



The Regulatory Lookback

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THE REGULATORY LOOKBACK

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Cass R. Sunstein

Abstract

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

I. The Cooling Function of Technocracy

In 2013, the Federal Aviation Administration (FAA) eliminated certain restrictions of the use of electronic technologies – tablets, cell phones, and computers – at various stages of flights.¹ The FAA’s decision was widely hailed; it did not provoke partisan divisions. Across the United States, travelers agreed that the decision would significantly increase convenience and remove irritating restrictions that had significant aggregate costs. The scientific evidence also seemed clear: The restrictions that the FAA eliminated were pointless and did not contribute to safety. The FAA’s deregulatory

Robert Walmsley University Professor, Harvard University. This essay, produced as a keynote lecture for a symposium at Boston University and forthcoming in the Boston University Law Review, draws heavily on chapter 7 of *Simpler: The Future of Government* (Simon & Schuster, 2013). (Many thanks to Simon & Schuster for permission to do so.) Readers are asked to make allowances for the occasional informality of an essay that is based on an oral presentation and on a chapter intended for a popular audience. Special thanks to Matthew Lipka for superb research assistance and valuable comments.

¹ See

http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/2013/InFO13010.pdf

efforts, part of the continuing “regulatory lookback,” created substantial benefits without imposing significant costs.

Amidst political polarization, it is often helpful to focus on facts – on what, exactly, is known or at least knowable. Careful assessment of facts, and projection of likely consequences, can have a *cooling function*. That assessment can help to reduce political divisions, even in periods of intense polarization. Under favorable conditions, technocrats inform and discipline politicians and their constituents, by clarifying the stakes. To be sure, it is far from impossible to argue with numbers, but it can be hard to do so, and once that particular argument begins, people tend to know what it is that they are arguing about. By itself, that is important progress.

From 2009 to 2012, I was privileged to serve as Administrator of the Office of Information and Regulatory Affairs. In that capacity, I learned that close attention to the human consequences, and indeed to costs and benefits, can help to promote both consensus and progress in domains in which both of these might otherwise prove difficult to achieve. President Obama’s Executive Order 13,563,² ratifying and intensifying the longstanding American commitment to careful analysis of costs and benefits,³ can be understood as an effort to reduce attention to intuitions, dogmas, political posturing, and interest groups, and instead to focus public officials on what matters, which are the effects of potential policies on the human beings who are subject to them.⁴

Some people are likely to doubt the view that technocracy can have a cooling function. In their view, debates about policies and regulations are really debates about values, not about facts. When people disagree about a rule that would protect clean air or increase highway safety, it is because of what they most value, not because of disagreements about the evidence. Facts are not irrelevant, but they are hardly the main event.

A great deal of evidence does show that with respect to policies and regulations, values sometimes have priority.⁵ If people have certain predispositions, they will be inclined to believe that climate change is a serious problem, that nanotechnology is dangerous, that nuclear power is a bad idea, and that gun control saves lives. If they have different predispositions, they will be inclined to the opposite beliefs. Predispositions with respect to values help to account for people’s factual judgments on these and many other questions. If we are asking what, in fact, explains people’s disagreements about facts, one answer would be their disagreements about values.

² See Exec. Order No. 13,563, 3 C.F.R. 215 (2012) [hereinafter Exec. Order No. 13,563], reprinted in 5 U.S.C. app. § 601 (Supp. V 2011).

³ See Exec. Order 12,291, 3 C.F.R. 127 (1981); Exec. Order 12,866, 3 C.F.R. 638 (1993).

⁴ For discussion, see Sunstein, *supra* note *.

⁵ Dan Kahan and his coauthors have done a great deal of valuable work on this topic. See THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL (last visited Nov. 26, 2012), <http://www.culturalcognition.net/kahan/>.

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

To answer these questions, the facts are indispensable. For fuel economy, it is necessary to know what consumers will gain, and what they will lose, and what the likely effects will be on air quality and on energy security. Abstractions, intuitions, party affiliation, dogmas, and inclinations are hopelessly inadequate. This is an opportunity, not a problem. If regulators discover that a proposed fuel economy rule would not much benefit consumers or the environment but would add \$900 to the cost of every new car, they have learned enough to know that the rule will be exceedingly hard to defend. After they learn such facts, those previously inclined to favor the rule might well change their minds. And if we know (hypothetically) that a rule requiring rearview cameras in cars would prevent many deaths (say, nine hundred per year) and cost very little (say, \$1 per car), the argument for that rule would be hard to resist.

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

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

The executive branch has particular advantages here, because of the existence of institutional arrangements that have long prized such analysis.⁶ Insofar as executive

⁶ See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013); John Graham, *Saving Lives through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2001).

agencies have a degree of policymaking discretion under relevant statutes, their ability to investigate the facts, to consider a range of options, and to assess the costs and benefits of each can make the cooling functioning of technocracy an institutional reality.

II. Looking Forward, Looking Back

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

In important cases, public officials may not be able to specify, with confidence, the costs of a rule that would require reductions in air pollution, or the benefits of a rule that would reduce risks of injuries in coalmines. Sometimes the most that can be done is to identify “ranges” for both benefits and costs, and those ranges can be fairly wide. Cost estimates of \$200 million to \$400 million are not unusual.⁷ Benefits estimates on the order of one thousand lives saved to two thousand lives saved are not hard to find.⁸ In addition, the ranges themselves may be either too optimistic or too pessimistic. Costs may turn out to be far higher than anticipated; the same is true of benefits.⁹ In addition, circumstances might change. Reasonable assumptions, accepted by relevant officials in advance, might be undermined by technological changes, private adaptation, or other factors.

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

A. Inconsistent Dogmas

⁷ For examples, see Cass R. Sunstein, *The Real World of Cost-Benefit Analysis*, 114 COLUM. L. REV. 167 (2013).

⁸ *Id.*

⁹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 41-46 (2005) (2005), available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf (collecting studies comparing *ex ante* and *ex post* analyses of regulations’ costs and benefits, including examples where cost and benefit estimates were off by more than a factor of ten).

