DURABLE CHANGES IN WHITE HOUSE REGULATORY REVIEW? RAMIFICATIONS OF THE BIDEN ERA

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INTRODUCTION

We read with keen interest Professor Richard L. Revesz's recent account of how the role of the Office of Information and Regulatory Affairs (OIRA) in regulatory review evolved in the Biden Administration.[1] Since President Biden served only one term and since Professor Revesz served as Biden's OIRA Administrator for only two years (prior to the start of the second Trump Administration), it might be tempting to suspect that durable change was minimal. Indeed, President Trump already has repealed most of President Biden's regulatory-reform agenda.[2] However, Biden's OIRA produced several innovations that are worthy of consideration by scholars and practitioners, as we believe that some of them, perhaps in modified form, are likely to reappear in the future.

In this Article, we offer insight into which of the Biden-era innovations may have some durable impact. Readers should recognize that we may harbor biases since we served at OIRA from 2001 through 2006, during the George W. Bush Administration. Indeed, some of the Biden-era innovations changed practices that we played a role in establishing twenty years earlier. We do not address in this comment whether the Biden Administration ensured that each rulemaking had sufficient benefits to justify its costs.

Professor Revesz's article also provides a new historical account of presidential leadership of regulation based on benefit-cost analysis (BCA). He argues that progressives should be more supportive of BCA because the tool has its origins not under Presidents Richard Nixon and Ronald Reagan

1. *See* Richard L. Revesz, *The Evolution of Regulatory Review*, 77 ADMIN. L. REV. 131 (2025) [hereinafter Revesz, *Evolution of Regulatory Review*]; *see also* Richard L. Revesz, *Managing Regulatory Review in the Biden Administration*, REGUL. REV. (Nov. 25, 2024) [hereinafter Revesz, *Managing Regulatory Review*], https://www.theregreview.org/2024/11/25/revesz-managing-regulatory-review-in-the-biden-administration/ [https://perma.cc/3NHG-44FK]; *Administrative Law Review Spring 2025 Symposium: The Future of Administrative Law*, 10 ADMIN. L. REV. ACCORD 177, 188–201 (2025) (transcribing the keynote address of Professor Revesz, which touched on many of the same reforms and initiatives).

2. *See* Lisa A. Robinson, *Regulatory Benefit-Cost Analysis Under the Trump Administration*, REGUL. REV. (May 6, 2025), https://www.theregreview.org/2025/05/06/robinson-regulatory-benefit-cost-analysis-under-the-trump-administration/ [https://perma.cc/5RHF-BDQJ].

(the conventional account),[3] but under Presidents Franklin Delano Roosevelt[4] and Lyndon Baines Johnson.[5] We agree with Professor Revesz's broader argument that presidential interest in BCA is bipartisan, for reasons that are even more compelling today. However, we critique Professor Revesz's historical account of presidential oversight of the administrative state. We argue that Professor Revesz understates the role of President Reagan and overstates how much Presidents Roosevelt and Johnson set the stage for centralized review of social regulation using BCA.

We begin with several points of agreement with Professor Revesz about the role of OIRA and BCA in the administrative state. We then discuss some specific Biden-era innovations which may be likely to reappear in future presidential administrations. We conclude with a critique of Professor Revesz's historical account of BCA and presidential oversight of the administrative state.

I. POINTS OF AGREEMENT

We start with several key points of agreement with Professor Revesz.

A. Benefits of OIRA's Managerial Role and Societal Well-Being Perspective

We agree that OIRA brings specialized expertise to regulatory review because it accumulates knowledge through reviews of regulatory analyses and rules prepared by numerous federal agencies. The number and diversity of agencies under review greatly expanded recently, as President Trump required OIRA review of rules from independent agencies,[6] a reform that long has had bipartisan support.[7] As Professor Revesz points out, the

3. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 140–141.

4. *Id.* at 141.

5. *Id.* at 144.

6. *See* Exec. Order No. 14,215, 90 Fed. Reg. 10,447 (Feb. 24, 2025).

