November 30, 2021

Rep. David N. Cicilline, Chair
Rep. Ken Buck, Ranking Member
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Cicilline, Ranking Member Buck, and Members of the Subcommittee:

I'm a Senior Policy Analyst at the Center for Progressive Reform (CPR), a non-profit research and advocacy organization that works to build thriving communities on a resilient planet. I have been studying the federal regulatory system for over 13 years, with a particular focus on improving integrity in regulatory decision-making and meaningful opportunities for public participation.

As the subcommittee is aware, one of the goals of the Administrative Procedure Act (APA) was to enshrine evidence-based decision-making and public engagement as two of the hallmarks of U.S. administrative law. I commend the subcommittee for hosting this timely hearing to investigate how the U.S. regulatory system falls short in obtaining this ideal. This letter is intended to assist the subcommittee in this investigation by marshaling relevant research and analysis I have produced over the years.

First, I want to draw your attention to a series of polls conducted jointly by CPR and Data for Progress, which explore public attitudes towards the regulatory system and various regulatory process reforms. The first set of polling results demonstrates broad public support across the political spectrum for using regulations to tackle various environmental challenges, including climate change. These polls also showed similar broad support for reforming centralized White House review of regulations as well as the use of cost-benefit analysis for evaluating regulations as part of that review process. The second set of polling explored in greater depth public attitudes

towards the use of cost-benefit analysis in regulatory decision-making. It found that likely voters across the ideological spectrum broadly disapprove of current techniques for performing cost-benefit analysis, calling into question its usefulness and legitimacy as a policy tool. I have attached two reports describing each set of polling to this letter.

These polling results may be helpful to the subcommittee if it decides to address the current problems with White House review of regulations and the use of cost-benefit analysis in regulatory decision-making. As the poll results make clear, both of these institutions as they currently exist are grossly out of sync with widespread American values. Accordingly, the subcommittee may wish to consider legislative reforms that restrict how centralized White House review is conducted and to promote alternative forms of regulatory analysis to replace the use of cost-benefit analysis.

Second, I wish to draw your attention to two memoranda that I prepared with my colleagues at CPR for the Biden administration, which outline comprehensive recommendations for reforming centralized White House regulatory review and regulatory analysis. The first memo re-envisions the White House Office of Information and Regulatory Affairs (OIRA), which has traditionally conducted centralized White House regulatory review, as a champion of a new, more constructive vision of regulation. Accordingly, it outlines a more constrained approach to OIRA's process of regulatory review so that it focuses on interagency coordination and ensures the legal and procedural soundness of agency rules. In addition, the memo recommends that OIRA increase its staff diversity and be charged with articulating a new proactive vision of regulation and putting that vision into practice.

The second memo outlines a strategy for realigning cost-benefit analysis to make it more consistent with social justice, equity, and other good-government principles. It stresses reaffirming the primacy of agencies and their statutory missions in regulatory decision-making by empowering agencies to assess the costs and benefits of their rules according to the context-specific methods outlined in their authorizing statutes. It also calls for new practices that better account for unquantifiable regulatory impacts, as well as steps for elevating distributional considerations, justice, and equity in agency analyses.

I have attached copies of both memos to this letter

While the recommendations contained in these two memos were framed in administrative terms, many could be accomplished through legislation. If the subcommittee wishes to reform White House regulatory review and regulatory analysis, these memos provide several specific options for how to do so.

Third, scholars of the regulatory system are now investigating how various procedures and institutions in the rulemaking process may be contributing to broader patterns of racial injustice and inequity in our society. I wish to draw the subcommittee's attention to an article I published recently in the Environmental Law Institute's *Environmental Forum*, which seeks to contribute to these efforts. This article begins by exploring how cost-benefit analysis has slowly displaced the precautionary principle over the last 40 years. The upshot of this trend, as the article explains, is that it shifts the "costs" of regulatory uncertainty onto regulatory beneficiaries. To the extent that these beneficiaries are disproportionately communities of color, this shifting of costs is fundamentally and racially unjust.

The article also examines the flipside of this equation: Just as regulatory uncertainty entails costs, the alleviation of uncertainty – that is, the generation of new policy-relevant information – entails certain benefits. Again, existing regulatory policies lead to a racially inequitable distribution of these benefits – a phenomenon I call "information injustice." I have attached a copy of the article to this letter.

Based on this analysis, the article concludes that in order to make the regulatory system "anti-racist," policymakers need to consider reforms aimed at a more equitable distribution of the costs and benefits of policy-relevant uncertainty. The subcommittee may wish to consider legislation that tackles these challenges. Specifically, such legislation would seek to (1) restore the primacy of the precautionary principle in regulatory decision-making and (2) promote greater information justice by prioritizing agency development and use of new policy-relevant information that specifically relates to the environmental and public health harms experienced disproportionately by marginalized communities.

Finally, the best way to learn about how to fix the regulatory system to make it more just and equitable is to ask to the public interest advocates – particularly those from structurally marginalized communities – who interface with the regulatory system's procedures and institutions every day. In June of 2019, CPR did just that, by hosting a first-of-its-kind, one-day convening that brought together a diverse group of more than 60 activists and administrative law scholars. Following the convening, I summarized the discussions that took place during the day in a report called *Regulation as Social Justice: A Crowdsourced Blueprint for Building a Progressive Regulatory System*. I have attached a copy of this report to this letter.

The report includes a detailed assessment of the weaknesses in the U.S. regulatory system. Of potential interest to this subcommittee, it also provides a comprehensive set of reform recommendations directed towards various actors relevant to regulatory policy, including Congress. Among its recommended reforms, the report urges Congress to repeal the Congressional Review Act.

I appreciate the subcommittee's attention to the critical issue of regulatory process reform, and I hope the materials provided as part of this letter assist in these efforts. I look forward to working with the subcommittee on this issue in the future.

Sincerely,

James Goodwin
Senior Policy Analyst
Center for Progressive Reform

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CPR Center for Progressive Reform

BUILDING A PROGRESSIVE REGULATORY AGENDA

How a better cost-benefit analysis process can be used to tackle climate change

James Goodwin *Senior Policy Analyst, Center for Progressive Reform*
Ethan Winter *Senior Analyst, Data for Progress*

January 2021

Introduction

Despite common political narratives that cast regulations in negative terms — describing them as burdensome red tape or confusing legalese — we find that likely voters are actually quite receptive to more assertive uses of regulations. Specifically, we find that likely voters are receptive to using regulations to limit pollution and tackle climate change.

As part of a January 2021 survey, Data for Progress polled 1,156 likely voters nationally to measure attitudes towards regulations broadly and, more narrowly, how the impacts of regulations are assessed through a unique tool called cost-benefit analysis. The poll gave particular attention to the intersection of regulations and climate change.

These results show that there is broad public support for a progressive climate agenda that relies heavily on regulatory action. They also show that the public disapproves of how the current cost-benefit analysis process is being used to stymie more assertive regulatory action on climate and other environmental issues. These results demonstrate public support for reforming this process to help advance progressive climate policy efforts.

The Biden-Harris administration has already signaled that reforming the cost-benefit analysis process will be one of its top priorities. Among the administration's Day One actions, President Biden issued a memorandum entitled "Modernizing Regulatory Review," which directs relevant officials to overhaul the practice of cost-benefit analysis to better account for the wide range of benefits that regulations produce. These include protections for future generations and other benefits that are difficult to predict or that cannot be easily converted into dollars-and-cents terms, as required by cost-benefit analysis. In support of this reform effort, the memo cites many policy challenges the United States currently faces, including climate change.

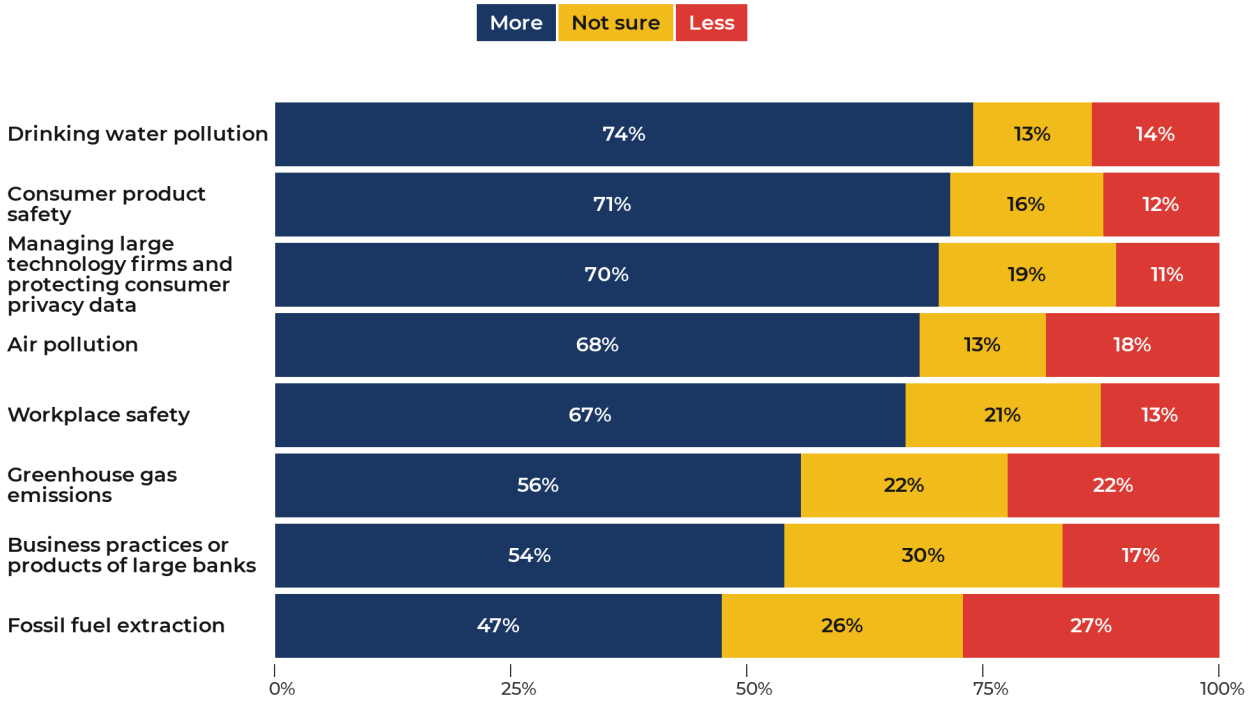
More broadly, the memorandum suggests the Biden-Harris administration intends to move away from a decades old approach in which economists take a leading role in shaping regulations. Such a move would entail a new form of analysis for evaluating regulations — one very different from the current practice of cost-benefit analysis. All in all, the results of Data for Progress' survey suggest the reforms called for in the recent memorandum would enjoy broad support across the political spectrum.

Voters Want More Regulations

Likely voters showed enthusiastic support about the prospect of the government using regulations to limit water and air pollution, protect consumer safety, and ensure the privacy of personal data — a result that contrasts with the conventional wisdom that "regulation" carries negative connotations with the public. For instance, just 14 percent of those polled want less regulation of drinking water pollution, while 74 percent want more regulation. In fact, the number of respondents who answered that they want more regulation of a host of environmental issues was almost always higher than the combined number of respondents who wanted either less regulation or were unsure.

Voters Want More Regulations On A Number Of Issues

Do you think we need more or less regulations for each of the following issues:



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

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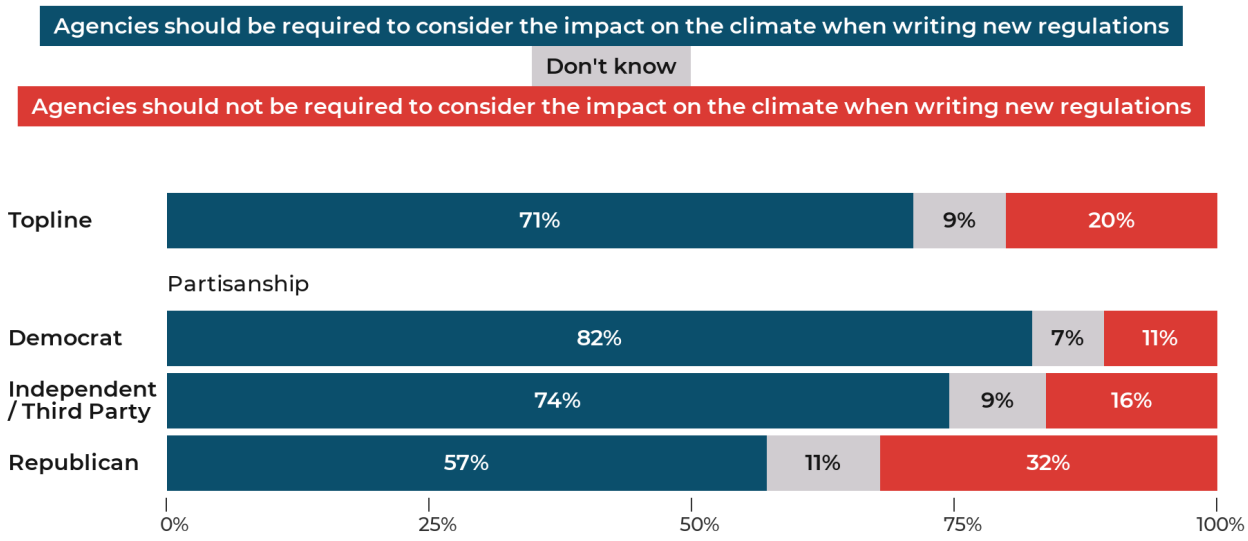
Voters Want Regulatory Process Reform to Tackle Climate Change

We asked likely voters if they want climate change to be taken into account when regulations are written. By a 51-point margin, likely voters want climate taken into account (71 percent favor considering climate impacts, 20 percent do not favor considering climate impacts). Both a majority of Democrats and Republicans want climate impacts taken into account, by margins of 71-points and 25-points, respectively. Importantly, this is a change the President Joe Biden could enact through executive action without having to deal with Congress.

Voters Back Considerations On Climate When Writing Regulations

Some people are proposing that when new regulations are written, government agencies be required to consider how this rule would impact the climate.
When thinking about this proposal, which statement comes closer to your view, even if neither is exactly right?



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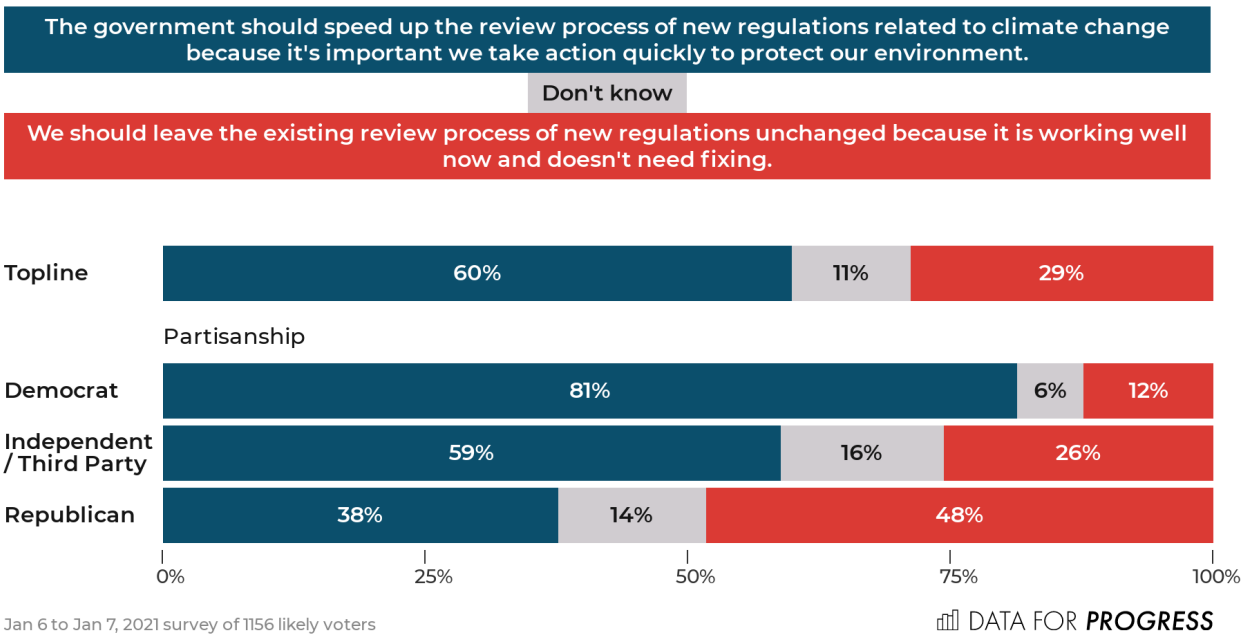
Climate change requires urgent action and likely voters are supportive of expediting the review process of regulations related to climate change. By a 31-point margin, likely voters want the review process sped up. By wide margins, both Democrats and Independents also support this, backing it by a margin of 69-points and 33-points, respectively. Republicans are more divided on this: 48 percent favor leaving the regulatory process unchanged while 38 percent support modifying it.