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

Within the business community, not to mention the Republican Party and conservative think tanks, many intelligent people share a single view: government agencies are far too optimistic, even self-serving, about both benefits and costs.¹⁰ When I spoke on one occasion to a group of small businesses, an executive asked me with complete exasperation, “How can we possibly trust cost-benefit analysis when agencies keep lowballing the costs?” Many conservatives told me (and continue to tell me) that agencies cook their numbers so as to make their rules appear far better than they actually are. In their view, agencies are irredeemably self-interested; they want to justify their rules and so tweak or twist the numbers to provide that justification. In short, regulators cannot be trusted. Their policy preferences are driving their numbers, rather than vice versa, or so the story goes.

Within the public interest community (especially among environmentalists), not to mention the Democratic Party and liberal think tanks, many intelligent people hold precisely the opposite beliefs. When I was speaking on one occasion to a group of committed environmentalists, one of them asked me, with real frustration, “How can we rely on cost-benefit analysis, when the costs are always inflated?” Many progressives believe that agencies systematically underestimate the benefits and exaggerate the costs.¹¹

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

¹⁰ See, e.g., Si Kyung Seong & John Mendeloff, *Assessing the Accuracy of OSHA's Projections of the Benefits of New Safety Standards*, 45 AM. J. INDUS. MED. 313, 324-28 (2004) (finding that the Occupational Safety and Health Administration consistently overestimates regulatory benefits); Sherzod Abdukadirov, *Regulatory Benefits: Examining Agency Justification For New Regulations 22-23* (Mercatus Institute, Working Paper No. 12-37, 2012) (stating that many regulations overestimate benefits).

¹¹ See, e.g., Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071, 1082-84 (2006) (“The evidence is clear: the costs of environmental protection are much more often overestimated, rather than underestimated, in advance.”); David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 600 (1997) (“Studies comparing regulatory cost estimates with actual compliance costs show that regulators consistently overestimate costs.”).

Both camps can cite apparently convincing examples. In the Obama administration, some proposed rules were withdrawn because agencies were ultimately convinced that the costs would be considerably higher than they expected. For example, the Occupational Safety and Health Administration withdrew a highly controversial rule designed to protect workers from excessive noise.¹² It did so in part on the ground that it appeared to have underestimated the costs.¹³

On some occasions, other agencies have given unrealistically low estimates of the burdens imposed by paperwork and reporting requirements. Real people have to spend real time on those requirements, even if they seem simple and easy to navigate to those who wrote them. There have been significant efforts to reform the Free Application for Federal Student Aid (FAFSA) form so as to increase the likelihood that students who need financial help will be able to attend college.¹⁴ But some specialists argue that those efforts do not go nearly far enough, and that even now, the FAFSA form requires significantly more time and effort than the Department of Education projects.¹⁵

On the other hand, agencies have sometimes offered inflated cost estimates. The Clean Air Act requires companies to reduce acid rain.¹⁶ Originally the Environmental Protection Agency projected that this requirement would impose high costs, and industry contended that the costs would be actually much higher than the EPA projected. It turned out that the costs were significantly lower.¹⁷ In many cases, moreover, industries learn a great deal over time, and costs fall for that reason, in ways that agencies may not be able to anticipate. The expense of a requirement today may be much higher than the expense of the same requirement tomorrow, in part because of cost-reducing innovations spurred by the regulation itself. Focusing on just this point, the Department of Energy has been rethinking its cost projections for rules requiring energy efficiency.¹⁸ In its view, a “learning curve” analysis is needed to produce accurate numbers. Because industry learns how to do things more efficiently, innovation often drives anticipated costs way down.

Without a doubt, those with an incentive to oppose rules will tend to overstate the costs and perhaps even claim that if rules are finalized, terrible dislocations will occur. I saw such overstatements at least one a month. I also saw professional civil servants at agencies, working with OIRA and other offices within the government, trying to generate

¹² See Press Release, U.S. Dep’t of Labor, U.S. Department of Labor’s OSHA Withdraws Proposed Interpretation on Occupational Noise (Jan. 19, 2011), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19119.

¹³ *Id.*

¹⁴ See Susan Dynarski & Mark Wiederspan, *Student Aid Simplification* (Nat’l Bureau of Econ. Research, Working Paper No. 17834, 2012), *available at* <http://www.nber.org/papers/w17834>.

¹⁵ *Id.*

¹⁶ A. DENNY ELLERMAN ET AL., *MARKETS FOR CLEAN AIR* (2000).

¹⁷ *See id.*

¹⁸ See Paul Voosen, *For Energy Efficiency, Chu’s Law Is On the Way*, GREENWIRE (June 14, 2012), <http://eenews.net/public/Greenwire/2012/06/14/1>; Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57,516 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430).

the right numbers. But if industry overstates costs, regulators may not have enough information to make a correction.

While the polarized positions divide most often on costs, benefits matter too, and they produce identical divisions. Do government agencies overstate or underestimate them? Industry representatives frequently argue that benefits are wildly exaggerated and highly speculative. Public interest groups frequently argue that benefits are underestimated, especially in light of the fact that many are hard to quantify and are based on evolving scientific information.¹⁹

B. Data

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

Consider, for example, Winston Harrington's careful study, building on previous work, which explores sixty-one rules for which benefit-cost ratios could be compared before and after the fact.²⁰ Harrington found no systematic bias. In his account, agencies overestimated both benefits and costs with about equal frequency. Specifically, in sixteen of the sixty-one cases, the ratios were found to be essentially accurate. In twenty-four cases, the ratio was better, not worse, than the agency had anticipated. In twenty-one cases, the ratio was worse than anticipated. Harrington's general conclusion is that while both costs and benefits tend to be lower than estimated, no bias can be found in estimates of benefit-cost ratios.

Harrington's study focuses on benefit-cost ratios, which is a relevant question but not the central one. What most matters is *net benefits* and whether agencies have accurately calculated them.²¹ Nor did Harrington specify the degree to which benefits and costs were underestimated or overestimated. Other studies do not isolate the net benefits question, but they do explore the question of underestimation or overestimation. One such study analyzed twenty-five environmental and occupational safety regulations for

¹⁹ Compare Laurie T. Johnson & Chris Hope, *The Social Cost of Carbon in U.S. Regulatory Impact Analyses: An Introduction and Critique*, 2 J. ENVTL. STUD. SCI. 205 (2012) (finding that the government underestimates the benefits of limiting carbon, where one author was a Natural Resources Defense Council economist), and Mark Drajem, *Obama Agrees to Open Carbon-Cost Estimate to Outside Comment*, BLOOMBERG (Nov. 4, 2013), <http://www.bloomberg.com/news/2013-11-04/obama-agrees-to-open-carbon-cost-estimate-to-outside-comment.html> (describing complaints by industry lobbyists that the government's estimate of the benefits of reducing carbon pollution is exaggerated).