7. For example, since at least 1990, the American Bar Association's (ABA's) Section of Administrative Law and Regulatory Practice has recommended that "presidential review should apply generally to all federal rulemaking, including that by independent regulatory agencies." *See* AM. BAR ASS'N SEC. OF ADMIN. L. & REGUL. PRAC., *Improving the Administrative Process: A Report to the President-Elect of the United States*, 1, 9–10 (2016) (co-author Paul Noe co-chaired the ABA work group that developed the 2016 report). The 1990 ABA recommendation closely followed the earlier recommendation by the Administrative Conference of the United States. *See* ACUS Recommendation 88-9, Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5,207 (Feb. 2, 1989) (same). In 2002, President George W. Bush issued Executive Order 13,272, "Proper Consideration of Small Entities in Agency Rulemaking," which directed both executive and independent regulatory agencies covered by the Regulatory Flexibility Act to enhance their compliance with the Act. *See* Exec. Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 16, 2002).

Executive Office of the President also has evolved to become increasingly complex—from seven policy components during the Reagan Administration to fifteen under President Biden.[8] Unlike various White House policy councils, OIRA has a substantial and capable career staff that serves across presidential administrations. Finally, new statutes and executive actions increasingly required the coordination of multiple agencies and offices. For OIRA Administrator Revesz, this included, for example, the Inflation Reduction Act and President Biden's "whole of government" approach to climate and environmental justice.[9] Going forward, additional issues such as national manufacturing policy, permit reform, and emerging technologies such as artificial intelligence will continue to require interagency collaboration. We concur with Professor Revesz that OIRA can make an administration more effective by proactively resolving disagreements, ensuring that both agencies and EOP offices do not act at cross-purposes, and that actions are responsive to the President's priorities.

OIRA also has deeper knowledge of—and a broader perspective on—BCA than any other single agency; this is important because BCA continues to play an important role in diverse rulemakings. While agencies that are passionately committed to advancing their missions may be vulnerable to "tunnel vision,"[10] OIRA can offer a broader perspective through the benefit-cost framework it manages. We agree with Professor Revesz that BCA is neither "inherently" pro-regulation nor anti-regulation; the focus is on doing more good than harm and thereby maximizing societal well-being.[11]

We also agree with Professor Revesz that OIRA is in a good position to foster the diffusion of best agency practices not only for BCA, but also in areas such as information quality; management of statistical data; public participation in rulemakings; and protection of agency rulemakings from reversal by Congress, courts, or subsequent administrations. And OIRA retains a classic management role as arbiter of interagency disputes, since one agency may not have adequate incentives to account for the interests of another agency during regulatory or deregulation development.[12]

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8. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 153.

9. *See, e.g.*, Exec. Order 14,096, 88 Fed. Reg. 25,251, 25,252 (Apr. 26, 2023).

10. *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993) ("Tunnel vision, a classic administrative disease, arises when an agency so organizes or subdivides its tasks that each employee's individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good.").

11. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 197.

12. *Id.* at 155–56.

B. Meeting New Demands of Administrative Law

One of Professor Revesz's insights with which we whole-heartedly agree may be the most valuable, yet most underappreciated. He lucidly explains that the recent evolution of administrative law has made OIRA's role more important than ever. These changes include *Loper Bright Enterprises v. Raimondo*[13] overruling *Chevron* deference to agency interpretations of ambiguous statutes; a new 'major questions doctrine' that shifts the power to resolve weighty economic, social, and political issues from agencies back to Congress; increasingly rigorous scrutiny of the reasoning and analysis used to justify regulatory action (e.g., a more muscular arbitrariness standard); the numerous nationwide injunctions from aggressive district court judges;[14] and a potential revival of the nondelegation doctrine. These developments raise challenges for any administration, regardless of its political philosophy.

Professor Revesz states that "the effect of *Loper Bright* is somewhat difficult to predict" but will increase pressure on agencies to justify how their action is consistent with the "best reading" of the authorizing statute.[15] This will increase the importance of OIRA, providing a forum for experts (in law, analysis and policy) throughout the Executive Branch to weigh in on the agency's regulation. We agree but would go further.