Voters Favor Expediting The Review Process Of New Climate Change Related Regulations

Which statement comes closer to your view, even if neither is exactly right?



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

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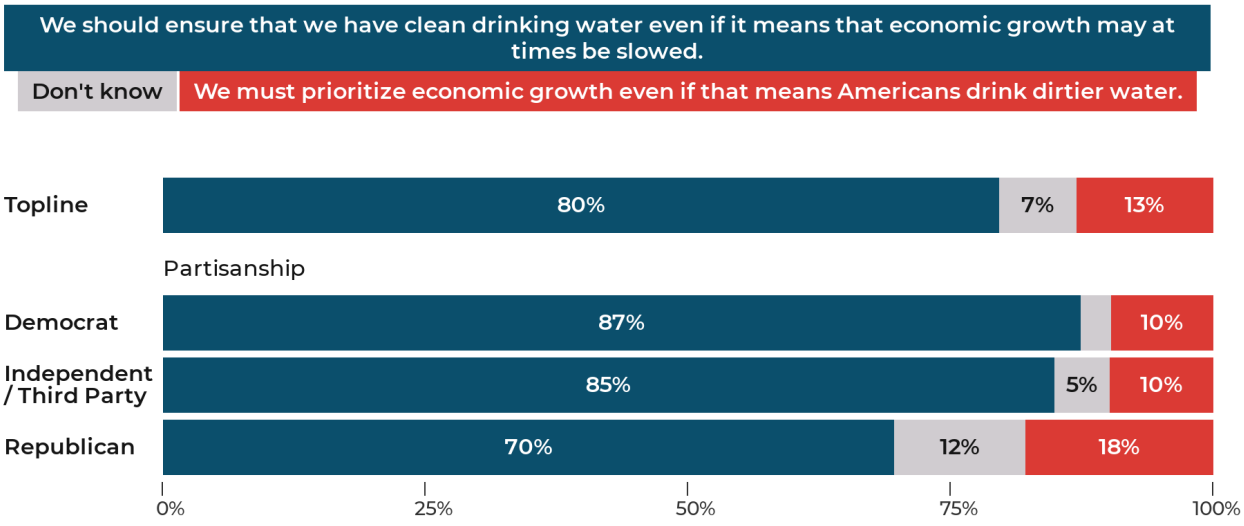
Voters Prioritize the Environment Over Economic Growth

We also posed likely voters with two "extremes," forcing them to choose between cleaner air and water or economic growth as a priority. We should note that these two priorities are not inherently opposed; for example, investing in renewable energy and environmental protection has numerous economic benefits. Nevertheless, the common misconception that people favor economic growth over protecting the environment is not reflected in our poll. By decisive margins, we find that likely voters want to see a regulatory agenda that prioritizes clean air and water, even at the expense of a slower rate of economic growth.

We observe similar patterns across both air and water regulations. Likely voters see clean water as more important than economic growth by a 67-point margin (80 percent clean water, 13 percent economic growth). These attitudes are generally consistent across partisanship: by a 77-point margin and a 52-point margin, Democrats and Republicans, respectively, both identify clean water as something to be prioritized ahead of economic growth.

Voters Overwhelmingly Favor Prioritizing Clean Drinking Water Over Economic Growth

When thinking about how regulations are written, which statement comes closer to your view, even if neither is exactly right?



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

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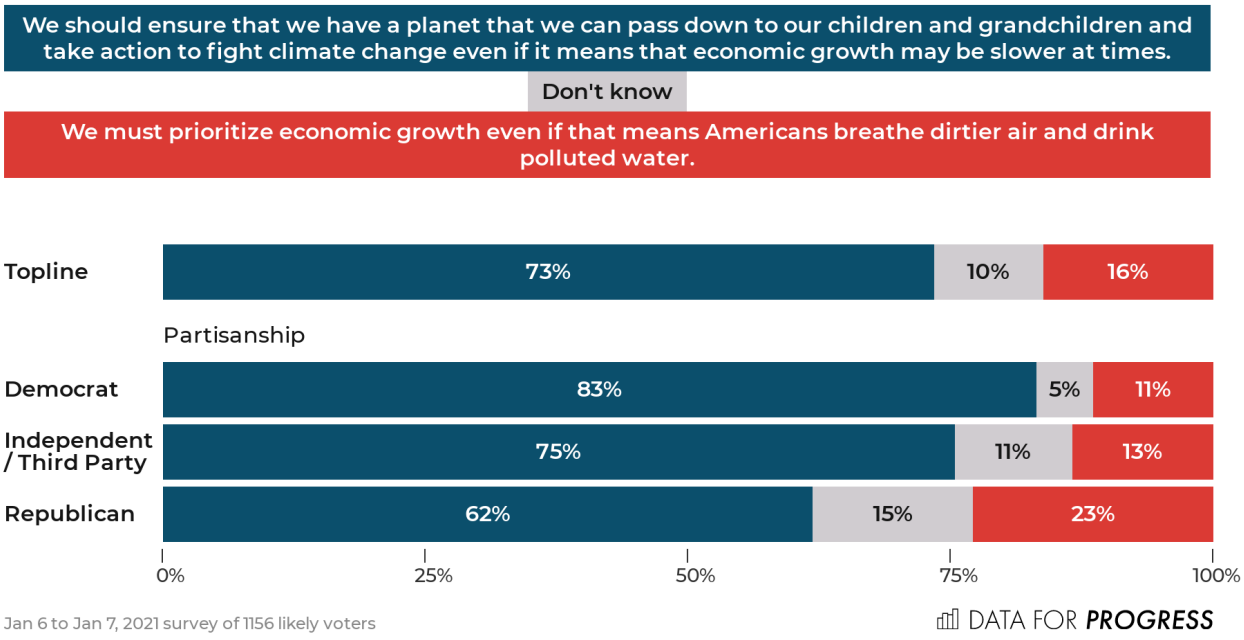
We then asked a similar question, this time focusing squarely on climate change. We find that likely voters favor passing down a livable planet to our children and grandchildren over economic growth by a 57-point margin (73 percent prioritize climate, 16 prioritize economic growth). Democrats identify safeguarding the climate as more important than economic growth by a 72-point margin. Republicans, meanwhile, still see climate change as more important than economic growth by a 39-point margin.

Voters Overwhelmingly Favor Prioritizing Our Planet's Future Over Economic Growth

When thinking about how regulations are written, which statement comes closer to your view, even if neither is exactly right?



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

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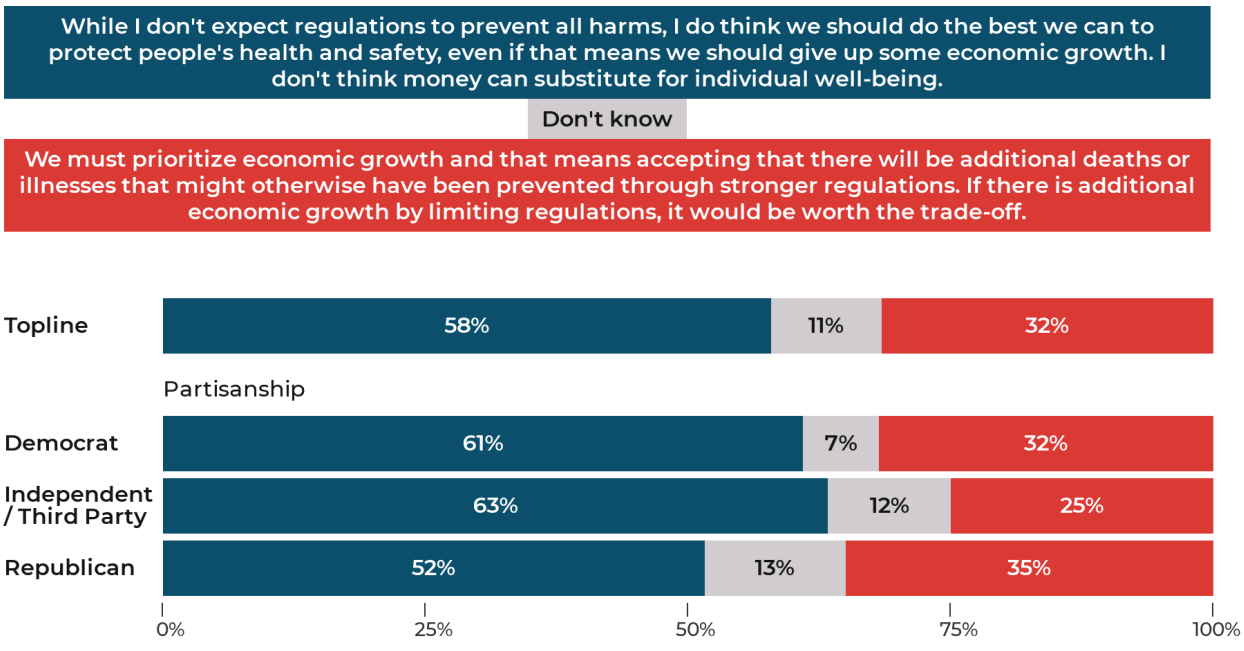
Towards a Progressive Regulatory Regime

In a similar vein, we asked likely voters a question to gauge general attitudes about the role of regulations in our economy and society. We find that a majority of likely voters (58 percent) believe regulations are important and should be designed to prioritize protecting people's health and safety over economic growth. The belief that safeguarding people's health and wellbeing should come first extends across party lines. By margins of 29-points and 17-points, respectively, Democrats and Republicans see regulations as more important than economic growth.

One way to reorient the regulatory process and make it more amenable to advancing progressive priorities, particularly with regard to climate, is to better account for the benefits new rules would provide future generations. The current practice of cost-benefit analysis is to heavily discount any benefits future generations may derive from regulations, giving the present generation priority. We asked likely voters their opinion on altering this.

A Majority Of Voters Back Stronger Health and Safety Regulations, Even If It Means Less Economic Growth

When thinking about how regulations are written, which statement comes closer to your view, even if neither is exactly right?



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

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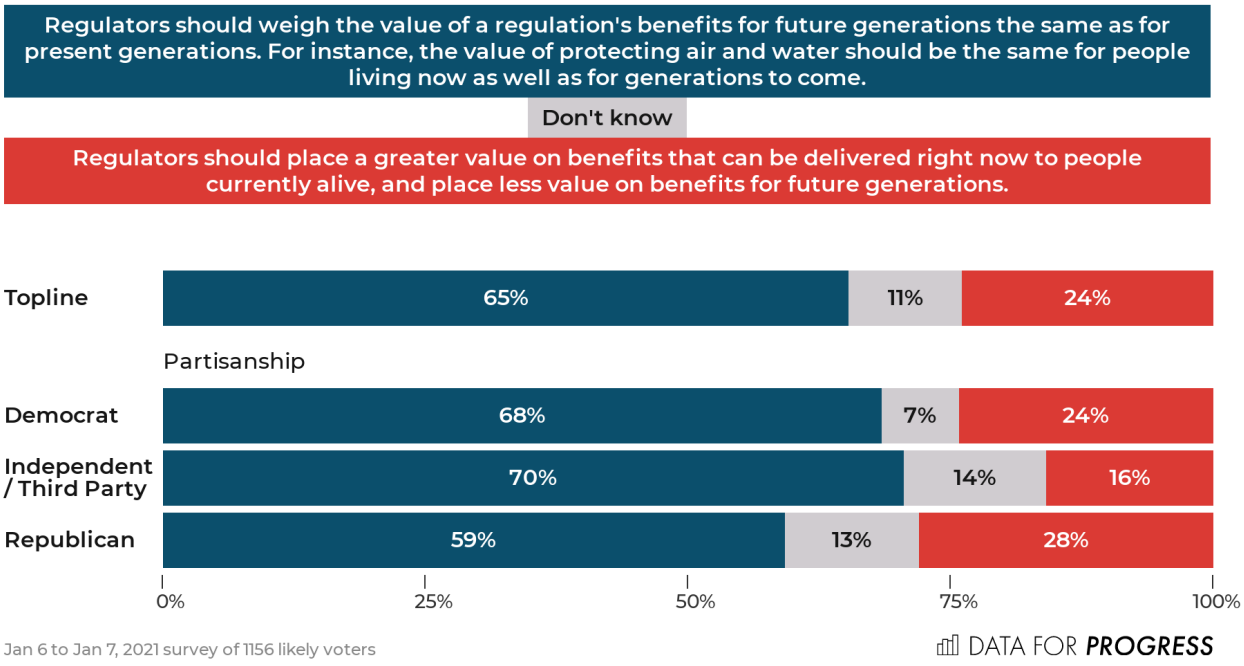
Voters Want Regulations To Equally Benefit Present And Future Generations

When thinking about how the government writes regulations, which statement comes closer to your view, even if neither is exactly right?



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

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We find that likely voters are staunchly opposed to treating impacts on future Americans differently in this way in cost-benefit analyses of regulations. By a 41-percentage-point margin, likely voters want future generations to be assigned the same value as present generations when the costs and benefits of regulations are assessed. This belief is shared by likely voters that identify as Democrats, Independent / Third Party, and Republicans by overwhelming margins — specifically, 44-points, 54-points, and 31-points, respectively.

Conclusion

This polling suggests that likely voters are quite supportive of robust use of regulations to address an array of issues, especially as it pertains to the environment. When it comes to climate change, these results point to a different way politicians and activists can talk about the policy space, one that emphasizes pollution and impacts on future generations.

A majority of the electorate agrees that regulations are a legitimate tool for keeping people safe. With this knowledge, federal officials in the executive branch should operate with bold optimism, working to make full use of the statutory authorities that Congress has provided them to them to keep workers safe, tackle climate change, prevent pollution, and protect future generations.

The Biden-Harris administration has already launched a process to reform long-standing cost-benefit analysis practices. By better accounting for regulatory benefits, these reforms would help strengthen the policy justification for stronger regulations to address a wide variety of issues, including climate change. The results of this polling suggest the public would strongly favor these reforms and the stronger regulations they would contribute to.

Methodology

From January 6 to January 7, 2021, Data for Progress conducted a survey of 1,156 likely voters nationally using web-panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is ±2.9 percentage points.

COVER PHOTO
Bill Oxford /Unsplash

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CPR Center for Progressive Reform

Reclaiming Regulation: Making the Public's Values Heard in Regulatory Analysis

James Goodwin *Senior Policy Analyst, Center for Progressive Reform*
Ethan Winter *Senior Analyst, Data for Progress*
Isa Alomran *Intern, Data for Progress*

February 2021

Introduction

For nearly 40 years, the federal government has evaluated new regulations using a peculiar yardstick known as cost-benefit analysis. Despite the influential role this analysis plays in regulatory decision-making, little is known about how well this methodological approach reflects the values of the country more broadly.