²⁰ Winston Harrington, *Grading Estimates of the Benefits and Costs of Federal Regulation* (Resources for the Future, Discussion Paper No. 06-39, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937357.

²¹ For an explanation, see Sunstein, *The Real World of Cost-Benefit Analysis*, *supra* note.

which retrospective estimates could be found.²² The basic conclusion is that agencies display a modest tendency to overestimate costs (a finding in support of the progressive view). For twelve rules, agencies overestimated costs; they estimated costs accurately for five; they underestimated for two; and the costs were indeterminate for six.²³

In 2005, the Office of Management and Budget, and in particular the OIRA staff, provided an overview of many retrospective analyses based on an examination of forty-seven case studies.²⁴ The overview offers three key conclusions. First, agencies were far more likely to overestimate benefits than to underestimate them.²⁵ More particularly, agencies overestimated benefits 40 percent of the time, whereas they underestimated benefits only 2 percent of the time. Second, agencies tended to overestimate the benefit-cost ratio, and in that sense to be a bit too optimistic about the consequences of their rules; agency estimates were accurate 23 percent of the time, while the ratio was overestimated 47 percent of the time and underestimated 30 percent of the time. Third, agencies were slightly more likely to overestimate than to underestimate costs; agencies were accurate 26 percent of the time, overestimated costs 34 percent of the time, and underestimated costs 26 percent of the time.²⁶

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

III. The Regulatory Lookback

A sensible regulatory system, dedicated to empirical analysis and designed to transcend partisan divisions, would go beyond the competing dogmas. It would track reality. A key question is whether particular rules should be revised, simplified, strengthened, expanded, or eliminated in light of what we learn about what those rules are

²² Winston Harrington, Richard Morgenstern & Peter Nelson, How Accurate Are Regulatory Cost Estimates? 1 (Mar. 5, 2010), *available at* http://grist.files.wordpress.com/2010/10/harringtonmorgensternnelson_regulatory_estimates.pdf.

²³ *Id.*

²⁴ See OFFICE OF MGMT. & BUDGET, VALIDATING REGULATORY ANALYSIS, *supra* note, at 46–47.

²⁵ As in the Harrington study, *supra* note, OMB’s 2005 report used the term “accurate” to mean “that the post-regulation estimate is within +/- 25 percent of the pre-regulation estimate.” *Id.* at 42.

²⁶ *Id.* at 47.

actually doing. It is an astonishing fact that until very recently, there has been no sustained effort to gather, let alone act on, that information – and that existing efforts remain preliminary and partial. Such an effort might well help agencies to simplify the system by eliminating unjustified burdens and a great deal of pointless red tape.

A. The Problem of Cumulative Burdens

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

It is important to distinguish the concept of *cumulative* burdens from that of *aggregate* burdens. One rule might cost \$100 million, and another \$200 million, and yet another \$300 million; those costs can easily be aggregated. With respects to benefits, the aggregate of benefits is similarly straightforward. So long as the aggregates are accurate, the questions of costs and benefits are symmetrical. But the concept of cumulative burdens is different. It points not to a simple aggregation, but to the fact that if a public official, a small business, or an individual is asked to engage in tasks A, B, C, and D, there may be little room for other tasks, simply because of the scarcity of time.²⁷ The opportunity costs of a large set of overlapping, inconsistent, or redundant rules might turn out to be large. In principle, a competent analysis of costs might be able to capture those costs, but it is exceedingly hard to do so in the context of particular rules. I issued a guidance document designed to draw attention to cumulative burdens and to reduce them,²⁸ but it must be acknowledged that this project remains a work in progress. Particular goals should be to engage with affected parties in advance of proposed rulemaking; to harmonize inconsistent or redundant requirements; and to consider whether federal regulation is needed in light of requirements at the state and local levels.

Some business groups objected to cumulative burdens while focusing particularly on the need for international regulatory cooperation. They contended that just as it makes no sense to have to meet redundant requirements from the federal government and California and Georgia and New York, it is also senseless for companies to have to

²⁷ On the general topic, see SENDHIL MULLAINATHAN & ELDAR SHAFIR, *SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH* (2013).

²⁸ See Memorandum from Cass R. Sunstein, Administrator, Office of Info. and Regulatory Affairs, on Cumulative Effects of Regulations to the Heads of Exec. Dep'ts and Agencies (Mar. 20, 2012), <http://www.whitehouse.gov/sites/default/files/omb/assets/infocreg/cumulative-effects-guidance.pdf>.

absorb and meet complex and overlapping requirements from the United States, Canada, Mexico, the United Kingdom, and France. If nations do not really disagree about facts or values, should they not attempt to harmonize their requirements, if only to promote trade and growth? One representative of a large business organization went so far as to say to me, early on, that while domestic regulation from the Obama administration was a concern, the problem of unnecessary international differences was a much larger one, and that if we could do something to reduce that problem, we would make a major contribution. When I worked in government, we took these concerns very seriously.²⁹

B. Retrospective Analysis

In January 2011, focusing directly on the issue of simplification, President Obama called for a government-wide “retrospective analysis” of existing rules and required agencies to produce, in short order, preliminary plans for such analysis.³⁰ If it is firmly institutionalized,³¹ the requirement of retrospective analysis might well count as the most important structural change in regulatory policy since the original requirement of prospective analysis during the Reagan Administration.³²

Motivated above all by the general goal of streamlining the regulatory system, the requirement had a particular origin. In the midst of a serious economic crisis, there was a great deal of interest, within the Executive Office of the President, in taking all reasonable steps to promote economic growth. Eliminating costly regulatory burdens certainly counts as such a step. At the same time, everyone knows that during the first term of the Obama administration, Congress enacted and the president signed the Affordable Care Act, perhaps the most important social legislation since the 1960s.³³ Also during the first term, Congress enacted and the president signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which amounted to the most important financial legislation since the 1930s.³⁴ And while we focused on net benefits and tried to keep costs down, we also issued a number of important rules to protect public safety, health, and the environment. Some of those rules were both contentious and expensive, and it must be acknowledge that they were not exactly simple.³⁵

At the same time that we moved forward in these ways, we believed that in a difficult economic period, there was a pressing need to eliminate unjustified requirements and to reassess rules on the books. Doing so, we knew, would be a significant step toward making the whole system simpler, and could have substantial beneficial effects on the economy. We also heard this suggestion, loud and clear, from businesses both large and small. Some expensive rules, even if well-motivated when issued, probably never made a great deal of sense. Some old rules, sensible when issued, do not make sense today.

