, Paper No. 13-30, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312708.

¹⁰⁹ See Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478, 39,482-83 (July 6, 2011) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pt. 575).

focus groups, which are often highly artificial and which sometimes test what people like rather than what they would actually do.¹¹⁰ A presentation might be pleasing without having much of an effect on what people understand and do.

In the United Kingdom, there has been a great deal of interest in using randomized controlled trials, above all through the work of the Behavioural Insights Team (sometimes called the Nudge Unit).¹¹¹ Related efforts should be made in the United States and elsewhere,¹¹² and in 2013, a kind of behavioral insights team was also created in the United States as well.¹¹³ If randomized trials are not feasible, we might be able to design experiments that replicate actual behavior by asking people concrete questions about what they would do if provided with certain information or if given a range of options. The current fuel economy label was based on tests of this kind.¹¹⁴ But such experiments are second best. Randomized controlled trials deserve pride of place.¹¹⁵

Of course there are constraints – involving not merely law but also resources and feasibility (and perhaps equity as well) – in using randomized controlled trials in the regulatory context. But in many cases, they would be both appropriate and useful. The agencies’ retrospective review plans show an unambiguous commitment to moving in this direction. The Department of Treasury states that it will work to “develop and incorporate experimental designs into retrospective analysis, when appropriate.”¹¹⁶ The Department of Labor states that it “is contemplating how to incorporate the use of experimental designs to determine the impact of various regulations.”¹¹⁷ The Department of Interior states that it will consider the use of “experimental or

¹¹⁰ See Robert J. Johnston et al., *Contingent Valuation Focus Groups: Insights from Ethnographic Interview Techniques*, 24 AGRIC. & RESOURCE ECON. REV. 56, 56-57 (1995) (summarizing numerous ways that bias can be introduced into focus groups, including the risk that “questions can elicit speculative responses not closely linked to behavior”).

¹¹¹ See, e.g., *Behavioural Insights Team*, GOV.UK, <https://www.gov.uk/government/organisations/behavioural-insights-team> (last visited Mar. 10, 2014), archived at <http://perma.cc/PHA7-8ZMP>.

¹¹² See JIM MANZI, UNCONTROLLED: THE SURPRISING PAYOFF OF TRIAL-AND-ERROR FOR BUSINESS, POLITICS, AND SOCIETY 245 (2012); DUNCAN J. WATTS, EVERYTHING IS OBVIOUS 200-03 (2011).

¹¹³ See Courtney Subramanian, ‘Nudge’ Back in Fashion at White House, TIME (Aug. 9, 2013), <http://swampland.time.com/2013/08/09/nudge-back-in-fashion-at-white-house>, archived at <http://perma.cc/H5ZP-G4W4>.

¹¹⁴ See Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478, 39,483 (July 6, 2011) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. 575).

¹¹⁵ See *id.* at 39,483 n.25.

¹¹⁶ DEP’T OF THE TREASURY, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 20 (2011), archived at <http://perma.cc/MG9H-AKPR>.

¹¹⁷ U.S. DEP’T OF LABOR, *supra* note 73, at 20.

quasi-experimental designs, including randomized controlled trials.”¹¹⁸ We should expect far more progress in the future.

CONCLUSION

Discussions of political dysfunction tend to focus on high-profile controversies and disputes. Such discussions neglect much of the real work of government, which is often not highly publicized, but which can greatly improve people’s lives.

While in government, I was struck every day by the contrast between the one, two, or three grand narratives that dominate the political headlines (and also the concerns and preoccupations of the most informed observers) and the less dramatic, usually smaller, but nonetheless important matters that dominate the day-to-day work of most people in government. The grand narratives were largely irrelevant to the less dramatic matters. The latter should not be disparaged. They have major effects, and they receive little attention precisely because they are not contentious across political divides. Efforts to simplify government are central examples.

With respect to the regulatory lookback, a great deal remains to be done. What is needed is a genuine culture of retrospective analysis, in which agencies stand ready and willing to improve and simplify rules completed decades ago, or years ago, or months ago, or even weeks ago. Well-functioning companies are flexible and adaptive. They learn in real time. The same should be true of government.

¹¹⁸ DEP’T OF THE INTERIOR, PRELIMINARY PLAN FOR RETROSPECTIVE REGULATORY REVIEW 19 (n.d.), *archived at* <http://perma.cc/D68F-5BLX>; *see also* U.S. DEP’T OF AGRIC., FINAL PLAN FOR RETROSPECTIVE ANALYSIS PURSUANT TO EXECUTIVE ORDER 13563, at 23 (2011), *archived at* <http://perma.cc/S7KW-57BH> (“[The USDA] may consider the use of experimental or quasi-experimental designs, including randomized controlled trials, when promoting the empirical testing of the effects of rules.”).