Our polling finds that the current cost-benefit analysis regime is grossly out of sync with the values of voters. Specifically, we find that likely voters broadly disapprove of the preferred techniques for performing cost-benefit analysis, calling into question its usefulness and legitimacy as a policy tool. These results should be cause to question the democratic legitimacy of how regulatory decisions are made and the need for reforming how new regulations are evaluated.

As part of a January 2021 survey, Data for Progress polled 1,156 likely voters nationally to measure attitudes toward the federal government's regulatory decision-making process, and more specifically, how the practices and techniques for evaluating regulations influence that process.

Regulations play a major, if often underappreciated, role in all our lives. Whether drinking water from our tap, buying food off a grocery store shelf, or strapping our children in car seats, we are able to go about our day without having to worry much about health and safety. And that is thanks to regulatory safeguards that public servants faithfully implement and enforce on our behalf. Without regulations, life, for many of us, would quite literally be nasty, brutish, and short.

Making good regulations is not easy, especially in a complex society like ours, where the need for safeguards is great. No doubt, then, it is important to have a system in place for evaluating the quality of regulations before they become enforceable.

Measuring the quality of regulations is not as straightforward as measuring flour for a cake recipe or hand size for a new pair of mittens. Inevitably, it involves subjective, value-laden judgment calls. This is true of the form of cost-benefit analysis that is most commonly used for regulations, which seeks to promote "socially optimal" regulations that "maximize economic growth." While these concepts might resonate with the select few who hold advanced degrees in economics, for the rest of us, they are obscure and wonky.

Our polling seeks to answer the question of how the worldview and values at the heart of current cost-benefit analysis practices represent those of the broader electorate. Significantly, we find that likely voters across the political spectrum largely reject cost-benefit analysis as ethically inconsistent with their own values.

The economics-focused cost-benefit analysis is not the only available yardstick for evaluating regulations, however. Before that form of analysis rose to prominence during the Reagan administration, other approaches were used, including ones that allowed greater space for consideration of other factors that Americans value, such as fairness, justice, and equity.

In a little-noticed memo issued on Day One, the Biden-Harris administration signaled that it is considering overhauling existing policies that govern the evaluation of new regulations as part of a broader regulatory reform effort. This memo, entitled "Modernizing Regulatory Review," directs relevant administration officials to explore options for redesigning regulatory analysis so that it can better account for a wider range of regulatory benefits that the economics-focused cost-benefit analysis either undervalues or disregards altogether.

The results of this polling suggest that this reform effort would enjoy broad support from likely voters. If done well, the resulting new approach to regulatory analysis could help promote better regulatory outcomes and greater legitimacy in regulatory decision-making.

Voters Believe That Protecting Lives Is More Than Just Dollars and Cents

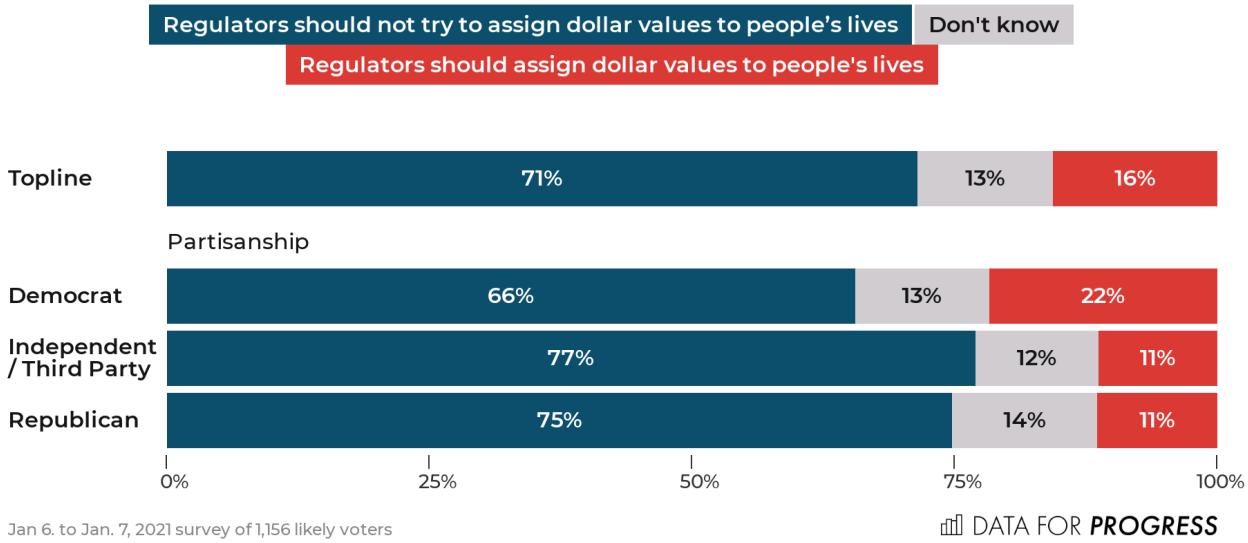
A basic tenet of the economics-focused cost-benefit analysis is that the only impacts that count when evaluating a regulation are those that are measured in monetary terms. That is because dollars and cents serve as the common metric that the analysis uses for directly comparing the pros and cons of a particular regulatory decision in order to determine whether it makes the most efficient use of our money.

For regulations to protect public health and the environment, this approach poses a big problem because the "benefits" of those rules — things like cancers prevented or endangered species saved — cannot be measured in dollars and cents. In these cases, economists have invented complex methodologies for attempting to assign a monetary value to what they call "non-market benefits" — that is, benefits that cannot be bought or sold at a store. One of the more controversial methodologies is what is known as the "value of statistical life," or VSL, which is used to put monetary value on protecting a human life. The VSL represents an important part of the benefits analysis for those public health and safety regulations that are aimed at preventing people from dying early due to preventable accidents or diseases.

We asked likely voters about their views on attempts by economists to reduce human lives to dollars-and-cents terms. We find that likely voters disapprove of this practice by a margin of 55 percentage-points (71 percent oppose, 16 percent support). This attitude toward regulations is shared across self-identified partisanship. Voters who self-identify as Democrats, Independents or Third Party, and Republicans all oppose assigning monetary value to people's lives (by margins of 44 points, 66 points, and 64 points, respectively). Though perhaps not intuitive, this partisan pattern may be explained by a skepticism toward regulations more broadly among Republican voters.

Voters Do Not Want Monetary Values Assigned To People's Lives

When new regulations are being crafted, do you think that regulators should or should not try to assign monetary values to people's lives?



Jan 6. to Jan. 7, 2021 survey of 1,156 likely voters

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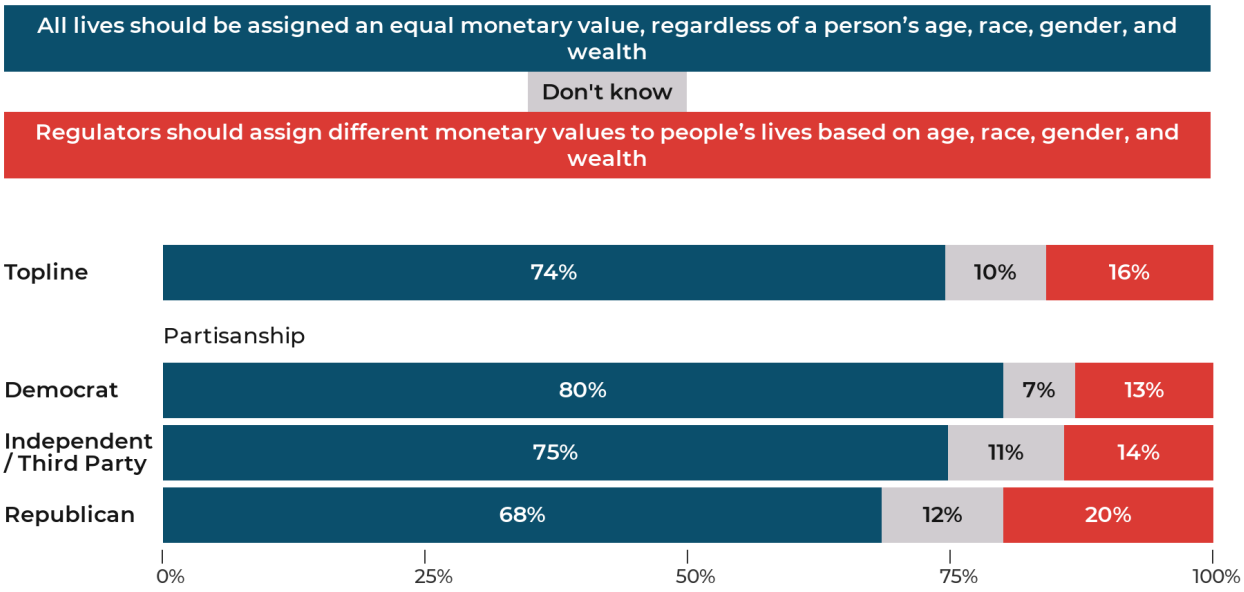
The methodology that economists use to determine VSLs has another controversial consequence: Researchers have found that it yields different VSLs based on race. Specifically, this research has determined that the VSLs of Black people are lower than those of whites. Put differently, this research holds that saving Black people's lives is "worth less" for the purposes of performing cost-benefit analysis. Many mainstream economists support using different VSLs based on race because it would provide a more "precise" measure of regulatory impacts, thereby advancing their goal of promoting economically optimal regulations.

Similar research suggests that cost-benefit analysis would be "improved" if VSLs were adjusted for other factors, such as gender or wealth, with the lives of men or the wealthy potentially assigned a higher value.

We asked likely voters about their views on the economists' preference for using different VSLs in cost-benefit analysis based on characteristics of race, gender, or wealth. We find that by a 58-point margin, likely voters want all lives to be assigned equal monetary value (74 percent want all lives to be given equal weight, 16 percent do not). The notion that all lives ought to be treated equally during the cost-benefit analysis is shared regardless of partisanship: By margins of 67 points, 61 points, and 48 points, Democrats, Independent / Third Party voters, and Republicans, respectively, all think that lives should be treated equally during the regulatory review process.

Voters Want All Lives to Be Given Equal Weight During the Cost-Benefit Analysis Review Process

When thinking about how regulations are written, what comes closer to your view, even if neither is exactly right?



Jan 6. to Jan. 7, 2021 survey of 1,156 likely voters

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Voters Support Taking All Benefits Into Account When Evaluating Proposed Regulations

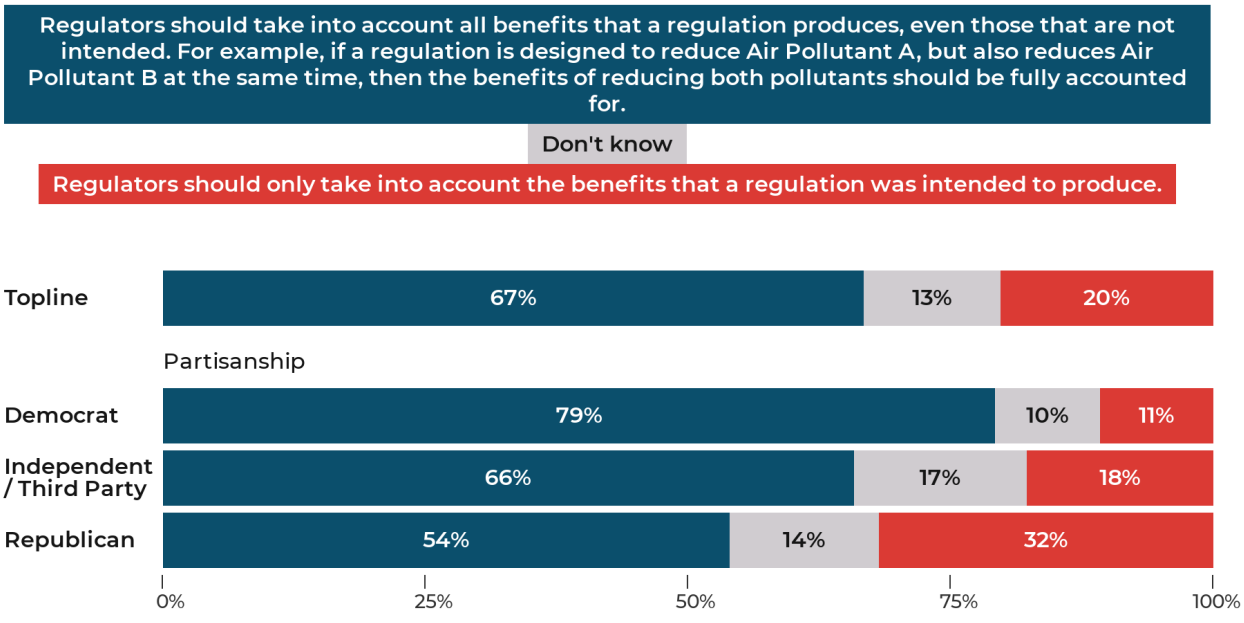
It is not uncommon for a regulation to produce benefits beyond those that were intended. For example, a regulation to limit greenhouse gas emissions from power plants is likely to reduce other pollutants, such as particulate matter and mercury, in the process. These additional, unintended benefits are sometimes referred to as "co-benefits" to distinguish them from the intended "direct benefits."

Many economists believe that cost-benefit analysis should treat co-benefits differently from direct benefits and have offered different proposals for doing so. One option would be to exclude them altogether if they are too large as compared to the direct benefits. Another would be to present them separately from the direct benefits in summaries of the analysis so that co-benefits would be given less weight.

We asked likely voters about their views on whether cost-benefit analysis should include co-benefits. Likely voters support including co-benefits by a margin of 47 points (67 percent support accounting for additional benefits, 20 percent oppose this). Support for this approach extends across party lines: Likely voters who self-identify as Democrats, Independent / Third Party voters, and Republicans all want the side benefits of a regulation to be included in the review process (by margins of 68 points, 48 points, and 22 points, respectively).

Voters Want the Side Benefits of Regulations Taken Into Account When They Are Evaluated

When thinking about how the government writes regulations, what comes closer to your view, even if neither is exactly right?



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Conclusion: Putting Public Values Back Into Regulatory Analysis

This polling suggests that the economics-focused cost-benefit analysis that now predominates in federal regulatory decision-making is driven by a worldview and set of values that widely diverges from the worldview and values shared by the American public. At best, this striking divergence calls into question the relevance and legitimacy of this analysis as a policy tool.

At worst, it suggests cost-benefit analysis may be promoting regulatory decisions that are fundamentally inconsistent with the policy preferences of the American public as enshrined in the statutes that Congress has enacted. Instead, such decisions may reflect the unique policy preferences of economists who influence the practice of cost-benefit analysis. This is troubling because economists are not representative of the broader public in their worldview or set of values or democratically accountable to the public.

In short, the practice of cost-benefit analysis may be undermining the democratic integrity of the regulatory system.

These concerns present an opportunity for the Biden-Harris administration to reform regulatory analysis to make it more "people centered." The administration has already launched a process to reform long-standing cost-benefit analysis practices with its Day One memo on "Modernizing Regulatory Review." This polling suggests that this effort would enjoy broad public support. It also offers lessons for the administration as it carries out this reform. In particular, the polling results suggest that both the quality of regulations can be improved and the legitimacy of the regulatory system can be enhanced by developing and implementing a new form of regulatory analysis — one that eschews overly technocratic economics in favor of a more qualitative approach grounded in human experience and values.