We believe that *Loper Bright* not only invites the BCA framework that OIRA manages but necessitates it. As two of *Loper Bright's* citations to *Michigan v. EPA*[16] show,[17] the cost-benefit default rule not only informs the "best reading" of authorizing statutes (e.g., terms that leave agencies with flexibility, such as to regulate as "appropriate" or "reasonable") but also ensures "reasoned decision making."[18] "Reasoned decision making,"

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13. 144 S. Ct. 2244 (2024).

14. *But see* Trump v. CASA, Inc., 145 S. Ct. 2540, 2562 (2025) (granting partial stays of injunctive relief from lower courts and holding that universal preliminary injunctions against enforcing President Trump's Executive Order 14,160—intended to restrict birthright citizenship—exceeded courts' historical equitable powers).

15. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 150.

16. 576 U.S. 743 (2015).

17. *See Loper Bright Enters.*, 144 S. Ct. at 2263 & n.6 (citing *Michigan*, 576 U.S. at 752, when discussing the best reading of a statutory authority "subject to the limits imposed" by a term or phrase that "leaves agencies with flexibility," such as to regulate as "appropriate" or "reasonable."); *id.* at 2263 (citing *Michigan*, 576 U.S. at 750, when discussing the role of the reviewing court in "ensuring the agency has engaged in 'reasoned decisionmaking'" by considering all relevant factors (such as costs)).

18. Paul R. Noe, Loper Bright *and the Ascendancy of the Cost-Benefit State*, 14 REGUL. REV. IN DEPTH 1, 5–6 (2025) (analyzing how the cost-benefit default rule that evolved from cases including *State Farm* (1983), *Entergy* (2009), and *Michigan v. EPA* (2015) is anchored by *Loper*

mandated by the Administrative Procedure Act's arbitrary and capricious standard and reaffirmed by *Loper Bright*, requires the consideration of all relevant factors,[19] including costs and benefits and analysis of policy alternatives—unless prohibited by the statute authorizing the rule.[20] And BCA is the only form of regulatory analysis that considers all welfare effects of regulations, while other forms of analysis fall short, often far short.[21] Finally, BCA supports the thoroughness, validity of reasoning, consistency and persuasiveness that under *Loper Bright* should merit "due respect" from courts for agencies' statutory interpretations.[22]

Before *Loper Bright*, courts already were holding that agencies must consider costs and ensure that regulations do more good than harm under the statute authorizing the rule or under the APA's arbitrary and capricious standard. In many cases, such as *Michigan*, courts require balancing benefits and costs under both.[23] We think that *Loper Bright* should accelerate this

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Bright in both the best reading of statutes and the arbitrariness standard of the APA and other statutes). *See infra* notes 19–23 and accompanying text.

19. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 55 (1983) (holding that the reasoned decisionmaking required by the APA's arbitrariness standard commands the agency to consider "all relevant factors").

20. Noe, *supra* note 18.

21. *Id.* at 8–9 (citing Jonathan S. Masur & Eric A. Posner, *Norming in Administrative Law*, 68 DUKE L. J. 1383, 1388–93 (2019)).

22. *Id.* at 10.