²⁹ See discussion *infra* Part V.B.

³⁰ See Exec. Order 13,563.

³¹ As is the goal of Exec. Order 13,610, 3 C.F.R. 258 (2012). See Appendix.

³² See Exec. Order 12,291, 3 C.F.R. 127 (1981).

³³ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

³⁴ See Pub. L. No. 111-203, 124 Stat. 1376 (2010).

³⁵ For a catalogue, see Sunstein, *The Real World of Cost-Benefit Analysis*, *supra* note.

Changed circumstances can make rules ripe for reassessment and trimming, or maybe deletion. Perhaps new technologies make such rules obsolete. Perhaps there is a problem of redundancy and overlap. Perhaps states are also imposing requirements, and federal regulations are no longer needed. Perhaps the private market is now working well enough, and old regulations no longer have a point, because there is no market failure for them to address.

Consider this important suggestion from the MIT economist Michael Greenstone, former chief economist at the Council of Economic Advisers: “The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. This is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions.”³⁶ By contrast, retrospective analysis can help show what actually works and what does not. In the process, it can promote the repeal or streamlining of less effective rules and the strengthening or expansion of those that turn out to do more good than harm. In a valuable essay, Greenstone outlines a series of ambitious reforms designed to promote a culture of experimentation and evaluation.³⁷ These reforms include an effort to ensure that regulations are written and implemented so as to facilitate reliable evaluation.

In my own experience—and I know that Greenstone agrees—agencies are highly professional, and they work hard to get the analysis right. Those who do the analysis are civil servants, not political appointees. They may be responsive, in appropriate ways, to their department’s political leadership, but that responsiveness does not compromise their efforts to produce sound analysis (which is very much in the interest of any administration, in part because it can avoid political embarrassment, and in part because it can reduce the risk of judicial invalidation). In addition, there are many checks on what agencies do. If an agency’s estimates are doubtful, OIRA will raise questions, as will the Council of Economic Advisers, the National Economic Council, the Office of Scientific and Technology Policy, and others.³⁸ On numerous occasions, the agency’s draft analysis of costs and benefits is altered and improved because of this process of close scrutiny.³⁹ And if an agency proposes a rule with an implausible or doubtful analysis, members of the public will raise questions, and those questions will receive a serious hearing.⁴⁰

³⁶ Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in NEW PERSPECTIVES ON REGULATION 113, 113 (David Moss & John Cisterno eds., 2009).

³⁷ *Id.*

³⁸ For discussion, see Sunstein, *The Office of Information and Regulatory Affairs*, *supra* note.

³⁹ See, e.g., *id.* at 1847 (reporting that 76% of rules sent to OIRA during a two-and-a-half year period were approved “consistent with change”); John D. Graham et. al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 971-74 (2006).

⁴⁰ See Administrative Procedures Act, 5 U.S.C. § 553(c) (2012); Sunstein, *The Office of Information and Regulatory Affairs*, *supra* note, at 1863 (discussing the importance of public comments).

Critics frequently neglect these safeguards,⁴¹ which often produce significant changes in the agency's original analysis. I saw many such cases.

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

IV. The Regulatory Lookback in Action

After the issuance of Executive Order 13,563, the initial step was the production of preliminary plans for retrospective review, which the president required within 120 days.⁴² This was an aggressive timeline, especially considering the fact that public officials have numerous things to do. Many agencies began by asking for suggestions from the public, requesting ideas about which regulations must needed to be revisited.. For example, the Environmental Protection Agency and the Departments of Commerce, Transportation, Interior, Homeland Security, State, and Treasury posted notices in the Federal Register, asking for comments about how the process should work and which rules should be streamlined or repealed.⁴³ Several agencies held public meetings nationwide.⁴⁴

In the early days of the process, there was a great deal of skepticism about the president's initiative, certainly outside of government. Critics in the business community contended that this was a symbolic exercise that was unlikely to produce anything significant or real.⁴⁵ Those in the public interest community agreed. They added that the

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

⁴² Exec. Order 13,563 § 6(b).

⁴³ See, e.g., Retrospective Review Under E.O. 13563, 76 Fed. Reg. 17,572 (Mar. 30, 2011) (Department of the Treasury).

⁴⁴ See, e.g., U.S. ENV'T'L PROT. AGENCY, IMPROVING OUR REGULATIONS: A PRELIMINARY PLAN FOR PERIODIC RETROSPECTIVE REVIEWS OF EXISTING REGULATIONS 34 (2011), available at <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/EnvironmentalProtectionAgencyPreliminaryRegulatoryReformPlan.pdf> ("Verbal comments were solicited at a series of twenty public meetings. . . . Additionally, EPA held nineteen more town halls and listening sessions targeting specific program areas (e.g. solid waste and emergency response) and EPA Regions.").

⁴⁵ See, e.g., *The Views of the Administration on Regulatory Reform: An Update Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 112th Cong. 54, 67 (2011) (statement of William Kovacs, Senior Vice President, U.S. Chamber of Commerce) (saying that while the Obama Administration's regulatory lookback was "a very positive first step . . . we have got a long way to go," and "in the case of EPA, its look-back does

idea of a regulatory lookback was a distraction from what was important, which was to look forward by issuing long-overdue public safeguards.⁴⁶ But within the government itself, President Obama's clear commitment to the project, expressed in his 2011 State of the Union Address⁴⁷ and in highly publicized remarks to the U.S. Chamber of Commerce,⁴⁸ had a significant impact.