Methodology

From January 6 to January 7, 2021, Data for Progress conducted a survey of 1,156 likely voters nationally using web-panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is ±2.9 percentage points.

QUESTION WORDING:

When new regulations are being crafted, do you think that regulators should or should not try to assign monetary values to people's lives?

- Regulators should not try to assign dollar values to people's lives.
- Regulators should assign dollar values to people's lives.
- Don't know.

When thinking about how the government writes regulations, what comes closer to your view, even if neither is exactly right?

- Regulators should take into account all benefits that a regulation produces, even those that are not intended. For example, if a regulation is designed to reduce Air Pollutant A, but also reduces Air Pollutant B at the same time, then the benefits of reducing both pollutants should be fully accounted for.
- Regulators should only take into account the benefits that a regulation was intended to produce.
- Don't know.

When thinking about how regulations are written, what comes closer to your view, even if neither is exactly right?

- All lives should be assigned an equal monetary value, regardless of a person's age, race, gender, and wealth.
- Regulators should assign different monetary values to people's lives based on age, race, gender, and wealth.
- Don't know.

COVER PHOTO
Christopher Burns/Unsplash

Reorienting OIRA to Support Progressive Regulation

Given its unique position in the executive branch and the influence it wields, the White House Office of Information and Regulatory Affairs (OIRA) has significant potential to affirmatively advance the Biden-Harris administration's policy agenda. To realize this potential, however, it is necessary to rediscover and restore the progressive role that Executive Order 12866 set for OIRA' in the regulatory system —one that would not unnecessarily impede progress on the new administration's policy priorities.

The Problem:

Executive Order 12866 charges OIRA with conducting centralized review of the most important draft proposed and final rules being developed by executive branch agencies. Because those agencies cannot proceed with those rules without clearance from OIRA, this review process positions OIRA as a powerful regulatory "gatekeeper." Historically, OIRA has carried out this gatekeeping function with a strong fixation on reducing regulatory costs, and thus against stronger regulatory protections.

This anti-regulatory orientation departs from the progressive vision outlined in Executive Order 12866, which is built on the conviction that "The American people deserve a regulatory system that works for them." As that order explains, the American people should have "a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy" as its top priority. Whatever might have been the wisdom behind the heavy focus on regulatory costs in the past, it is fundamentally ill-suited to the demands we face as a country now, many of which call for a robust and energetic regulatory response. It is also incompatible with the Biden-Harris administration's ambitious policy agenda, much of which will involve aggressive implementation of existing laws through rulemaking.

Several factors contribute to OIRA's drift away from Executive Order 12866's progressive vision of regulation:

- **The role of cost-benefit analysis.** The economists at OIRA have over the years congealed on a hyper-formalistic version of cost-benefit analysis, one grounded in the doctrinally flawed program of welfare economics, as the prevailing measure of quality in regulatory decision-making. This approach is irrelevant to or directly incompatible with nearly all of the statutory provisions that executive branches implement, and thus serves to subvert agency decision-making. Decisions based on cost-benefit analysis are generally less protective than what most statutory standards call for, leading to systematically weaker regulations.
- **Staff.** Nearly all of OIRA's professional staff are economists by training. This pattern of staffing reinforces the primacy of cost-benefit analysis in regulatory decision-making. OIRA's organizational culture has been strongly influenced by the pronounced skepticism toward government action in general and toward regulation in particular that prevails in the economics discipline.[1]

- **"Open door policy" for industry lobbying.** OIRA maintains that its longstanding policy is to accept meetings regarding rules undergoing review with anyone who requests one. The empirical evidence shows that in practice regulated industries seeking regulatory relief have substantially dominated those meetings.[2] The primacy of cost-benefit analysis and the OIRA staff's cultural predisposition against regulation combine to make the bureau a sympathetic audience for industry lobbyists. The frequency of these contacts also reinforces the skewed view that OIRA personnel already take toward regulations.[3]

The upshot of this anti-regulatory orientation is that for decades, OIRA has operated to advance the unique interests of regulated industries at the expense of the general welfare. This dynamic has been made clear through the dominance of industry lobbying at OIRA combined with anecdotal evidence of OIRA working to block or water down regulations in response to industry demands.

As compared to other institutions within the regulatory system, OIRA carries out its work with a distinct lack of transparency. Its disclosure practices for communications with rulemaking agencies and interest group lobbyists as well as for how changes are made to draft rules during the review process have been inconsistent and incomplete.

The Solution:

President Biden should restore and expand upon the progressive role created for OIRA in Executive Order 12866 by issuing a new order that includes the following elements:

- **A legal and constitutional 'reset' for OIRA review.** A new executive order should overhaul OIRA's review process with an eye towards bringing it within the bounds of the law and constitutional principles. The order should explain that the purpose of this constrained approach to regulatory review is to restore and ensure agency primacy in regulatory decision-making, which would take fuller advantage of agencies' relevant expertise on policy matters, deploy administration resources more efficiently, and promote consistency with the law. To achieve this reset, the order should:
    - Limit OIRA's review to only the largest of agency rules, and it should consist of a limited check on three issues: (1) process (*i.e.*, whether the agency complied with applicable procedural requirements; (2) legal authority (*i.e.*, whether the rule fulfills the agency's statutory mandate), and (3) public communications (*i.e.*, whether the rule's benefits are explained in a clear and compelling manner).
    - Reassert the primacy of agencies in the regulatory decision-making process by directing agencies to use the context-specific methods specified in their authorizing statutes for considering costs and benefits, rather than applying the now-prevalent hyper-formalistic version of CBA as a one-size-fits-all tool. [More information on this recommendation, see accompanying memo on "Restoring Progressive Values to Agency Cost-Benefit Analysis"]
    - Explicitly prohibit reviews of science and other technically complex matters that are best left to agency expertise.

  - Direct OIRA to use its review role to promote interagency coordination and to serve as an honest broker to resolve interagency disputes.

- **New ethos and role for OIRA.** The new executive order should embrace a positive vision of regulation appropriate to the 21st century challenges the Biden-Harris administration will face. Building on the vision articulated in Executive Order 12866, the new order should emphasize how regulation is a legitimate institution within our democracy and how it plays an essential role in our society by promoting the general welfare, creating the conditions for a sound economy in which all are able to participate, and helping to advance broader social values such as equity and justice. To put this new vision into action, the order should charge OIRA with its unique perspective and expertise on cross-cutting, administration-wide regulatory policy issues to identify and promote reforms that will enable executive agencies to pursue their statutory missions in a more timely and effective manner. Issues OIRA might study include improving meaningful public engagement and participation (particularly among individuals from historically marginalized communities)[4] and unnecessary procedural barriers in the rulemaking system that waste agency resources and cause delays without improving agency decision-making.[5]
- **Strengthened commitment to transparency.** The new executive order should reaffirm the strict transparency requirements contained in Executive Order 12866. It should establish a presumption of disclosure with regard to these transparency requirements that displaces the deliberative process exemption to the Freedom of Information Act.

In addition to the executive order described above, the Biden-Harris administration should take appropriate steps to **increase diversity among the OIRA staff** as a means for transforming its institutional culture. In particular, OIRA should refrain from seeking out more economists for open positions, and seek instead to promote greater disciplinary diversity with a focus on candidates with expertise in sociology, community development, communications, and law. Special attention should also be given to increasing racial diversity and diversity in life experiences to ensure greater practical understanding of the real world impacts of regulations.

Potential Opposition:

Some within the Democratic Party may contend that the traditional approach to OIRA review is necessary to ensure political accountability for regulations and to ensure policies are consistent with presidential priorities. They also might contend that systematic efforts to minimize regulatory costs are necessary to avoid or reduce political attacks against the administration's policies – attacks, which could undermine the reelection efforts for the president or Democrats in Congress.

Strong centralized control of agency regulatory decision-making comes at a very high cost with relatively little benefit. In today's polarized political climate, Republicans and their industry allies routinely attack any regulation a Democratic president issues, even ones that have been watered down to minimize costs. Centralization also forgoes the many benefits that come from devolving decision-making responsibilities to agencies as much as possible – the most notable of which is leveraging agency expertise. Because criticism cannot be avoided, the better course is to

focus on defending regulatory safeguards directly to the American public, and that task will be made easier if those safeguards are set not by economists at OIRA but by the agencies with the relevant expertise.

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[1] Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 283 (2012).
[2] RENA STEINZOR ET AL. BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (Ctr. for Progressive Reform, White Paper 1111, 2011), *available at* https://cpr-assets.s3.amazonaws.com/documents/OIRA_Meetings_1111.pdf.
[3] David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006).
[4] *See, e.g.*, K SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS (2019).
[5] Nicholas Bagley, *The Procedure Fetish*, 118 MICH.. L. REV. 345 (2019).

APPENDIX

Specific provisions of a Biden executive order on reorienting the role of OIRA could include:

- Reforms to OIRA's review process:
    - Resetting OIRA's review function:
        - New priorities for review:
            - Economically significant rules (defined as X% of GDP).
            - Rules that implicate the policies of sister agencies (use the regulatory agenda as a means for identifying such rules early in their development).
        - Reoriented function of review:
            - Draft proposals:
                - Priority on facilitating interagency coordination.
            - Draft final rules:
                - Limited check on agency decision-making process that covers the following issues:
                    - Compliance with applicable procedural requirements.
                    - Fulfillment of statutory mandates:
                        - Including the overarching goals and objectives of the statute.
                        - In contrast to "minimizing regulatory costs."
                    - Quality of discussion of the benefits of the rule and how the rule will deliver those benefits:
                        - This discussion should be clear and compelling.
                        - Necessary for advancing the administration's overarching positive vision of regulation.
                - Explicit bar on reviewing questions of science or other complex technical issues better resolved by agency experts.
        - Reaffirm strict transparency requirements of Executive Order 12866:
            - Establish a presumption of disclosure for these requirements that overrides the "deliberative process" exemption to the Freedom of Information Act.
    - Interagency coordination:
        - The goal of the review of draft proposed rules should be to promote interagency coordination and identify potential inconsistencies between agency policies.
        - OIRA should strive to serve as an honest broker to resolve any resulting interagency disputes.

- Establishing a new role for OIRA aimed at promoting effective and timely regulatory implementation:
    - Train political appointees on alternative policymaking tools beyond notice-and-comment rulemaking, such as enforcement discretion and adjudication.
    - Help support agencies in defending their final rules in judicial review by submitting *amicus* briefs that detail how the supporting regulatory analyses were conducted consistent with law and best practices.
    - Identify unmet regulatory needs.
        - Use the review process for proposed rules to identify new policy ideas that agencies can implement through regulation. Specifically, this could come in the form of suggested amendments to the proposed regulations that would help to address other administration policy priorities (*e.g.*, climate change).
        - Produce an annual report to congress on "Unmet Regulatory Needs." This report could replace the current annual report to congress on regulatory costs and benefits.
    - Assist agencies with identifying barriers to the achievement of their statutory missions, including inadequate budgetary resources and gaps in legal authorities; identify and advocate for needed reforms to address those barriers.
    - Identify systemic barriers to participation in regulatory implementation, particularly among marginalized communities
        - This could include overhauling regulations.gov to make it more user friendly.
    - Identify unnecessary procedural burdens in the rulemaking process that waste agency resources and delay rulemakings without improving the quality of decision-making; identify and advocate for needed reforms to address those barriers.
    - Identify reforms that would enable agencies to better account for and promote non-economic values in their regulations, such as justice and equity.

In addition to a new executive order, the next OIRA Administrator can help contribute to these efforts to reorient OIRA so that it affirmatively supports effective and timely regulatory implementation by taking appropriate steps to diversify the bureau's personnel. These steps could include:

- To fill open positions in the future, refrain from hiring additional economists and instead seek to increase disciplinary diversity by hiring experts on the following issues:
    - Sociology
    - Community organizing
    - Communications
    - Law

- Increase racial diversity and diversity of background experiences (*e.g.*, living in poverty, previous employment in manual labor, etc.).

  - Should seek to build a staff that "looks like America" and that can better identify with and understand the experiences of the individuals who will benefit from regulations.

- When hiring economists, seek out those with heterodox views (*i.e.*, those with record of being critical of the prevailing neoliberal tradition in economics).

Restoring Progressive Values to Cost-Benefit Analysis

The current approach to cost-benefit analysis is ill-fitted to the profound and unprecedented set of crises the incoming Biden-Harris administration will inherit. The practice has become ossified in a rigid hyper-formalism grounded in neoliberal orthodoxy.

In this incarnation it lacks the flexibility to adequately account for the vast data gaps and fat-tailed uncertainties[1] that plague our scientific understandings on so many fronts—a newly emerging global pandemic, a legacy of widespread contamination of water, soil and air with a vast array of industrial toxins, and an accelerating global climate crisis.

It is similarly ill-equipped to deal with inherently unquantifiable values like dignity, equity and fairness that have taken center stage in the wake of this summer's Black Lives Matter protests. Compounding these shortcomings, its focus on economic efficiency, defined in terms of *aggregate* social welfare, is fundamentally incompatible with the attention to existing disparities in wealth and power that this political moment demands.

This memo proposes a set of strategies for reorienting the practice of cost-benefit analysis to return it to Executive Order 12866's original grounding in progressive values and to situate the Biden-Harris administration to nimbly meet the challenges of the 21st century.

The Problem:

Although Executive Order 12866 attempted a course correction from the Reagan years—emphasizing the importance of unquantifiable variables, the imperative to consider distributional impacts and equity, and "the primacy" of federal agencies and their statutory mandates in regulatory decision-making—in the intervening decades agency practice has gradually drifted from that progressive vision. This is likely attributable to a White House Office of Information and Regulatory Affairs (OIRA) staff dominated by the economics profession, the "cognitive lure" of numbers and their inherent tendency to "crowd out" qualitative descriptions, and guidance documents from both OIRA and the agencies emphasizing monetization, high discount rates, and the numeric calculation of net benefits.

Accordingly, the version of cost-benefit analysis held up as the norm and the expectation in OIRA review assumes a world where comprehensive data on regulatory impacts are available to agencies, allowing them to monetize all significant costs and benefits and pinpoint the alternative that maximizes net benefit.[2] Unfortunately, that is not the real world. For most of the biggest and most contentious federal rulemakings, the data necessary to meaningfully quantify benefits are simply unavailable.[3] And, for some benefits that resist monetization, these data will never exist. [See accompanying memo on "Data Gaps Plague Cost-Benefit Analysis."]

Nonetheless, despite these yawning data gaps, agencies feel enormous pressure to monetize both sides of the equation and hesitate to submit rules unless they can make their case on the numbers alone.[4] This hyper-attention to dollars and cents crowds out unquantifiable impacts, distributional impacts, and equity even when those intangible values are a primary purpose of an agency's statutory directive. These problems are exacerbated by the practice of applying high

discount rates (3 and 7 percent) that have the effect of drastically shrinking the benefits that will accrue to future generations, sometimes down to almost nothing.[5] As a result, the cost-benefit requirement effectively ends up imposing on agencies a burden of proof that is in many instances insurmountable, putting a chilling effect on the implementation of regulatory safeguards.

This hyper-formalized version of cost-benefit analysis grounded in a rigid adherence to free market fundamentalism has come to dominate agency practice in a way that has led agencies astray from their statutory missions.

Members of Congress were well aware of these pervasive data gaps when they passed many of the statutes from which the biggest and most contentious regulatory programs originate. In response, they came up with a lot of creative ways to make sure costs are kept in check and are not disproportionate to benefits without requiring them to be directly weighed against each other, thus avoiding the need to express regulatory benefits – things like saving lives or preventing neurological damage to kids – in monetary terms. In contexts in which significant benefits (or costs) can't be quantified, these tools can often provide a more useful framework for rational decision making. They include:

- Cost-effectiveness analysis
- Feasibility analysis (*i.e.*, do the best we can using available methods and technologies)
- Qualitative "Ben Franklin" cost-benefit analysis (*i.e.*, an apples-to-oranges comparison to ensure costs are not grossly disproportionate to benefits)
- Multi-factor qualitative balancing.
- Scenario analysis

The current hyper-formalistic approach to cost-benefit analysis is often in tension with these statutory requirements.