23. Michigan v. EPA, 576 U.S. 743, 752, 750 (2015) (holding that "the phrase 'appropriate and necessary' requires at least some attention to cost . . . . No regulation is 'appropriate' if it does significantly more harm than good," and that the refusal of the Environmental Protection Agency (EPA) to "consider whether the costs of its decision outweighed the benefits" was arbitrary and capricious); Mexican Gulf Fishing Co. v. Dep't of Com., 60 F.4th 956, 965–66, 973 (5th Cir. 2023) (finding the agency exceeded its unambiguous authority under Magnuson-Stevens Act to promulgate a rule as "necessary and appropriate . . . which at a minimum requires that its benefits reasonably outweigh its costs," and also that rule was arbitrary and capricious because its "insignificant benefits do not bear a rational relationship to the serious financial and privacy costs imposed"); U.S. Chamber of Com. v. SEC, 85 F.4th 760, 777 (5th Cir. 2023) (citing *Mexican Gulf Fishing*, striking down SEC rule and stating "[A] regulation is arbitrary and capricious if the agency 'fail[s] to consider . . . the costs and benefits associated with the regulation,' . . . [a]nd, as part of that cost-benefit analysis, the agency must identify benefits 'that bear a rational relationship to the . . . costs imposed.'"); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (citing *Michigan*, 576 U.S. at 752, 750, which informs both the "best reading" of statutes, as well as "reasoned decisionmaking"); Kan. Nat. Res. Coal. v. Fish & Wildlife Serv., 780 F. Supp.3d 650 (W.D. Tex. 2025) (applying *Loper Bright*, *Michigan v. EPA*, and *Mexican Gulf Fishing Co.*, vacating Endangered Species Act 4(d) Rule because FWS violated its statutory authority to regulate as "necessary and advisable" and failed to

trajectory toward the cost-benefit state.[24] The probing arbitrariness standard applied by the Supreme Court in *Ohio v. EPA*[25] further indicates that agencies will have to move beyond conclusory statements to show their rule does more good than harm.[26] Thus, while OIRA always has had a role in the evolution of the cost-benefit state[27]—such as in the Bush 43 era, when we worked with the Environmental Protection Agency (EPA) to design the cost-benefit

consider "all relevant factors" by not weighing benefits and costs); U.S. Chamber of Com. v. FTC, Case No. 6:25-cv-9-JDK, slip op. (E.D. Tex. 2026) (applying *Loper Bright*, *Michigan v. EPA*, and *Mexican Gulf Fishing Co.*, vacating premerger notification rule that tripled regulatory costs because FTC exceeded its statutory authority under the Hart-Scott-Rodino Antitrust Improvements Act to regulate as "necessary and appropriate" and also arbitrarily failed to apply reasoned decisionmaking, including failing to adequately show that the benefits of the rule bear a reasonable relationship to its costs and failing to consider less burdensome alternatives); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 221–22 (2009) (applying the canons of construction to conclude EPA reasonably interpreted Clean Water Act provision silent on cost and requiring "best technology available for minimizing adverse environmental impact" to support benefit-cost balancing); Business Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (emphasizing SEC's failure to apprise itself of the economic consequences of its proposed regulation made promulgation of the rule arbitrary and capricious and not in accordance with law); Paul R. Noe & John D. Graham, *The Ascendency of the Cost-Benefit State?*, 5 ADMIN. L. REV. ACCORD 85 (2020); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (1983) (reasoned decisionmaking required by the APA's arbitrariness standard requires the agency to consider all "relevant factors"); Antonin Scalia, *Regulatory Review and Management*, REGULATION (Jan.–Feb. 1982) (discussing how the requirement in President Reagan's EO 12,291 that a regulation's benefits must outweigh its costs did nothing to change the APA's arbitrary and capricious standard because an agency would be arbitrary and capricious if it promulgated a regulation that did more harm than good or if the agency was indifferent to that outcome—unless otherwise required by a rare statute that prohibits cost consideration, such as the Delaney Clause).

24. *See* Noe, *supra* note 18, at 1.

25. 144 S. Ct. 2040 (2024).

26. *See id.* (invoking a muscular 'hard look' arbitrary and capricious standard for failure to reasonably respond to comments to stay Biden EPA's Good Neighbor Plan under the Clean Air Act); *see also* Richard J. Pierce, Jr., *Two Neglected Effects of Loper Bright*, REGUL. REV. (July 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/ [https://perma.cc/2FT2-5NE4] (arguing *Loper Bright* and the strong version of the arbitrary and capricious test in *Ohio v. EPA* for failure to adequately respond to comments "eliminate any plausible basis for the major questions doctrine").

27. We use the term "cost-benefit state" as coined by Professor (and former OIRA Administrator) Cass Sunstein: the principle that "government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation." CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002).

approach in the Clean Water Act rule upheld in the Supreme Court's *Entergy* decision[28]—we envision a much larger role for OIRA going forward.