Throughout the federal government, agencies were energized. A number of officials, at a wide range of agencies, had long wanted to engage in an initiative of this sort, but time is limited and officials have to set priorities. Now the president himself had directed them to act. The lookback requirement gave real space to officials who were already excited about the basic idea, and for officials who had not thought about it, the requirement spurred real creativity. In the end, every agency met the president's deadline.⁴⁹

In May 2011, the agencies released their preliminary plans, identifying hundreds of reforms, many of which would streamline or delete regulatory requirements. Recognizing the importance of public participation, every agency made these plans publicly available and requested comments and suggestions.⁵⁰ I issued a guidance document, which is binding on agencies, directing them to address the comments they received and to make their plans final within eighty days.⁵¹

Twenty-six such plans were issued in August 2011. They included over 580 initiatives, filling more than eight hundred pages. The initiatives promise billions of dollars of savings and tens of millions of hours of reductions in annual paperwork and

little to nothing in the way of addressing the bulk of rulemakings of significant concern to the Chamber and its members").

⁴⁶ See, e.g., Press Release, Center for Effective Government (formerly OMB Watch), Federal Agencies Release Retrospective Reviews: Preliminary Plans Appear Reasonable, But Proof will be Final Product, (May 26, 2011), <http://www.foreffectivegov.org/node/11683> (expressing the concern that "the more agencies look back the less they will be able to look forward," while also noting positive aspects of the review).

⁴⁷ See President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

⁴⁸ See President Barack Obama, Remarks by the President to the Chamber of Commerce (Feb. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce>.

⁴⁹ See Kori Schulman, *A 21st Century Regulatory System*, THE WHITE HOUSE BLOG (May 26, 2011), <http://www.whitehouse.gov/blog/2011/05/26/21st-century-regulatory-system> (announcing the completion of preliminary plans from all agencies).

⁵⁰ See Memorandum from Cass R. Sunstein, Administrator, Office of Info. and Regulatory Affairs, to the Heads of Executive Departments and Agencies, Retrospective Analysis of Existing Significant Regulations (Apr. 25, 2011), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.

⁵¹ *Id.*

reporting requirements.⁵² Within a short period, over a hundred of the initiatives were finalized or formally proposed to the public.⁵³

One of these enjoyed short-term fame, not only because it eliminated unnecessary costs but because it had the dubious honor of being the most twittered moment of the 2012 State of the Union Address.⁵⁴ It took a village, but I share the responsibility for that particular honor.

Since the 1970s, milk had been defined by law as an “oil” and potentially subject to costly rules designed to prevent oil spills. This was silly. While oil spills can be really bad for the environment, milk spills are pretty innocuous, and they really should not be subject to the same restrictions. (As one skeptic said, people don’t confuse “Got Milk?” with “Got Oil?”) The agricultural community, including many small businesses, had long asked the EPA to repeal these restrictions. As a key part of its retrospective review plan, EPA concluded that the regulatory requirements placed unjustifiable burdens on dairy farmers, and it issued a final rule to exempt them. The projected five-year savings are over \$700 million.⁵⁵

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

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

- The Department of Health and Human Services finalized several rules to remove unnecessary regulatory and reporting requirements previously imposed on hospitals and other health care providers, thus saving about \$5 billion over the next five years.⁵⁶ These streamlining initiatives were received with great enthusiasm by nurses and doctors, who had long urged the government to eliminate pointless red tape.

⁵² The final plans can be viewed on the White House’s website. *Regulation Reform*, THE WHITE HOUSE, <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system> (last visited Nov. 25, 2013).

⁵³ See Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57, 58 (2013), available at <http://jreg.commons.yale.edu/files/2013/06/Moving-Forward-with-Regulatory-Look-Back-final.pdf>.

⁵⁴ *Some Sour Over ‘Spilled Milk’ Line in State of the Union Address*, NBC POLITICS ON NBCNEWS.COM (Jan. 25, 2012), http://nbcpolitics.nbcnews.com/_news/2012/01/25/10229627-some-sour-over-spilled-milk-line-in-state-of-the-union-address.

⁵⁵ U.S. ENV’T L. PROT. AGENCY, *supra* note 44, at 13.

⁵⁶ DEP’T OF HEALTH & HUM. SERVS., PLAN FOR RETROSPECTIVE REVIEW OF EXISTING RULES 3, 8–17 (2011), available at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/healthandhumanservicesregulatoryreformplanaugust2011.pdf>.

- HHS finalized a rule to eliminate certain restrictions on the use of telemedicine,⁵⁷ particularly helping hospitals in rural areas. This rule provides a significant benefit to patients as well as doctors. By removing an anachronistic restriction, people in rural areas can now get quality care with the aid of computers and telephones. The five-year savings are \$67 million, and the dollar figure does not fully capture the benefits that doctors and patients are receiving.

- The Department of Labor finalized a rule to harmonize hazard warnings for workers with those of other nations, producing savings in excess of \$2.5 billion over the next five years, most of it for employers.⁵⁸ The basic idea is that many employers do business in more than one nation, and if they have to alter their hazard warnings whenever they cross national borders, they will incur pointless costs. (Recall the importance of international regulatory cooperation.) A significant advantage of this rule is that it promotes trade and exports. In addition, the new warnings are simpler and easier to understand, and lives are expected to be saved as a result.

- The Department of Transportation finalized a rule to simplify a railroad safety regulation, producing savings of between \$620 million and \$818 million and avoiding the risk that such costs will be passed on to consumers.⁵⁹

- The Occupational Safety and Health Administration issued a final rule to remove over 1.9 million annual hours of redundant reporting burdens imposed on employers, thus saving more than \$45 million in annual costs.⁶⁰

- EPA finalized a rule to eliminate the requirement, imposed in some states, that gas stations place air pollution controls on the nozzles that people use to put gas into their tanks. Because modern cars and trucks already have effective air pollution control technologies, the required

Matthew Lipka 11/25/13 10:29 PM
Comment [1]: Note that because this is not a major rule the savings figure isn't currently in any official public document, so I cannot confirm it. The only place I've seen this number is in *Simpler*.

⁵⁷ Changes Affecting Hospital and Critical Access Hospital Conditions of Participation: Telemedicine Credentialing and Privileging, 76 Fed. Reg. 25,550 (May 5, 2011) (to be codified at 42 C.F.R. pts. 482, 485).

⁵⁸ U.S. DEP'T OF LABOR, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 10-11 (2011), available at <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentofLaborPreliminaryRegulatoryReformPlan.pdf>.

⁵⁹ Positive Train Control Systems, 77 Fed. Reg. 28,285 (May 14, 2012) (to be codified at 49 C.F.R. pt. 236).