The Solution:

President Biden should sign an executive order that aligns the practice of cost-benefit analysis with his progressive vision. This includes reaffirming the primacy of federal agencies and their statutory mandates in regulatory decision-making by directing agencies to use the context-specific methods specified in their authorizing statutes for considering costs and benefits, rather than applying the now-prevalent hyper-formalistic version of cost-benefit analysis as a one-size-fits-all tool. Additionally, this new executive order should implement a set of specific practices aimed at elevating unquantified benefits and costs to the same level of attention and consideration accorded to quantified effects. Finally, it should bring front and center the consideration of cumulative burdens on frontline communities and distributional impacts (including the impact of discount rates on intergenerational equity).

Potential opposition:

Some within the Democratic Party may feel invested in the practice of cost-benefit analysis as it has evolved over the decades (pre-Trump). They may resist these recommendations, arguing that rational regulation requires the economists' approach to weighing of costs and benefits. Ironically, the hyper-formalistic version of cost-benefit currently in use regularly produces results that can only be described as irrational and entirely at odds with common sense. [See accompanying memo on "Restoring Rationality to Regulatory Analysis."] Indeed, even some of those who have traditionally been cost-benefit's staunchest defenders have come more recently to recognize that it may be ill-fitted to some of the 21st century's defining challenges.[6] Some of those who defend the status quo may fail to appreciate how widespread and pervasive the data gaps really are. Some may argue that the Supreme Court's 2015 opinion in *Michigan v. EPA* now requires the economists' formalistic cost-benefit analysis, but that would be a misreading of that case. In fact, *Michigan* supports the notion that agencies should have discretion to choose from a menu of tools for the consideration of costs and benefits like those listed above.

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[1] *See* Martin L. Weitzman, *Fat-Tailed Uncertainty in the Economics of Catastrophic Climate Change*, 5 REV. OF ENVTL. ECON. & POL'Y 275 (2011).

[2] *See* Office of Mgmt. & Budget, *Circular A-4: To the Heads of Executive Agencies and Establishments: Regulatory Analysis* 10 (2003) ("[a] distinctive feature of . . .Benefit-Cost Analysis is that both benefits and costs are expressed in monetary units, which allows you to evaluate different regulatory options with a variety of attributes using a common measure.").

[3] *See* Amy Sinden, *The Problem of Unquantified Benefits*, 49 ENVTL. L. 73 (2019) (study of 45 cost-benefit analyses prepared by EPA in connection with major final rules issues between 2002 and 2015; in 80 percent of cost-benefit analyses, EPA was, due to data limitations, entirely unable to monetize whole categories of benefits the agency described as either actually or potentially "important," "significant," or "substantial"); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications* 124 YALE L. J.. 882, 997-98 (2015) (presenting a series of case studies "suggest[ing] that the capacity of anyone . . . to conduct quantified CBA[] with any real precision or confidence does not exist for important representative types of financial regulation.").

[4] Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1865-66 (2013) ("In the Obama Administration, it has been very rare for a rule to have monetized costs in excess of monetized benefits."); Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 180-81 (2014) (noting that where a regulation's monetized benefits are less than monetized costs, "the agency is unlikely to attempt to go forward with this regulation," and if it does, it "will not be easy to establish" that the benefits justify the costs); Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 352 (2014)("OIRA's fine cost-benefit sieve leads EPA personnel to be deeply wary of developing rules that have very high costs in relation to their quantified and monetized benefits.").

[5] *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 107-117 (2008).

[6] Jonathan Masur & Eric Posner, *Climate Regulation and the Limits of Cost-Benefits Analysis*, CAL. L. REV. 1557 (2011) ("[T]he formulaic approach to weighing costs and benefits that is embodied in the standard methods used by regulatory agencies is not appropriate for [the] problem [of climate change].") ; Michael A. Livermore, *Can Cost-Benefit Analysis of Environmental Policy Go Global?* 19 NYU ENVTL. L. J. 146, 172 (2011)(cost-benefit analysis "of only limited value" in the context of regulations protecting natural resources); Susan Rose-Ackerman, *Putting*

Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review, 65 U. MIAMI L. REV. 335 (2011) (arguing that "a number of pressing current problems do not fit well into the cost-benefit analysis paradigm, [including in particular those with potentially long-term catastrophic and irreversible effects, such as] climate change, nuclear accident risks, and the preservation of biodiversity"); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 68-69 (2002) (suggesting that cost-benefit analysis may be inappropriate for regulations aimed at protecting endangered species, "ensur[ing] against irreversible damage, or otherwise . . . prevent[ing] the violation of rights").

APPENDIX

Specific provisions of a Biden executive order on reforming cost-benefit analysis could include:

- Reiterating the Supreme Court's admonition in *Michigan v. EPA* that there is no one-size-fits-all method for the consideration of costs and benefits and that it is "up to the agency to decide how to account for costs [and benefits]" by choosing among the wide array of tools available.
    - This choice should be tailored to the particular context in which the rulemaking arises, including :
        - Attention to the feasibility of quantifying and monetizing relevant costs and benefits; and
        - The agency's statutory mandates.
    - OIRA should be required to defer to the agency's choice of decision-making tool.

- Requiring the agencies to articulate the particular methods their organic statutes direct them to use in accounting for regulatory costs and benefits.

- Reaffirming that any attempt to characterize or quantify regulatory benefits should include co-benefits.

- Ending the practice of across-the-board use of 3- and 7-percent discount rates. Instead, agencies should reevaluate the use of discount rates in order to:
    - Develop new approaches to discounting that are tailored to particular statutory contexts; and
    - Give priority to the value of intergenerational equity.

- Prohibiting calculation of net benefit unless all significant categories of benefit and cost can be effectively and non-controversially monetized, with only two specific exceptions:
    - Where net benefits are calculated in the context of a breakeven analysis; or
    - Where an incomplete benefits estimate exceeds a reasonably complete cost estimate and the net benefits estimate is clearly designated as a lower bound.

- Forbidding monetization of benefits (or costs) for which prices are not set in existing markets.

- Directing the agencies and OIRA to employ the principle of "proportionality" to decide what decision-making tool to adopt and the level of time and resources to devote to quantification, ensuring that the rigor of the analysis is commensurate with the magnitude of the rule's impacts.
    - This principle is currently used in the European Union.

- Requiring any chart presenting a rule's total quantified costs and benefits to:

  - Use a "+B" or a "+C" to indicate where significant benefits or costs could not be quantified;
  - List in narrative terms all significant categories of non-quantifiable benefits or costs; and
  - For any monetized estimates of non-market goods, to include an alternative valuation in natural units (lives saved, illnesses averted, acres of wetlands preserved, etc.).

- Requiring an analysis of distributional impacts and of relevant equity and justice considerations.
  - This analysis should account for who bears the costs and who reaps the benefits of the rule
  - It should also pay particular attention to cumulative burdens suffered by historically marginalized groups and frontline communities as well as other similar distributional concerns.

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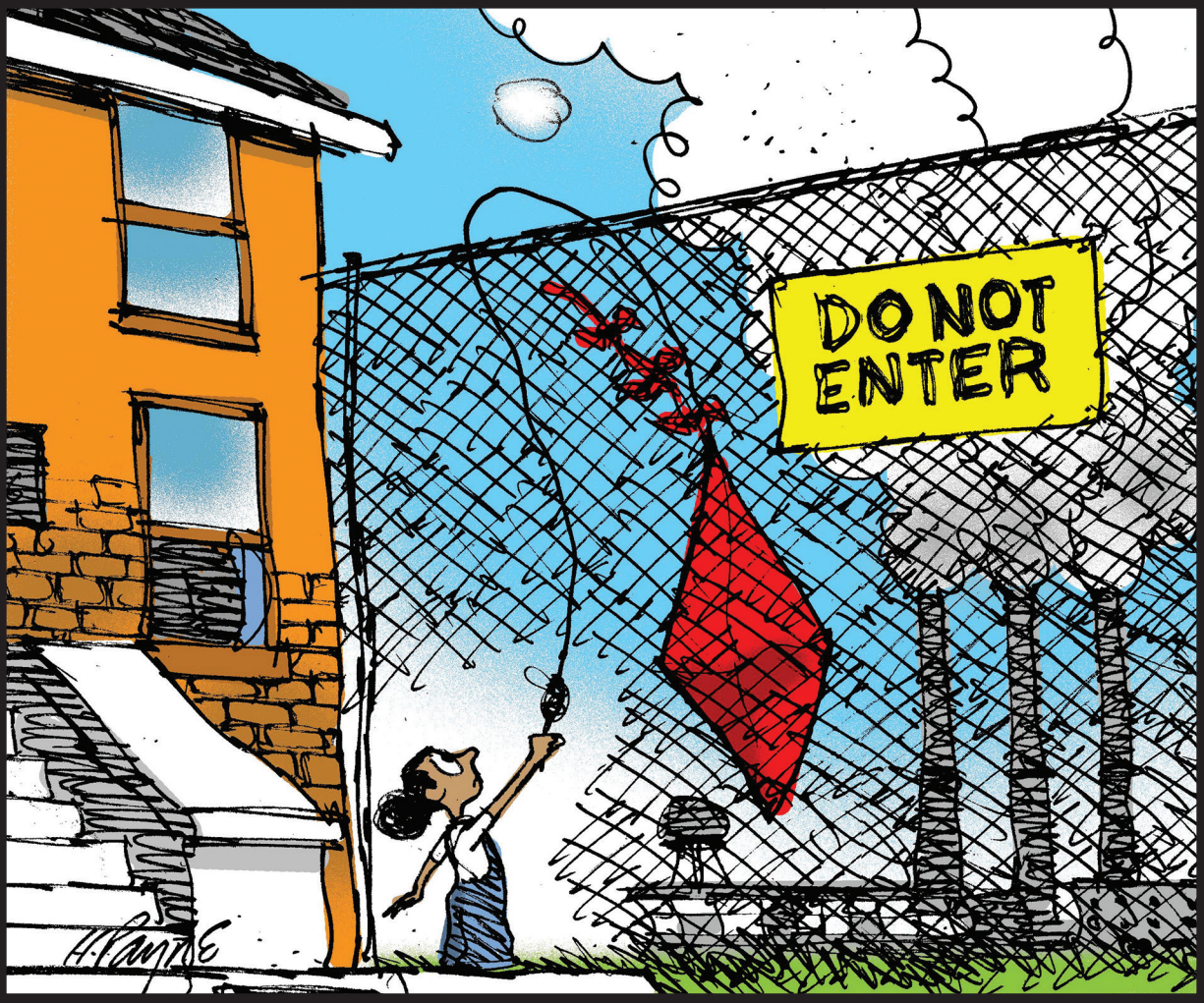

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When the System Fosters Racial Injustice

Several causes contribute to race-based disparities in environmental and public health harms. One of these is the role of the regulatory system in implementing and enforcing environmental policies with discriminatory effects

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By the time the environmental justice movement began taking shape in the 1980s, communities of color had already been suffering from the disproportionate burdens of pollution for decades. Since then, evidence of racially discriminatory patterns in the distribution of environmental harms has only continued to mount.

Researchers from the universities of Michigan and Montana empirically documented in a pair of 2015 studies the phenomenon of "sacrifice zones," finding that industrial facilities associated with high levels of pollution are disproportionately sited in low-income communities and communities of color. A 2019 study published in the *Proceedings of the National Academies of Science* found that while White people in the United States are disproportionately responsible for particulate matter pollution — which is linked to heart disease, permanent lung damage, and premature death — Black people and Latinos endure significantly greater exposure to this pollution.

But even as environmental justice has grown in prominence, early policy responses in its support have been lackluster, undermined by tepid commitment from political leaders, inadequate resources, and feeble accountability measures. Executive Order 12898, which was first issued in 1994, directs that "each federal agency shall make achieving environmental justice part of its mission," but compliance has largely remained an afterthought. In 2018, a federal court held EPA in violation of Title VI of the 1964 Civil Rights Act for persistently failing to address communities' environmental justice complaints for more than a decade. In 2019, the Government Accountability Office found a systematic failure by key federal agencies to fulfill their responsibilities under the directive. So it is unsurprising that among President Biden's first acts in office was an executive order that includes some promising updates and reforms to EO 12898. An early mark of his administration will be how well those reforms are implemented on the ground.

The unjust events of the past year may bring long overdue change. In the wake of George Floyd's violent alleged killing at the hands of a Minneapolis police officer and the waves of protests it spurred in cities across the country, many White Americans are now grappling with the racial demons that haunt our nation. Many who have never been the victims of racial discrimination are now starting to recognize the patterns of disparate impacts that can result from our existing institutions and other underlying structural forces.

These results can occur even if those institutions and structures were not designed with racially discriminatory intent. It's time for policymakers, advocates, and the legal profession to act.

Several systemic causes contribute to race-based disparities in environmental and public health harms. One of these causes results from the role of the regulatory system in implementing and enforcing environmental policies. Even though absent of racist intent, certain institutions and procedures within the regulatory system produce discriminatory effects. This article focuses on three such features: cost-benefit analysis; the erosion of the precautionary principle; and "information injustice," which I'll define later. Ultimately, advancing environmental justice requires equity-informed reforms to relevant institutions and procedures.

When it comes to institutional procedures that reinforce and perpetuate racial disparities in environmental harms, few are more influential than cost-benefit analysis. Its prominence has grown steadily over the past forty years. A series of executive orders dating back to the beginning of the Reagan administration has charged agencies with performing cost-benefit analyses on their most significant rules when submitting them for review to the White House Office of Information and Regulatory Affairs. These analyses are intended to inform agencies of the likely impacts of pending regulations and, where legal, improve the substantive "quality" of agency decisionmaking.

Cost-benefit analysis comes in many varieties: the predominant version is grounded in welfare economics theory. This version sees our nation's aggregate wealth maximization as its ultimate goal and thus endeavors to steer regulatory decisionmaking accordingly. In

practice, it tends to be hyper-technical and formalistic. This is due to its aspirations of acquiring comprehensive knowledge about a potentially infinite number of possible regulatory approaches, so as to identify the "economically optimal" one — that is, the approach that maximizes net benefits by balancing a regulation's costs and benefits at the margin. The requirements of Executive Order 12866, which currently governs cost-benefit analysis, largely follow this approach.

The virtue of this formalistic version of cost-benefit analysis, according to its defenders, is that it promotes rational decisionmaking by insulating it from the messiness of resolving incommensurable subjective values, such as fairness and equity. But it is precisely this commitment to supposed "moral objectivity" that has left the practice vulnerable to producing racially disparate results.

This dynamic first comes into play at the very beginning of the cost-benefit process, when the analytical baseline is defined for the purposes of comparing potential policy impacts. The problem arises when the status quo conditions that make up that baseline include aspects of racial injustice and inequality. Once racism is baked into the baseline, the analytical results may become distorted in ways that reinforce preexisting race-based inequities, which can be significant in the context of environmental policymaking.

For example, decades of discriminatory land-use policies have given rise to sacrifice zones in neighborhoods near polluting industrial facilities. In these areas, people of color and low-income communities are heavily concentrated. In the standard assessment of a regulation to control toxic air pollution from such facilities, these injustices would be included as merely another part of the analytical baseline. To the extent that the analysis would then focus on incremental pollution increases beyond this baseline, it would fail to properly account for the cumulative burdens these frontline communities already suffer, thereby making it harder to justify sufficiently protective regulations.