C. Protecting the Durability of Regulatory Policies

As Professor Revesz explains, OIRA can buttress regulations not only for judicial review, but also for political challenges, especially under the Congressional Review Act (CRA) when the White House changes hands and the incoming president's party also controls Congress.[29] In our politically polarized times, not only has scrutiny of rules increased from other branches of government, but the consequences of regulatory overreach may be more dire than ever.

Regulators who aggressively push the envelope on their legal authority ultimately may not only jeopardize their policies, but also significantly diminish their agency's authority in the long run, particularly by creating major risks for litigation or nullification under the CRA. Examples that have backfired on aggressive regulators have mounted in the courts and Congress in recent years.

In response to aggressive assertions of regulatory power, the Supreme Court and the lower courts have checked agencies under many doctrines, including the major questions doctrine;[30] exceeding the "best reading" of the agency's regulatory authority without *Chevron* deference;[31] a 'hard look'

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28. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009); Noe, *supra* note 18.

29. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 157–58 ("With both President Biden and President Trump having coordinated with their Senate allies to use [the Congressional Review Act (CRA)] to disapprove of their predecessor's regulations, the CRA "will likely continue to feature prominently in future regulatory transition strategies.").

30. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (under major questions doctrine, striking down tenant eviction moratorium issued under 1940s emergency public health statute by the Centers for Disease Control and Prevention, first by the Trump Administration during COVID-19 pandemic and continued by the Biden Administration); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (under major questions doctrine, striking down Biden-era Occupational Safety and Health Administration's (OSHA's) vaccination or mask-and-test rule for COVID-19); West Virginia v. EPA, 142 S. Ct. 2587 (2022) (under major questions doctrine, striking down Obama EPA's Clean Power Plan); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (under major questions doctrine, striking down Biden-era student loan forgiveness initiative).

31. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) and remanding for further proceedings two circuit court decisions upholding National Marine Fisheries Service (NMFS) rule requiring herring fishermen to pay costs for onboard government observers); Ryan, LLC v. FTC, 746 F. Supp. 3d 369 (N.D. Tex. 2024) (applying *Loper Bright*, setting aside rule banning noncompete clauses as exceeding FTC's statutory authority, and arbitrary and capricious

arbitrary and capricious standard;[32] and the failure to reasonably balance costs and benefits, particularly under *Michigan v. EPA* and *Loper Bright*.[33] A revived and richer nondelegation doctrine may also be on the horizon. While numerous court decisions struck down regulations of the Obama and Biden administrations, the Trump Administration also has faced many major

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because the rule was based on inconsistent and flawed evidence and failed to consider positive benefits of noncompete clauses).

32. *See* Ohio v. EPA, 144 S. Ct. 2040 (2024) (invoking a 'hard look' arbitrary and capricious standard for failure to reasonably respond to comments; staying Biden EPA's Good Neighbor Plan promulgated under the Clean Air Act).