⁶⁰ Standards Improvement Project, 76 Fed. Reg. 33,590 (June 8, 2011) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917-19, 1926, 1928)

controls were redundant and could be eliminated without increasing pollution. The anticipated five-year savings are about \$300 million.⁶¹

- The Departments of Commerce and State undertook a series of steps to eliminate barriers to exports, including duplicative and unnecessary regulatory requirements, thus reducing the cumulative burden and uncertainty faced by American companies and their trading partners.⁶²

A small subset of these initiatives, already finalized or formally proposed to the public, will produce savings of more than \$10 billion over the next five years.⁶³ This figure is a small fraction of the eventual savings. Many of the lookback initiatives also provide benefits that are hard to monetize but likely to be significant. For example, it is not easy to quantify the economic benefits, including the jobs created, of reducing restrictions on exports and simplifying the requirements imposed on those who do business across national borders. Nonetheless, those benefits are expected to be high.⁶⁴

V. Toward a Culture of Retrospective Analysis

A. A One-Time Endeavor?

After the plans were finalized, we did a great deal to try to create a culture of retrospective analysis rather than just a one-time endeavor. In 2012, the president issued an Executive Order with three key components.⁶⁵ First, agencies are required to reach out to the public, on a continuing basis, to solicit ideas about reforms. Second, agencies must give priority to reforms that would have a significant impact -- for example, those with big economic savings. New initiatives should make a real difference; they should not be symbolic measures or mere updating. Third, and perhaps most important, agencies have

⁶¹ Widespread Use for Onboard Refueling Vapor Recovery, 77 Fed. Reg. 28,772 (May 16, 2012) (to be codified at 40 C.F.R. pt. 51).

⁶² DEP'T OF COMMERCE, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 3-6 (2011), available at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentofcommerceregulatoryreformplanaugust2011a.pdf>.

⁶³ COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRES., SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 6 (2012), available at http://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf.

⁶⁴ There is a large question about the extent to which independent agencies should be required to engage a similar regulatory lookback. In Executive Order 13,579, President Obama said that they "should" do so, without explicitly directing them to engage in that process. Independent agencies generally did what the President said that they "should" do, though their efforts were less ambitious than those of the executive agencies. See, e.g., FED. TRADE COMM'N, REGULATORY REVIEW PLAN: ENSURING FTC RULES ARE UP-TO-DATE, EFFECTIVE, AND NOT OVERLY BURDENSOME (2011), available at <http://ftc.gov/ftc/regreview/regreviewplan.pdf>; FED. COMM'N COMM'N, FINAL PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES (2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf; R.R. RET. BD., REGULATION AND REGULATORY REVIEW: RRB ACTION PLAN, available at <http://www.rrb.gov/pdf/blaw/EO13579.pdf>.

⁶⁵ Exec. Order 13,610, 3 C.F.R. 258 (2012).

to report on their progress to OIRA and to the public on a continuing basis. This final step is designed to promote accountability -- to ensure that if agencies are not doing much, the public will be able to see that and provide a corrective. Here, as elsewhere, we attempted to enlist sunlight as a check on drift and inaction. All of these steps can be understood as a further effort to establish a kind of “choice architecture” for the federal government itself.⁶⁶

B. International Regulatory Cooperation

Also in 2012, the president issued an Executive Order designed to reduce excessive costs and to increase simplification by promoting international regulatory cooperation.⁶⁷ The Executive Order explicitly links the lookback to such cooperation, calling for initiatives that will reduce costs and simplify the system by eliminating unnecessary disparities across nations.

There is a great deal more to do in this area, removing barriers to growth and trade. Through the work of the Regulatory Cooperation Council that I co-chaired, Canada and the United States have worked productively together to do exactly that,⁶⁸ and we made significant progress with Mexico too.⁶⁹ Further steps, with considerable promise, might well involve Europe, which should be engaging in a lookback of its own.⁷⁰ International regulatory cooperation and reduction of cumulative burdens remain high priorities and major challenges for the future. We should expect bipartisan consensus on that point.

C. Paperwork

As an additional step, I directed agencies to undertake significant new initiatives to eliminate reporting and paperwork burdens. I called for simplified applications, short-form options, exemptions or streamlining for small business, electronic filing, and elimination of unnecessary requirements.⁷¹ More specifically, I directed the agencies that now impose the highest paperwork burdens to identify at least one initiative, or combination of initiatives, that would eliminate two million hours or more in annual reporting burdens. I also directed all agencies to identify at least one initiative, or

⁶⁶ On the basic idea, see Sunstein, *Simpler*, supra note *.

⁶⁷ Exec. Order 13,609, 3 C.F.R. 255 (2012).

⁶⁸ See REGULATORY COOPERATION COUNCIL, JOINT ACTION PLAN (2011), available at http://actionplan.gc.ca/sites/default/files/japlan_eng.pdf.

⁶⁹ Relevant documents can be found at *United States-Mexico High-level Regulatory Cooperation Council*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/oira_irc_north_america#mexico (last visited Nov. 25, 2013).

⁷⁰ See generally *United States-European Union High-Level Regulatory Cooperation Forum*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/oira_irc_europe (last visited Nov. 25, 2013).

⁷¹ See Memorandum from Cass R. Sunstein, Administrator, Office of Info. and Regulatory Affairs, to the Heads of Executive Departments and Agencies, *Reducing Reporting and Paperwork Burdens* (June 22, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf>.

combination of initiatives, that would eliminate at least fifty thousand hours in annual reporting burdens. Major results have come as a result, with savings in excess of 100,000 annual burden hours.⁷²

As it happens, the Department of Treasury, and the Internal Revenue Service in particular, are responsible for nearly three-quarters of the total annual paperwork burden placed on the American people.⁷³ As many taxpayers reminded me while I was at OIRA, there are many opportunities here for making things easier and less frustrating. Often working with OIRA, the IRS has already done a great deal to simplify its forms -- for example, with Form 1040 EZ and with the growth of electronic filing.⁷⁴ Other “EZ” forms are now available and in use, and they are greatly easing people’s burdens.⁷⁵ The Plain Writing Act of 2010 should help to promote clarity, because it is designed to ensure that when government communicates with citizens, it does so in a way that people can easily understand.⁷⁶

D. Expanding Regulation?

The lookback has been focused, above all, on streamlining and eliminating rules, in part to reduce cumulative burdens. The president’s 2011 Executive Order has the same emphasis, but it explicitly acknowledges that agencies may “expand” their regulations if retrospective analysis supports that step.⁷⁷ We can easily imagine why this might be so—and why a careful lookback could justify expansion as well as elimination of rules. An agency might learn that a rule costs a great deal less than was anticipated and that more stringency is required by cost-benefit analysis. Or an agency might learn that with new technologies—electronic rather than paper reporting, for example—compliance is inexpensive and easy, and an exemption of (say) small businesses is no longer warranted. Or an agency might learn that a rule is working quite well, but that its coverage is too narrow, and more people should be subject to it.