Once the baseline is defined, the next step is to evaluate the rule's potential impacts. Here, too, the misguided desire for objectivity can embed racial injustice in the results. Formalistic cost-benefit analysis gives rise to this problem by automatically assigning equal moral weight to the competing interests affected by a given regulation. In environmental policymaking, this happens when cost-benefit analysis treats the expenses that a corporation would incur through compliance costs as ethically commensurate with the compromised health, diminished quality of life, and premature deaths experienced by affected communities. This can produce racially discriminatory impacts when the analysis holds that a particular air pollution regulation must be rejected or weakened because the amount of money it would force a company to spend to clean up its pollution exceeds the monetary value of preventing people of color in fenceline communities from getting sick.

Similarly, the practice of monetization intrinsic to formalistic cost-benefit analysis provides another avenue for distorting regulatory decisionmaking in ways that reinforce racial injustice. To compare costs and benefits, economists conducting analyses try to convert public health, a pollution-free environment, and other nonmonetary values and benefits into dollar figures so they can be directly compared with and balanced against the costs of a regulation, which are more naturally expressed in monetary terms.

Several techniques that analysts employ to place a monetary value on nonmarket goods protected by environmental regulations can unintentionally introduce racial bias. An example is ascribing a monetary value to preventing premature deaths. The most common technique economists use is to generate a *value of a statistical life* derived from observed *wage premiums* for work that involves a slightly higher risk of death. Significantly, research from Vanderbilt University economist Kip Viscusi shows that Black workers tend to receive smaller wage premiums than White workers, which implies that preventing premature deaths among African Americans is worth less. Of course, Black workers don't "value" their lives less than White workers, but structural racism in the labor market has left them with weaker bargaining power to demand higher wages.

While some have called to adjust the value of a statistical life to account for race in cost-benefit analyses, fortunately these calls have not yet been heeded, since they would lead to weaker protections in regulations that primarily benefit people of color. This example illustrates how monetization techniques can promote racially discriminatory results.

If formalistic cost-benefit analysis represents an approach to environmental policymaking that is excessively biased against strong regulations, then the precautionary principle represents its polar opposite. This principle is expressly biased in favor of strong regulation. Legal scholars such as David Driesen have sought to reconcile the theoretical underpinnings of these philosophies, but in practice they appear to be mutually exclusive. Indeed, the rise of formalistic cost-benefit analysis has, as if by

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SIDEBAR

EPA Must Be an Active Agent of Change

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"Whether intentionally or not, EPA and the regulatory elites have promulgated so-called 'neutral rules' that perpetuate an ever-growing environmental caste system"

Fredrick Douglass said that America glories in its refinement, but continues to maintain a dreadful system begun in avarice, supported in pride, and perpetuated in cruelty. The subordination and oppression of the non-elite and non-entitled is now reaching crisis level.

For decades we have known that there is a direct correlation between race, income, socioeconomic status, and the amount of environmental degradation people are forced to endure. Flint, Michigan, and Franklin, Indiana, are prime examples of how racism and classism create a persistent, intergenerational pattern of differentiation in relation to risks and harms. Whether intentionally or not, EPA and the regulatory elites have promulgated so-called "neutral rules" that perpetuate an ever-growing environmental caste system.

Black Lives Matter and Stop AAPI Hate typify the call for a system of governance that does not default to the template that has for decades oppressed and subordinated rural communities, poor communities, and communities of color. EPA must stop being a knowing or unknowing participant in regulatory oppression and become an active agent of change. This type of equitable social change is only possible when all people are seen as important and all "the important people" are seated at the regulatory table.

To accomplish this, the Biden EPA must go beyond working primarily with states and localities to working directly with the disenfranchised. It must come in as a mindful collaborator, building the power of non-elites. Active engagement would be a step toward ending the hegemonic power exercised by governmental regulators over historically subordinated people.

One example of where such a partnership between EPA and the traditionally disenfranchised should be leveraged is in addressing the recent Clean Water Act regulatory changes relative to the statute's protection of Waters of the United States. Our country contains forty million acres of lakes, ponds, and reservoirs; over two million miles of rivers and streams; one hundred million acres of wetlands; and twenty to thirty times more groundwater than all of these surface waters combined. After last year's WOTUS changes, many of these miles and acres are no longer protected by the CWA — affecting millions who rely on these sources for drinking water, fishing, farming, and recreation.

As with most environmental laws, the WOTUS regulations can have both immediate and multigenerational effects on communities. EPA must actively bring in previously excluded peoples in regulatory negotiations and rule promulgations. Accordingly, the agency must build new collaborative alliances based on transcultural and transracial respect and understanding.

After issuing an executive order formalizing the principles of inclusion, antiracism, anticlassism, and antisubordination, President Biden should direct EPA to evaluate the new WOTUS regulations with an eye toward those who are currently affected by contaminated water and those who could be most adversely affected by a lessening of CWA protections. Next, the agency must go to the affected or potentially affected communities and let the people speak for themselves. Therefore, elites, such as scientists, lawyers, judges, regulators, corporations, NGO officials, legislators, academics, etc., cannot be "the sole or controlling voices" in this transformative paradigm for multigenerational socioenvironmental change.

WOTUS regulations must incorporate the voices, the experiences, and perspectives of traditionally eco-marginalized and subordinated peoples. Enhanced participation and collaboration will help ensure the agency's environmental protection for all. EPA can create a new era of equitable, sustainable and representative environmental justice for the people who need it the most. Affected communities can actively and directly share the responsibility of environmental governance and regulatory change. This is the essence of our democracy; this is the essence of "We the People."

hydraulic force, displaced the precautionary principle's influence in regulatory decisionmaking.

As with cost-benefit analysis, the precautionary principle is not a monolithic concept but rather encapsulates a range of variations. For simplicity's sake, legal scholars distinguish between *weak* and *strong* versions. Broadly speaking, the weak version holds that lack of evidence alone is not sufficient grounds for failing to take protective action to prevent serious harm to health or the environment. In other words, this version dictates how precaution should bear on the threshold decision of whether to take regulatory action in the face of uncertainty. In contrast, the strong version generally calls for some form of robust regulatory action, even if costly, whenever a significant threat to health or the environment emerges. This version thus focuses more on what kind of regulatory action to take; what makes it strong is its default to robust responses against threats that are significant enough even if we lack complete certainty.

The weak version has long been recognized as an animating principle of modern U.S. environmental law. Landmark court decisions such as *Reserve Mining Co. v. EPA* in 1975 and *Ethyl Corp. v. EPA* in 1976 held that neither the Clean Water Act nor the Clean Air Act requires conclusive proof that a particular polluting activity significantly harms public health before EPA can take regulatory action to limit that activity.

Both versions of the precautionary principle have been enshrined in various provisions across our major environmental statutes. The Clean Air Act embraces the weak version when it authorizes the agency to limit hazardous air pollutants from fossil-fueled power plants if it finds that such regulations would be "appropriate and necessary" based on a "study of the hazards to public health reasonably anticipated to occur as a result of" those pollutants. The strong version is consistent with various technology-based standards common to U.S. environmental law. The trigger for applying these standards does not require certainty about the environmental or public health risks to be addressed, and the default regulatory response, while sensitive to cost considerations, is not strictly dictated by them.

Perhaps the clearest statement of the strong version is the Clean Air Act's call for EPA to set National Ambient Air Quality Standards at a level "allowing for an adequate margin of safety." As Justice Antonin Scalia explained in *Whitman v. American Trucking,* the act directs EPA to account for this margin by first determining "the maximum airborne concentration of a pollutant that the public health can tolerate" based on its research on the pollutant's health effects, then "decreas[ing] the concentration" below that level. As important, he further concluded that "nowhere are the costs of achieving such a standard made part of that initial calculation."

Despite this sure legal footing, the precautionary principle's influence on environmental regulation has withered considerably in recent decades, and especially during the Trump administration. This is true even of the weak version, which is generally viewed as noncontroversial.

During the Obama administration, EPA's rigid adherence to formalistic cost-benefit analysis at times trumped application of the precautionary principle. For example, in determining the "best technology available" for preventing harm to aquatic species caused by the cooling water intake structures at power plants, the agency rejected the more protective option of closed-cycle cooling technology in favor of a weak facility-based permitting program. The driving factor for this determination was a highly flawed cost-benefit analysis that failed to account for the vast majority of the rule's potential benefits because the agency's economists could not put a dollar figure on them. Minimizing costs on industry took priority over the intrinsic precautionary nature of the Clean Water Act.

The Trump EPA was much more aggressive in rejecting the precautionary principle. One of the first formal actions Trump's first EPA administrator, Scott Pruitt, took was to reject a proposed ban on the neurotoxic pesticide chlorpyrifos under the Federal Insecticide, Fungicide, and Rodenticide Act. Chlorpyrifos is suspected of causing brain damage in children and other harms. But Pruitt claimed that "despite several years of study, the science addressing neurodevelopmental effects remains unresolved and . . . further evaluation of the science . . . is warranted."

Trump's second EPA administrator, Andrew Wheeler, rejected the advice of career scientists to strengthen the NAAQS for particulate matter, citing "important uncertainties in the evidence for adverse health effects below the current standards and in the potential for additional public health improvements from reducing ambient [particulate matter] concentrations below those standards." It is hard to reconcile that conclusion with the weak form of the precautionary principle, let alone the Clean Air Act's requirement that EPA build in an "adequate margin of safety" when setting NAAQS.

In short, the precautionary principle is gradually being hollowed out by an ever-increasing demand for certainty before regulatory action can be taken to ad-

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A Lesson on Why Equality Is not Equity

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"I'm in agreement on the point that systems can have unintended discriminatory impacts. But let's go one step further: not anticipating those impacts and correcting for them — which we could have easily done for both the virus and vaccines — is intentional."

COVID-19 was initially seen as an equal opportunity problem — with a dangerous virus spreading, all of us were at risk. But we weren't really: those engaged in low-wage essential work, living in overcrowded housing, and already suffering from inadequate health care were most vulnerable. The ethnic disparities in case and death rates that emerged in the United States should have been no surprise; they stem from a preexisting system of racialized costs and benefits.

When we got around to developing vaccines, the equality-equity distinction became clear. In most states, everyone in an age bracket or occupational category had an equal shot at a shot — provided they had a computer, high-speed internet, flexible employment, and a car to make their way to a mega-site. Those on the wrong side of the digital divide, of employment quality, and of transit independence were left behind. The result of this inequity was racial gaps in vaccination rates.

So I'm in agreement when anyone makes the point that systems can have unintended discriminatory impacts. But let's go one step further: not anticipating those impacts and correcting for them — which we could have easily done for both the virus and vaccines — is intentional.

So how do we recognize this and do better in the broader environmental realm?

Consider the debates about cap-and-trade systems as a way to curtail greenhouse gases. Environmental justice proponents worry that trading — in which a company decides to keep polluting and pay another company to reduce instead — can result in uneven local reductions in associated co-pollutants. Market proponents dismiss these concerns, since it is not the intention of the system to be racially discriminatory but rather to be efficient.

But such efficient systems are inherently unequal — trading means having pollution loads decrease more in some places than others. The only question is who gets the short end of cap-and-trade stick — and since there is some risk that such a system could worsen pollution levels in disadvantaged communities, how hard would it be to declare some overburdened areas "no-trade zones" or create a premium for reductions that generate the most pay-off on the co-pollutant side?

You can make a decision not to consider those issues — but that's a decision. So what do we need to do to center and not sideline equity?

One key step is to take into account time. Most equity analysts work statically — measuring at a particular moment who gains and who loses from a particular policy. But centering equity means correcting for the errors of the past, creating full participation in decisions today, and safeguarding against unequal outcomes going forward.

In environmental policy, that means prioritizing relief for neighborhoods that have long suffered the most and creating new employment opportunities for those communities. California has tried to get part of this right by insisting that a healthy share of the revenues created by cap-and-trade go to disadvantaged communities as defined by a tool called CalEnvironScreen.

It means repairing informational inequalities that limit the full participation of disadvantaged groups in regulatory processes, including funding community-based, participatory research and accessible data like that provided by CalEnviroScreen. It also means developing new methods of local engagement that move us from staged conflicts to sustained dialogues.

And it also involves stressing precaution so that "unintended" consequences become, as much as possible, anticipated outcomes that we seek to consciously achieve or avoid. That requires understanding how environmental policy interacts with all other existing systems of exclusion and inclusion — a hard job but worthwhile.

In this last year, we saw that systems that are supposed to secure the common good — like public health and community safety — can produce and reinforce significant racial inequalities. Environmental policymakers have a chance to break that mold, showing how putting equity first can improve outcomes for everyone.

dress environmental and public health threats; when action is taken, that same uncertainty is used to block all but the most modest of protections. This trend is at odds with the principle, which aims to shift the costs of uncertainty to those who desire to undertake actions that present a risk of harm. Basic fairness considerations dictate that these parties bear the costs because they ultimately profit from the actions and because the information advantages they enjoy regarding their actions better position them to resolve the uncertainties of potential harms. Indeed, this cost-shifting scheme can be seen as a variation on the "polluter pays" principle in American environmental law, which holds that the party that causes pollution (i.e., through its profit-making activities) should shoulder the cost of remedying any resulting damage to the environment.

As the precautionary principle continues to decay, the practical upshot is that the costs of uncertainty are shifting to victims of pollution. Risks these individuals face — to their health, well-being, and property — increasingly go unaddressed because EPA must dedicate more time and resources to gathering evidence to support regulatory action to address them. In perhaps its grimmest form, these evidence-gathering activities include "counting the bodies" of victims of premature death from particular environmental or public health threats. Due to structural causes of inequity, these bodies are — or will be — disproportionately Black or Brown.

All too often, racial injustice emerges as a natural consequence from such rejections of precautionary approaches to environmental regulation, as the examples from the Trump administration discussed above illustrate. Farm workers most at risk of harmful exposures to chlorpyrifos are overwhelmingly Latinos. Similarly, research demonstrates that people of color are exposed to particulate matter at far greater levels than White people.

The agency is more likely to regulate environmental and public health risks it is aware of than those it isn't. As Mustafa Santiago Ali, the former top environmental justice official at EPA, has noted, "Data drives policy, and the lack of data drives policy." This dichotomy makes the issue of how information is gathered and used in the rulemaking process vitally important. The erosion of the precautionary principle, in which uncertainty can be weaponized to torpedo regulatory actions, only amplifies the stakes in these fights.

Uncertainty is an inescapable feature of environmental regulation, and its management is one of its central challenges. If the precautionary principle is ultimately about how to fairly allocate the costs of uncertainty through regulatory decisionmaking, then a related question involves how to fairly allocate the benefits of reducing uncertainty regarding environmental and public health risks. For the purposes of this article, I refer to this distributional concern as one of *information injustice*.

The general tendency of the environmental regulatory apparatus has been to "choose ignorance" (to borrow a phrase from University of Texas Professor Wendy Wagner) when it comes to harms that disproportionately affect historically marginalized communities. In contrast, environmental regulators are likely to place greater emphasis on understanding harms that affect elites. Because they reflect and reinforce broader power disparities in our society, these patterns of information injustice tend to produce racially inequitable results.

Once set, the pattern of information injustice self-perpetuates. That's because regulation begets new information, which is then used to support additional regulation. The classic example is when EPA used the precautionary principle as a foothold to begin regulating the use of lead in gasoline despite uncertainty about the degree of harm it posed. Thanks to that initial regulation, the agency learned a great deal about the link between leaded gas and public health harms through subsequent epidemiological research, which later supplied the evidence for a full ban. The far more typical case, however, is characterized by a catch-22 that preserves the status quo: without regulation, a particular environmental risk is unlikely to be researched, but without research, an environmental risk is unlikely to be regulated in the first place.

Several norms and institutions within environmental law promote information injustice and contribute to its influence throughout the regulation development process. Common features like reliance on self-monitoring regimes for tracking emissions and strong confidential business information protections for regulated entities can undermine EPA's efforts to gather essential exposure data for pollutants and toxic chemicals. A similar result arises from the agency's use of census data to identify populations potentially exposed to certain pollutants or hazards to inform its regulatory decisionmaking. Such data can lead EPA to underestimate exposures for marginalized populations, especially people of color and individuals with insecure immigration status, since the census tends to systematically under count these populations.

A recent Associated Press investigation found that a

combination of inadequate resources and poor implementation has contributed to huge gaps in air pollution monitoring systems overseen by EPA. According to the investigation, monitors routinely failed to capture even large pollution events such as major refinery explosions. These events likely resulted in acute exposures in neighboring fenceline communities in which historically marginalized populations disproportionately reside.

Information injustice's pathologies likewise extend to EPA's ability to study the dose-response relationships of many chemicals and pollutants that are essential for establishing adequate regulatory protections. For instance, the original Toxic Substances Control Act essentially conceded defeat on understanding the human health consequences of most of the existing chemicals in use at the time the law was enacted. The law grandfathered them into its regulatory program by allowing their continued sale without any up-front testing. The old TSCA's approach to new chemicals was not much better, establishing only minimal testing requirements and providing the agency with little authority to demand additional information about chemicals' potential harms. The 2016 updates to TSCA aim to rectify these errors, but the damage is already done: few of the more than 86,000 chemicals currently available for production have been subjected to any toxicity testing.

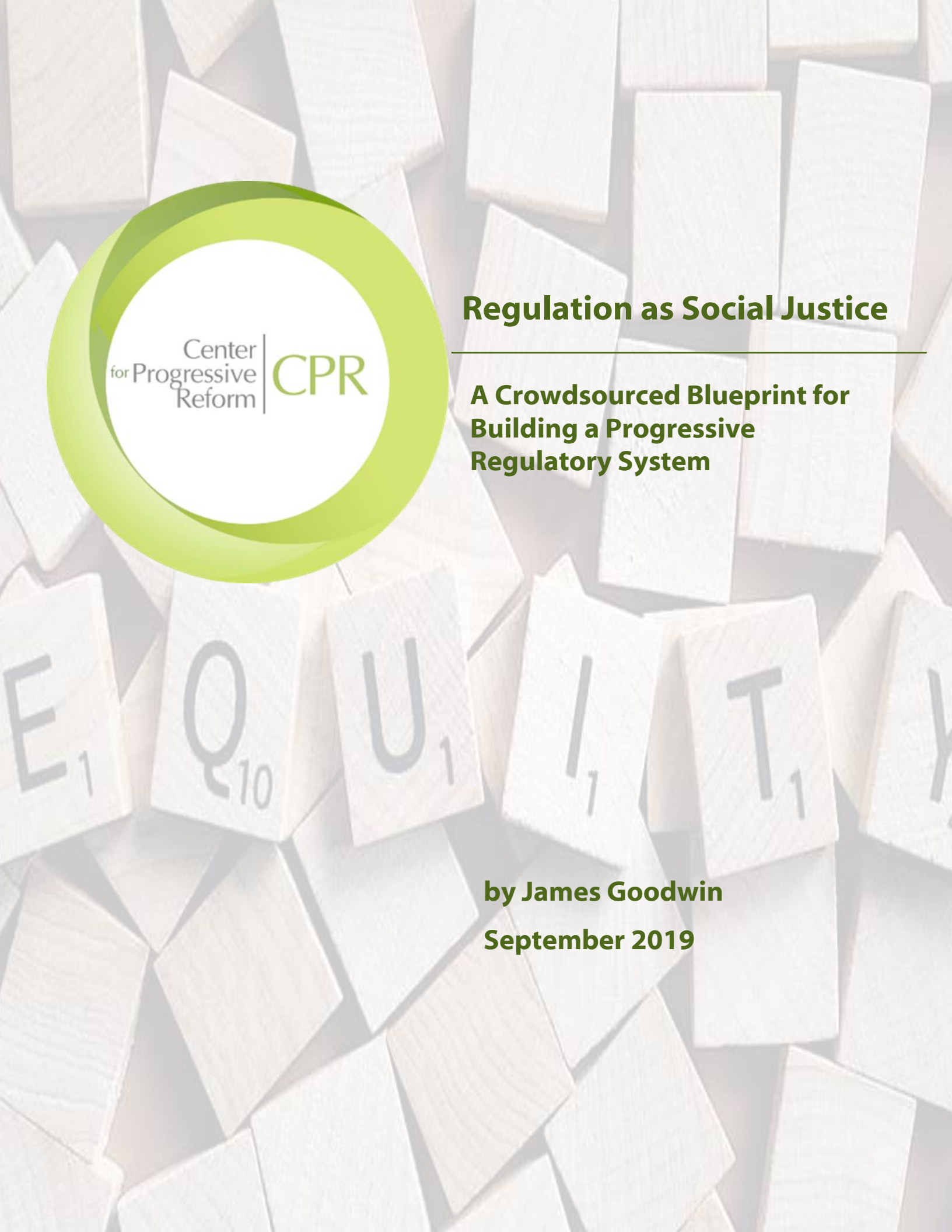
A similar dearth of dose-response information is evident in EPA's pollution control regulations. For instance, the agency lacks such information for dozens of the toxic air pollutants it is supposed to control through the strict National Emission Standards for Hazardous Air Pollutants program. What little toxicity information it does have on those air pollutants is often decades old. The agency's cost-benefit analyses further confirm its persistent failures in acquiring reliable dose-response information to support its pollution regulations. A recent empirical study of 45 analyses EPA conducted for major rules between 2002 and 2015 found that 80 percent excluded entire categories of benefits that the agency itself described as "important," "significant," or "substantial." It excluded them because benefits were not quantifiable due to data limitations, including those characterizing dose-response relationships.

Finally, on those rare occasions when information does exist regarding particular environmental and public health hazards, significant obstacles remain before it can actually be used by EPA to inform its regulatory decisionmaking. Most notably, stakeholders opposed to stringent environmental regulations — including regulated industries and political conservatives — have created several institutional mechanisms within the rulemaking process for manufacturing doubt about the accuracy or quality of this information. The ultimate aim is persuading EPA to disregard it altogether. The 2001 Data Quality Act establishes a process for industry and special interest groups to challenge information that agencies use to support their regulations.

Another more recent example is the Trump EPA's rule on Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, which required the agency to give less weight to dose-response studies for which all of the underlying data are not publicly available. (A federal district court has since struck down the rule.) The practical and intended effect of this rule was to subordinate the use of epidemiological public health research, such as the landmark Harvard Six Cities Study. By demonstrating the relationship between elevated levels of particulates and the increased incidence of premature deaths in affected populations, this study and subsequent research provides the scientific foundation for strengthened particulate matter NAAQS and other air pollution regulations opposed by powerful industry interests. Performing these studies, however, entails departing from standard transparency practices in science, since the patient data that researchers gather are governed by strict privacy agreements.

It is important to understand how these three features of the regulatory system can contribute to racially inequitable results in environmental policymaking so that we can take the next step of designing a reform agenda. One critical element will be recalibrating the relative influence of cost-benefit analysis and the precautionary principle such that the latter predominates. On his first day in office, President Biden issued a memorandum on "Modernizing Regulatory Review" that offers one possible vehicle for pursuing this reform. Congress, too, can contribute, either through surgical amendments to the Administrative Procedure Act or through standalone legislation. To address the problem of information injustice, policymakers should explore options for encouraging research targeted at understanding pollutants and toxic chemicals that disproportionately impact historically marginalized communities. These options should include rescinding unnecessary obstacles to the use of that information.

No doubt there are other structural features of the rulemaking system that contribute to racially inequitable results in environmental policymaking beyond the three discussed here. Work must continue to identify them as part of a broader process of rebuilding the regulatory system so that it affirmatively promotes racial justice. **TEF**



Regulation as Social Justice

A Crowdsourced Blueprint for Building a Progressive Regulatory System

by James Goodwin

September 2019

About the Center for Progressive Reform

Founded in 2002, the nonprofit Center for Progressive Reform connects a nationwide network of scholars with policymakers and allied public interest advocates. CPR pursues a vision of legal and regulatory policies that put health, safety, and environmental protection before private interests and corporate profit. With rigorous analysis, strategic engagement in public interest campaigns, and a commitment to social welfare, CPR supports thoughtful government action, ready public access to the courts, enhanced public participation, and freer access to information.

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A Crowdsourced Blueprint for Building a Progressive Regulatory System

Introduction

On June 5, 2019, the Center for Progressive Reform hosted a first-of-its-kind, one-day convening that brought together a diverse group of more than 60 progressive activists and academics. Our purpose was to begin the process of developing a progressive vision of the U.S. regulatory system – one that is not only robust and responsive enough to meet the immediate challenge of protecting people and the environment against unacceptable risks, but that also is institutionally designed to promote the broader social goals of justice and equity.

Participants agreed that one of the important but often overlooked factors contributing to the nation's most challenging social problems – growing economic inequality, racism, and the inability to come to grips with the climate crisis – is that our regulatory system is broken and ineffective. Consequently, to fulfill a progressive vision of society, advocates will need to pay special attention to rebuilding and modernizing the regulatory system.

By protecting us all against a variety of health, safety, environmental, and consumer hazards, such a regulatory system would avert the kinds of harms that can amplify institutionalized injustice. Moreover, a stronger regulatory system that provides greater and more meaningful public participation opportunities would shift more political power to ordinary Americans, breaking up the near-monopoly of political power that corporate special interests now enjoy in the regulatory space.

We built the convening around a series of innovative "Idea Exchanges," during which participants were invited to explore these ideas by drawing upon and sharing their unique expertise and experiences. These sessions consisted of structured small group discussions involving no more than eight participants, led by a facilitator, and including a dedicated scribe to carefully document the discussions. The first Idea Exchange session launched by asking participants "How do you see your advocacy work contributing to the goals of social justice and equity?" The second Idea Exchange session began with "What legal or other institutional changes would you make so that you are better able to promote social justice and equity as part of your advocacy work?" Following is a synthesis of the ideas prompted by these questions.

The Broken U.S. Regulatory System: The Progressive Community's Assessment

Progressive policy advocates identified four broad contributing factors that help explain the current weakened state of the U.S. regulatory system: weak and outdated laws; unnecessary implementation barriers facing agencies; excessive corporate influence; and obstacles to meaningful public participation.

Weak and Outdated Laws

The last few decades have seen Congress increasingly marked by a pattern of asymmetrical polarization in which conservative lawmakers have taken more extremist policy positions at the expense of serving the interests of their constituents, particularly the working poor and communities of color. These lawmakers bear the lion's share of the responsibility for Congress's ongoing failure to ensure that the federal government operates effectively and to address new and emerging threats to the public (*e.g.*, climate change) through legislation. Despite the harms that result from this phenomenon, these members rarely face any political consequences for their inaction. In the absence of new legal tools, agencies instead resort to utilizing their existing authorities as best as they can, which often results in inadequate or incomplete protections.

Partisan dynamics have made the pursuit of compromise on legislation all but impossible. As a result, on the infrequent occasions that protective legislation is actually passed, it has typically been watered down to the point that it is ineffectual and imposes no greater burden than affected industries are willing to tolerate.

These partisan dynamics have made the pursuit of compromise on legislation all but impossible. As a result, on the infrequent occasions that protective legislation is actually passed, it has typically been watered down to the point that it is ineffectual and imposes no greater burden than affected industries are willing to tolerate (*e.g.*, toxic chemicals, compounding pharmacies, etc.).

The working poor and communities of color are disproportionately harmed by weak and outdated laws. The members of these communities bear a disproportionate burden when these threats remain unaddressed through effective legislative action. These individuals also have little political power in Congress, as they are systematically excluded from meaningfully participating in the shaping of Congress's legislative agenda or in the development of the substance of individual bills.

Unnecessary Implementation Barriers

Even when protector agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety

and Health Administration (OSHA) do have sufficient legal tools to achieve their mission of protecting people and the environment, they must often overcome significant obstacles before those tools can be deployed. Frequently, these obstacles were created or are encouraged by corporate interests for the purpose of defeating or delaying regulatory action. Their continued existence, however, translates into concrete harms for ordinary Americans, especially the working poor and people of color who would otherwise enjoy the greatest benefits from strong regulatory protections.

'Hollowed Out' Agencies. The agencies charged with protecting the public have been consistently starved of necessary financial resources. Current tax policies coupled with the seemingly bottomless appetite for defense spending generate insufficient revenue to support even basic government functions. Broadly accepted "small government" ideology, when used as a rationale for starving protector agencies, strongly deters even modest efforts to increase agency budgets or the tax revenues to pay for them.

The agencies charged with protecting the public have been consistently starved of necessary financial resources. Current tax policies coupled with the seemingly bottomless appetite for defense spending generate insufficient revenue to support even basic government functions.

Relatedly, agencies also face a dire shortage of critical human resources. Large numbers of experienced expert staff are reaching retirement age or seeking employment opportunities outside of the federal government in response to deteriorating working conditions. This resulting "brain drain" will be especially damaging because shrinking budgets and formal hiring freezes have prevented agencies from attracting and cultivating new talent within their ranks to replace outgoing workers. Recent actions by the Trump administration have only reinforced this dynamic, with the institution of policies that have the effect, if not the intent, of making public service increasingly undesirable. These actions include imposing contracts that remove grievance procedures and telework options, instead of bargaining in good faith.

Systemic Delays. The number of procedural and analytical requirements and "veto gates" that agencies must navigate in order to implement their authorizing statutes has grown inexorably in recent decades. Similarly, for agencies that want to avoid carrying out their statutory mission, they may use these requirements as cover for slow-walking the implementation of new regulations. Administrative law, however, provides no real accountability measures for inaction or persistent delays.

Avenues of Interference. The three main inputs in regulatory policy formulation are science, economic impacts, and legal authority. Opponents of regulatory safeguards have devised strategies for manipulating each of these factors to delay new rules or advance their preferred policy outcomes:

- Politicized science. Opponents of regulations have become adept at challenging agency science by demanding that regulatory decision-making meet unnecessary and irrelevant standards. When this strategy has failed, these opponents have sought to deny inconvenient scientific findings or censor them outright, including working to sideline career scientists. More recently, they have challenged the institution of science itself, baselessly calling into question its objectivity and reliability.

- Cost-benefit analysis. Rather than provide an objective tool for understanding the economic impacts of proposed regulations, cost-benefit analysis was always intended as a vehicle for corporate interests to attack common-sense safeguards. Its methodologies serve to distract attention from how regulations are necessary for protecting people and the environment against unacceptable harms by instead placing undue focus on industry profits. In this way, cost-benefit analysis empowers narrow industry interests at the expense of the public interest.

- Judicial interference. Bedrock administrative law doctrines such as *Chevron* and *Auer* deference and nondelegation have long stood as bulwarks to judicial activism by conservative judges looking to attack regulations they oppose on ideological grounds. The recent takeover of the federal judiciary by conservative judges ideologically hostile to federal regulation has placed these critical doctrines under threat of being reshaped or torn down altogether. Such changes would give these conservative judges nearly unfettered freedom to substitute their policy judgement for that of agency experts and demonstrated public needs and reject common-sense safeguards opposed by regulated industries.