All of these points are right and even important, but in the lookback process we did not emphasize them, and I do not expect that they will be the emphasis in the future. The reason is that in the Obama administration, most agencies were already working diligently to fill regulatory gaps, to expand regulatory safeguards, and to build on what

⁷² OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRES., INFORMATION COLLECTION BUDGET 16-20 (2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/infoereg/icb/icb_2012.pdf

⁷³ *Id.* at v.

⁷⁴ See *Choose the Simplest Tax Form for Your Situation*, INTERNAL REVENUE SERV. (Jan. 5, 2011), <http://www.irs.gov/uac/Choose-the-Simplest-Tax-Form-for-Your-Situation>.

⁷⁵ *E.g.*, *Form 990-EZ, Short Form Return of Organization Exempt From Income Tax, Short Form Return of Organization Exempt From Income Tax*, <http://www.irs.gov/pub/irs-pdf/f990ez.pdf> (last visited Nov. 25, 2013).

⁷⁶ See Memorandum from Cass R. Sunstein, Administrator, Office of Info. and Regulatory Affairs, to the Heads of Executive Departments and Agencies, Final Guidance on Implementing the Plain Writing Act of 2010 (Apr. 13, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf>.

⁷⁷ See Exec. Order 13,563, § 6.

was working. They did not need the lookback to engage in that endeavor. Gap-filling and increased protection are exceedingly important, but for this initiative, we found it best to focus on streamlining and burden reduction, not on gap-filling. While expansion is not off the table, simplification has been and will continue to be the principal concern.

One final point: It is ironic but true that procedural safeguards, designed to discipline the rulemaking process, create significant barriers to the project of simplification and indeed to the regulatory lookback. Changes in existing rules must be subject to the rulemaking requirements of the Administrative Procedure Act⁷⁸ as well as to judicial review and the OIRA review process.⁷⁹ Whether or not these safeguards are excessive, optimal, or insufficient, they do ensure that the regulatory lookback is not as expeditious as many would like. Rules may be excessive or unjustified, but in most cases, their simplification and repeal requires use of a time-consuming process.

VI. Experiments and Trials

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

In the past decade there has been growing interest in the use of randomized controlled trials as a means of learning the effects of policy initiatives.⁸⁰ In medicine, of course, it is standard to rely on such trials to see if a drug is safe and effective. For drugs, it would not make a great deal of sense simply to guess, to rely on informed hunches, or even to make simple “before and after” assessments. Suppose that we learn that people who use a certain asthma medicine do better after taking the medicine than before. If so, we know something important—but we do not know nearly enough. The risk with before-and-after assessments is that they may not control for confounding variables. Perhaps people are doing better because of some change in the environment that is not adequately understood by those who are making the assessment.

In the medical domain, the value of randomized controlled experiments is that they have the potential to provide a clear sense of the actual effects of the intervention. Esther Duflo, along with many others, has pioneered the use of randomized controlled trials for purposes of policy evaluation. Duflo has shown that in many cases, small measures, even nudges, can have big effects, especially in helping poor people.⁸¹

In the regulatory area, the use of such trials remains in a preliminary state. Analysis of costs and benefits is rarely informed by them. But it is easy to imagine serious evaluations. Consider a few examples:

⁷⁸ 5 U.S.C. § 553 (2012); 5 U.S.C. § 551(5) (2012) (defining “rule making” as “agency process for formulating, amending, or repealing a rule”).

⁷⁹ See Sunstein, *The Office of Information and Regulatory Affairs*, *supra* note.

⁸⁰ See generally ABHIJIT BANERJEE & ESTHER DUFLO, *POOR ECONOMICS* (2011).

⁸¹ See *id.*

- Would states really save lives by banning use of cell phones while driving? This is a disputed question. Laboratory experiments, showing that people's reaction times slow down when they are distracted, strongly suggest that the answer is yes, and indeed that driving while talking on a phone is a bit like driving while drunk, producing a fourfold increase in relative crash risk.⁸² But maybe those experiments are an unreliable guide to the real world. We could test whether a ban on cell phone use would have major effects on safety by comparing similarly situated localities, one with such a ban and one without. Or we could test whether accidents increase in periods in which cell phone use goes up -- for example, when rates decrease after 9 p.m.⁸³
- What are the effects of different methods of increasing rear visibility in cars? If cameras are placed in the dashboard, do accidents drop? How much, and compared to what? Do improved mirrors have an effect? What about sonar devices, making beeping noises? Do they work as well as cameras?⁸⁴ Randomized trials might help.
- It is important to evaluate different disclosure requirements.⁸⁵ We might test whether different fuel economy labels have different effects on similarly situated consumers.⁸⁶ Does one label produce different choices? How different? If labels draw attention to annual fuel costs, are people affected? Do people care about environmental factors? How much? The same kinds of questions might be asked about disclosure requirements for credit cards, mortgages, cell phones, and school loans.

In important areas, experimentation might take the form of advance testing of regulatory alternatives through randomized controlled trials. A movement in this direction would have major advantages over current approaches, such as focus groups, which are often highly artificial and which sometimes test what people like rather than

⁸² See CHARLOTTE L. BRACE ET AL., ANALYSIS OF THE LITERATURE: THE USE OF MOBILE PHONES WHILE DRIVING (2007), available at http://www.nsc.org/news_resources/Resources/Documents/Analysis%20of%20the%20Literature,%20The%20Use%20of%20Mobile%20Phones%20While%20Driving.pdf.

⁸³ See Saurabh Bhargava & Vikram Pathania, *Driving Under the (Cellular) Influence: The Link Between Cell Phone Use and Vehicle Crashes* 5 AM. ECON. J.: ECON. POLICY 92, available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.5.3.92>.