Excessive Corporate Influence

At both the federal and state level, corporate special interests are able to exercise enormous influence over regulatory development and implementation. As a result, regulatory policies often benefit corporations at the expense of public welfare. In the worst cases, these policies produce a regressive wealth transfer that enables corporations to enjoy larger profits at the cost of harms to public harms and safety – costs that are disproportionately paid for by the working poor and communities of color. At the same time, this excessive corporate influence has the effect of drowning out the voices of ordinary Americans, especially those from marginalized communities, systematically precluding their meaningful participation in the regulatory system.

Congress. The U.S. Supreme Court's *Citizens United* decision exploded years of progress on campaign finance reform, establishing a money-in-politics regime in which corporations and the wealthiest Americans can use mammoth contributions to political candidates and political action committees (PACs) to buy the policies and legislation they want. This

excessive corporate influence helps reinforce the pattern of legislative inaction noted above. Anti-regulatory legislative tools such as limitation riders in annual appropriations bills and Congressional Review Act (CRA) resolutions of disapproval enable members of Congress to reward their donors by overriding regulations they oppose while largely evading public scrutiny.

Regulatory agencies. Corporate interests are able to use their superior financial resources to dominate every step of the rulemaking process, effectively drowning out the voices of the people. Despite this dominance, opponents of regulatory safeguards have created institutions, such as the White House Office of Information and Regulatory Affairs (OIRA) and the Small Business Administration's Office of Advocacy, that serve to amplify and reinforce industry's arguments against regulatory safeguards. A chronic lack of resources has contributed to undue corporate influence over agencies by forcing them to become increasingly dependent on the industries they are supposed to oversee for expertise on complex technical matters and even to outsource many oversight and compliance assurance activities to those industries as a cost-saving measure. The arrival of the Trump administration has seen corporate capture of agencies elevated even further, with former industry officials and lobbyists assuming leadership positions throughout agencies to an unprecedented degree.

Corporate interests are able to use their superior financial resources to dominate every step of the rulemaking process, effectively drowning out the voices of the people.

States. One way states seek to attract new businesses is by weakening regulatory standards, creating a "race to the bottom" dynamic that leaves their residents inadequately protected against unacceptable risks. Many state economies are dominated by a few powerful industries, providing those businesses significant leverage to dictate regulatory standards.

Barriers to Meaningful Public Participation

At the same time that corporate influence over the regulatory system has increased, ordinary Americans are finding that that the traditional avenues to participation are being systematically shut off or marginalized. The increasing costs to meaningful participation mean that the working poor and communities of color will be the first to be excluded from this process, all but ensuring that the results will not be sufficiently attentive to their concerns and perspectives.

Congress. The dominating influence of money in politics means that average constituents have no realistic chance of having their views heeded by their representatives in Congress when they conflict with the views of large contributors or key industries. Individuals can still exercise their

democratic power in the voting booth, but gerrymandered congressional districts and systematic disenfranchisement, especially among the working poor and communities of color, have significantly diluted the voting power of those who desire real change.

Regulatory agencies. Meaningful participation in the rulemaking process can be resource-intensive, forcing even the largest public interest advocacy organizations to forgo available participation opportunities and locking out individuals altogether. The substance of regulatory decision-making has become increasingly technocratic, limiting meaningful participation to those with advanced training in law, economics, or science. And this disparity isn't equally distributed: The working poor and people of color tend to be more frequently excluded from the regulatory process than other Americans. It does not require a law degree to be poisoned by pollution, for example, but regulatory agencies are not geared to solicit, accept, or act on testimony about the *lived experience* of pollution's victims.

Courts. The Administrative Procedure Act, as well as a few environmental, consumer protection, and various other health and safety statutes, empower people to bring "citizen suits" to hold agencies accountable for fulfilling statutory mandates or to bring enforcement actions when regulated industries violate protective rules or standards. Narrow standing requirements created by conservative federal judges have limited the ability of citizens to sustain such suits, blunting the power of these provisions. Litigation costs might also present a barrier to bringing certain kinds of citizen suits. While laws like the Equal Access to Justice Act can help defray these costs in certain cases, significant gaps in access to litigation costs remain. And helpful laws that do exist are under attack by conservative lawmakers.

State and federal tort law, as administered by civil courts, offers a crucial backstop to weak or ineffective regulations or half-hearted enforcement. Acting at the behest of corporate interests, conservative judges, along with likeminded state and federal lawmakers, have successfully limited citizen access to the civil courts.

State and federal tort law, as administered by civil courts, offers a crucial backstop to weak or ineffective regulations or half-hearted enforcement. Acting at the behest of corporate interests, conservative judges, along with likeminded state and federal lawmakers, have successfully limited citizen access to the civil courts, including through the expansion of forced arbitration. To further discourage civil lawsuits, they have resorted to such tactics as placing arbitrary caps on available damages, thus reducing judgments to a small cost of doing business for scofflaw industries.

A Blueprint for Rebuilding a Progressive Regulatory System

Congress

Under our constitutional framework, the U.S. system of regulatory safeguards is a product of congressional legislation. That means protector agencies cannot do their jobs well unless and until Congress does its job well first. The U.S. Constitution also endows Congress with the responsibility of overseeing agency implementation of authorized public interest programs to ensure they are promoting the public welfare as effectively as possible. The influence of corporate money, however, has contaminated this aspect of Congress's work such that its oversight function has devolved into politicized interference aimed at preventing agencies from implementing broadly popular public safeguards. Achieving a progressive vision of the regulatory system will thus require fundamental reforms to Congress, as well.

Campaign finance reform. Congress is unlikely to pass legislation addressing new and emerging threats as long money as plays such an influential role in politics. In the absence of campaign finance reform, oversight will continue to be misused by members of Congress as a vehicle for rewarding corporate donors by attacking regulations they oppose, rather than as a legitimate tool for ensuring that the public interest is being served.

Policy development.

- Reversing the pattern of asymmetrical polarization that has come to define Congress will not be easy, thanks to the many structural forces that encourage and reinforce it. One important first step will be for all members of Congress – but especially conservatives – to cultivate and observe a new legislative culture in which bills are considered on the merits, rather than engaging in zero-sum-game politics that values short-term "wins" of blocking the opposing party's legislative agenda ahead of working together to advance the common good. Several institutional changes would help ensure the viability of a more productive legislative culture, including campaign finance reform and measures to enhance Congress's technical and policy capacity (such as reviving the Office of Technology Assessment).

- Authorizing committees should explore mechanisms for ensuring that environmental, consumer protection, and other health and safety statutes are designed to better account for their impacts on marginalized members of society, including the working poor and communities of color. These include ensuring that such legislation has an appropriate place-based focus and properly accounts for *cumulative impacts* on marginalized members of our society.

- Environmental, consumer protection, and other health and safety statutes must be designed to preserve state and local governments' authority to provide their citizens with protections that go beyond the "floor" established by federal regulations.

Budget process. The process by which Congress allocates tax dollars is fundamentally broken and must be overhauled so that we are better able to make necessary investments for improving our country, including by increasing resources for regulatory agencies.

Anti-regulatory gimmicks. Opponents of regulatory safeguards frequently employ anti-regulatory gimmicks like CRA resolutions of disapproval and limitations riders on appropriations bills to attack popular public safeguards as a means of rewarding their corporate donors. Such gimmicks also reinforce the hyperpartisanship that contributes to congressional dysfunction and undermine public esteem for Congress. While these devices in theory could be used to advance social justice, they are politically asymmetric, offering far more utility to opponents of regulatory safeguards. Because, on balance, progressive goals would be better served if these gimmicks no longer existed, Congress should take necessary steps to abolish them.

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Regulatory Agencies

The heart of the regulatory system is the agencies themselves. A progressive regulatory system will require energetic and well-resourced agencies. It will also require the creation of a policymaking process that is institutionally designed to insulate agencies from undue corporate influence and that orients decision-making toward the promotion of social justice and equity as a guide star in agencies' pursuit of their respective statutory missions.

Capacity. Increased budgets will ensure that agencies have the financial resources they need to carry out their statutory missions in an effective and timely manner and for resisting *corporate capture* (*i.e.*, so that they are not dependent on regulated industry for expertise and do not have to rely on outsourcing compliance and oversight activities to regulated industry) . The president and Congress should explore needed personnel reforms that would enable agencies to attract and retain highly qualified legal, technical, and scientific experts to inform their work. These reforms should also give special attention to addressing the "brain drain" trend that many federal agencies are currently experiencing. The presence of strong labor unions and employee protections would also help safeguard grievance procedures and limit opportunities by political leadership to make changes that worsen federal civil service working conditions.

Policy development.

- Congress should enact new legislation to correct the asymmetry in administrative law that makes it easier to hold agencies accountable for action than for *inaction* – an asymmetry that systematically disadvantages regulatory beneficiaries. This legislation should seek to grant citizens enhanced and expanded rights to spur agency action on new regulations. Similarly, this legislation should grant citizens enhanced rights to hold agencies legally accountable for unnecessary delays in advancing rules that are already under development. Alternatively, federal courts should adopt a less deferential approach when evaluating agencies' rejections of citizen petitions for rulemakings.

- The president and Congress should take appropriate steps to eliminate unnecessary procedural and analytical obstacles that delay rulemakings and waste scarce agency resources without improving the quality of agency decision-making. These obstacles also enable corporate capture of agency decision-making. In particular, the president and Congress should consider eliminating or reforming the various requirements related to cost-benefit analysis and regulatory impact analysis, centralized review conducted by OIRA, and the many procedural and analytical requirements mandated by the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act.

- The president, Congress, or agencies themselves should establish new procedural mechanisms and institutions for obtaining the perspectives of ordinary Americans, especially the working poor and communities of color, to inform their agenda-setting and regulatory decision-making. Rather than sitting back and waiting for responses that likely will never come, agencies should be under an affirmative duty to reach out to affected populations. New institutions should be created for the purpose of amplifying the voice of ordinary Americans in the rulemaking process. These institutions might include new kinds of task forces charged with explaining scientific and other policy-relevant data to the public in order to obtain better informed feedback or teams of local engagement staff who would work with community leaders to obtain a comprehensive understanding of a regulation's potential community-level impacts.

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- The president, Congress, or agencies themselves should establish new procedural mechanisms and institutions for affirmatively learning about the harms faced by different communities – particularly those that are disproportionately populated by the working poor and people of color.

These efforts might include better use of targeted environmental monitoring, supporting epidemiological research and citizen science initiatives, and tools for better accounting for the cumulative effects of the different kinds of harms that those communities experience.

- The president, Congress, or agencies themselves should institute strong new scientific integrity policies that safeguard agency scientists against improper influence in their work, better insulate agency scientific research from politically driven policy development, and empower agency experts to communicate to the public directly about their work.
- The president, Congress, or agencies themselves should institute new ethics reforms for agency leadership positions to protect against conflicts of interest and abuses of authority by individuals who previously served as corporate officers or lobbyists in the industries they would be charged with overseeing. The president, Congress, or agencies themselves should likewise institute new ethics reforms aimed at the other side of the "revolving door." These reforms would target abuses of authority or conflicts of interest among current agency officials who may become employed in the industry that the agency is charged with overseeing, or among former agency officials who have become so employed.

Enforcement.

- Increased budgets for agencies should include special attention to providing significantly greater resources for enforcement activities. At the same time, there should be a decreased reliance on outsourcing enforcement and compliance oversight to third-party auditors and less use of industry "self-policing," which serve to weaken accountability. To better leverage those additional resources, agencies should explore opportunities for greater coordination internally, as well as externally with other agencies, using such methods as joint inspections, for example.
- Agencies should make greater use of their existing legal authorities to deploy criminal enforcement for regulatory violations, particularly against culpable individuals, including responsible corporate officers. Congress should enact legislation granting agencies enhanced authority to employ criminal enforcement tools.
- Agencies should make greater use of their existing legal authorities to employ more non-traditional but effective enforcement tools such as shaming and enhanced disclosures by corporations of the harms their activities cause. Congress should enact legislation as necessary granting agencies enhanced authority to employ these and other kinds of non-traditional enforcement tools.

- Where applicable, federal agencies should conduct more rigorous oversight of state enforcement activities. Consistent with their legal authorities, agencies should be more aggressive in withdrawing state enforcement powers or taking other corrective measures when state enforcement performance is demonstrably inadequate. Congress should enact legislation as necessary granting federal agencies enhanced authority to hold states accountable for their delegated enforcement activities.
- Congress should enact legislation that grants expanded citizen suit opportunities for holding corporations and individuals accountable for regulatory violations. Such legislation should also seek, to the extent legally feasible, to remove standing barriers, particularly those created by the courts, that block people affected by violations to bring suits requiring that the law be enforced.
- Congress should enact legislation that expands and enhances protections for whistleblowers who play a vital role in exposing regulatory violations.

Courts

Congress has never deputized federal judges to participate in the execution of legislation by authorizing them to substitute their policy judgment for that of the agencies.

The courts have long been recognized as the "great equalizer" – a venue where any ordinary American can hold the most powerful people or corporations accountable for their misdeeds and the harms they cause. A progressive regulatory system will require courts to fulfill this role, complementing the protections that strong regulations provide while serving as a backstop when agencies are unwilling or unable to fulfill their statutory obligations. To achieve the kind of citizen-centered courts necessary for a progressive regulatory system, policymakers will need to eliminate existing barriers that prevent citizens from having full and meaningful access to bring their claims. This will include addressing non-constitutionally based standing requirements, as well as eliminating arbitrary constraints on achieving civil justice, such as forced arbitration and damage caps.

At the same time, a progressive regulatory system will require judges who reject judicial activism by respecting the constraints on their role in mediating disputes over regulatory policies. Congress has never deputized federal judges to participate in the execution of legislation by authorizing them to substitute their policy judgment for that of the agencies, and for good reason. Judges by training and practice are generalists and do not wield the substantive expertise that agency decision-makers are able to bring to bear in policymaking. Doing so, moreover, contravenes the explicit instructions of Congress that agencies resolve matters of public policy. Accordingly, in a progressive regulatory system, federal judges must

recognize the constitutional legitimacy of broad delegations of policymaking authority and respect the bedrock deference doctrines established in *Chevron* and *Auer*. Nevertheless, the federal courts will remain one of the greatest near- and medium-term threats to a progressive regulatory system as the George W. Bush and Trump administrations have had considerable success in seating judges who are not just ideologically hostile to regulations in general but also willing to engage in judicial activism to strike down individual regulations that they oppose on policy or political grounds.

State Governments

In our federalist system of government, states are, at the very least, important partners in promoting the public welfare and, at the very best, genuine innovators and pioneers in delivering stronger protections and advancing the goals of social justice for their citizens. In practice, though, states have too often been a barrier to safeguarding people and the environment while serving as a vehicle for excessive corporate influence over the rulemaking process. A progressive regulatory system both promotes and respects the principles of federalism by demanding that states behave in a way more in line with the idealized vision of this division of responsibilities.

State Constitutions. A few state constitutions already contain provisions recognizing their citizens' right to healthy environment. Citizens in other states can avail themselves of constitutional amendment procedures to include this provision in their own state constitutions. Such provisions would strengthen citizen efforts to fight any anti-regulatory policies that the state might attempt to pursue in the future.

Direct Democracy. Citizens should avail themselves of opportunities for statewide and local ballot initiatives to pursue progressive reforms of the state's regulatory system.

Policy Development. Public interest advocates in progressive states should pursue opportunities to work with state legislatures and governors to institute progressive reforms of the states' regulatory systems. These reforms might include creating new mechanisms for engaging members of the public – especially the working poor and people of color – in formulating policy agendas and developing new regulatory safeguards. State agencies in progressive states should also experiment with different approaches for incorporating a more *place-based focus* into their regulatory decision-making, including by giving special attention to the cumulative harms experienced by communities of color and low-income communities. These efforts can lead to a "bottom-up" approach in which state-level regulatory reforms in progressive states can help stimulate similar reforms at the federal level.