⁸⁴ Cf. Federal Motor Vehicle Safety Standard, Rearview Mirrors, 75 Fed. Reg. 76,186 (Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585).

⁸⁵ For an overview, see George Loewenstein et al., *Disclosure: Psychology Changes Everything*, Annual Review of Economics (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312708

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

what they would actually do.⁸⁷ A presentation might be pleasing without having much of an effect on what people understand and do.

In the United Kingdom, there has been a great deal of interest in using randomized controlled trials, above all through the work of the Behavioral Insights Team (sometimes called the Nudge Unit).⁸⁸ Related efforts should be made in the United States and elsewhere.⁸⁹ If randomized trials are not feasible, we might be able to design experiments that replicate actual behavior by asking people concrete questions about what they would do if provided with certain information or if given a range of options. The current fuel economy label was based on tests of this kind.⁹⁰ But such experiments are second-best. Randomized controlled trials deserve pride of place.⁹¹

Of course there are constraints—involving not merely law but also resources and feasibility (and perhaps equity as well)—in using randomized controlled trials in the regulatory context. But in some cases, they would be both appropriate and useful. The agencies’ retrospective review plans show an unambiguous commitment to moving in this direction. The Department of Treasury states that it will work to “develop and incorporate experimental designs into retrospective analysis, when appropriate.”⁹² The Department of Labor states that it “is contemplating how to incorporate the use of experimental designs to determine the impact of various regulations.”⁹³ The Department of Interior states that it will consider the use of “experimental or quasi-experimental designs, including randomized controlled trials.”⁹⁴ We should expect far more progress in the future.

⁸⁷ See Robert J. Johnston et al., *Contingent Valuation Focus Groups: Insights From Ethnographic Interview Techniques*, 24 AGRIC. AND RESOURCE ECON. REV. 56, 56-57 (1995) (summarizing numerous ways that bias can be introduced with focus groups, including the risk that “questions can elicit speculative responses not closely linked to behavior”).

⁸⁸ See <https://www.gov.uk/government/organisations/behavioural-insights-team>, which provides many valuable examples.

⁸⁹ See Duncan Watts, *Everything is Obvious* (2011); Jim Manzi, *Uncontrolled: The Surprising Payoff of Trial-and-Error for Business, Politics, and Society* (2012).

⁹⁰ See Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. at 39,483.

⁹¹ See *id.* at 39,483 n.25.

⁹² DEP’T OF THE TREASURY, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 20 (2011), available at <http://www.treasury.gov/about/budget-performance/annual-performance-plan/Documents/lookback%20plan%20final%208%2018%2011%20clean.pdf>.

⁹³ U.S. DEP’T OF LABOR, PRELIMINARY PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 22 (2011), available at <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentofLaborPreliminaryRegulatoryReformPlan.pdf>.

⁹⁴ DEP’T OF THE INTERIOR, PRELIMINARY PLAN FOR RETROSPECTIVE REGULATORY REVIEW 19, available at <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentoftheInteriorPreliminaryRegulatoryReformPlan.pdf>. See also U.S. DEP’T OF AGRICULTURE, FINAL PLAN FOR RETROSPECTIVE ANALYSIS PURSUANT TO EXECUTIVE ORDER 13563, at 23 (2011), available at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentofagricultureregulatoryreformplanaugust2011.pdf> (“[The USDA] may consider the use of experimental or quasi-experimental designs, including randomized controlled trials, when promoting the empirical testing of the effects of rules.”).

Conclusion

Discussions of political dysfunction tend to focus on high-profile controversies and disputes. Such discussion neglects much of the real work of government, which is often not highly publicized, but which has a significant impact on people's lives, and which is anything but dysfunctional.

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

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

Appendix:
Executive Order 13,610

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to modernize our regulatory system and to reduce unjustified regulatory burdens and costs, it is hereby ordered as follows:

Section 1. Policy. Regulations play an indispensable role in protecting public health, welfare, safety, and our environment, but they can also impose significant burdens and costs. During challenging economic times, we should be especially careful not to impose unjustified regulatory requirements. For this reason, it is particularly important for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.

Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), states that our regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.” To promote this goal, that Executive Order requires agencies not merely to conduct a single exercise, but to engage in “periodic review of existing significant regulations.” Pursuant to section 6(b) of that Executive Order, agencies are required to develop retrospective review plans to review existing significant regulations in order to “determine whether any such regulations should be modified, streamlined, expanded, or repealed.” The purpose of this requirement is to “make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

In response to Executive Order 13563, agencies have developed and made available for public comment retrospective review plans that identify over five hundred initiatives. A small fraction of those initiatives, already finalized or formally proposed to the public, are anticipated to eliminate billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens. Significantly larger savings are anticipated as the plans are implemented and as action is taken on additional initiatives.

As a matter of longstanding practice and to satisfy statutory obligations, many agencies engaged in periodic review of existing regulations prior to the issuance of Executive Order 13563. But further steps should be taken, consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.

Sec. 2. Public Participation in Retrospective Review. Members of the public, including those directly and indirectly affected by regulations, as well as State, local, and tribal governments, have important information about the actual effects of existing regulations. For this reason, and consistent with Executive Order 13563, agencies shall invite, on a regular basis (to be determined by the agency head in consultation with the Office of Information and Regulatory Affairs (OIRA)), public suggestions about

regulations in need of retrospective review and about appropriate modifications to such regulations. To promote an open exchange of information, retrospective analyses of regulations, including supporting data, shall be released to the public online wherever practicable.

Sec. 3. *Setting Priorities.* In implementing and improving their retrospective review plans, and in considering retrospective review suggestions from the public, agencies shall give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment. To the extent practicable and permitted by law, agencies shall also give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. Consistent with Executive Order 13563 and Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall to the extent practicable and consistent with law give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety, and our environment.

Sec. 4. *Accountability.* Agencies shall regularly report on the status of their retrospective review efforts to OIRA. Agency reports should describe progress, anticipated accomplishments, and proposed timelines for relevant actions, with an emphasis on the priorities described in section 3 of this order. Agencies shall submit draft reports to OIRA on September 10, 2012, and on the second Monday of January and July for each year thereafter, unless directed otherwise through subsequent guidance from OIRA. Agencies shall make final reports available to the public within a reasonable period (not to exceed three weeks from the date of submission of draft reports to OIRA).