33. *See, e.g.*, Mexican Gulf Fishing Co. v. Dep't of Com., 60 F.4th 956, 973 (5th Cir. 2023) (applying cost-benefit default rule in *Michigan v. EPA*, striking down rule by NMFS and the National Oceanic and Atmospheric Administration imposing GPS-tracking requirement on fishing boats as exceeding their unambiguous authority under Magnuson-Stevens Act to promulgate rules as "necessary and appropriate," as well as the APA's arbitrary and capricious standard because the "insignificant benefits do not bear a rational relationship to the serious . . . costs imposed"); Kan. Nat. Res. Coal. v. Fish & Wildlife Serv., 780 F. Supp. 3d 650, 660–62 (W.D. Tex. 2025) (applying *Loper Bright*, *Michigan v. EPA*, and *Mexican Gulf Fishing Co.*, vacating Endangered Species Act 4(d) Rule because FWS violated its statutory authority to regulate as "necessary and advisable," and failed to consider "all relevant factors" by not balancing benefits and costs); U.S. Chamber of Com. v. FTC, Case No. 6:25-cv-9-JDK, slip op. (E.D. Tex. 2026) (applying *Loper Bright*, *Michigan v. EPA*, and *Mexican Gulf Fishing Co.*, vacating premerger notification rule that tripled regulatory costs because FTC exceeded its statutory authority to regulate as "necessary and appropriate" and also arbitrarily failed to apply reasoned decision-making, including failing to adequately show that the benefits of the rule bear a reasonable relationship to its costs and failing to consider less burdensome alternatives); Louisiana v. Biden, No. 2:24-CV-00406, 2024 WL 3253103, at *1 (W.D. La. July 1, 2024) (enjoining Biden Administration's ban on liquid natural gas exports); *see also* Respondents' Motion for Vacatur at 18–21, Kentucky v. EPA, No. 24-1050 (D.C. Cir. Nov. 24, 2025) (admitting legal error by Trump EPA and requesting vacatur of Biden EPA's National Ambient Air Quality Standards for fine particulate matter because, among other things, EPA abused its discretion by ignoring costs associated with its decision whether to conduct a discretionary mid-cycle review under Clean Air Act Section 109(d)(1)); Press Release, EPA, Trump EPA Announces Next Steps on Regulatory PFOA and PFOS Cleanup Efforts, Provides Update on Liability and Passive Receiver Issues (Sept. 17, 2025) https://www.epa.gov/newsreleases/trump-epa-announces-next-steps-regulatory-pfoa-and-pfos-cleanup-efforts-provides [https://perma.cc/4RV5-PXTB] (announcing a forthcoming new Trump EPA "Framework Rule" to provide a uniform guide for future hazardous substances designations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address the Biden EPA's arguably standardless statutory interpretation and acknowledging the need to seriously consider costs when listing hazardous substances "as may be appropriate" under CERCLA Section 102).

court challenges, some of which have yet to be resolved.[34] It should be noted that, even where broad policy approaches from agencies may fail, more targeted and better supported initiatives may succeed under intensified judicial review.[35]

Recently, congressional deregulation under the CRA also has substantially increased. Importantly, the enactment of a joint resolution of disapproval not only nullifies the rule but also diminishes the agency's regulatory authority going forward. A rule disapproved under the CRA "may not be reissued in substantially the same form" in the future without new legislative authority,[36] which currently would require sixty votes in the Senate.

In the twenty years following its enactment in 1996, the CRA was used only once before 2017 to nullify a regulation (in 2001, when newly sworn-in President George W. Bush signed into law S.J. Res. 6, nullifying a controversial ergonomics rule promulgated by the Occupational Safety and Health Administration in the final months of the Clinton Administration).[37] Then during his first term, President Trump signed into law sixteen resolutions of disapproval nullifying Obama Administration rules.[38] On June

34. *See, e.g.*, Learning Res., Inc. v. Trump, No. 24-1287, 2026 WL 477534 (Feb. 20, 2026) (holding that International Emergency Economic Powers Act (IEEPA) did not authorize the President to impose tariffs and granting permanent injunction against Trump Administration's tariffs in 6-3 plurality opinion in which three Justices applied the major questions doctrine and three applied the best reading of IEEPA). On March 4, 2026, the Court of International Trade issued an order that tariffs collected as part of IEEPA were unlawful and should be refunded, but on March 6, 2026, the U.S. Court of International Trade paused that order, and further litigation is anticipated. Order, Atmus Filtration, Inc. v. United States, No. 26-01259 (Ct. Int'l Trade Mar. 6, 2026), ECF No. 33; *see also* Slaughter v. Trump, No. 25-5261, 2025 WL 2551247, at *1 (D.C. Cir. Sept. 2, 2025) (dissolving stay pending appeal of district court ruling against President Trump's firing without cause commissioners of the FTC); Transcript of Oral Argument at *1, 8, Trump v. Slaughter, No. 25-332, 2025 WL 3542394 (Dec. 8, 2025); Cook v. Trump, 804 F. Supp. 3d 14, 17 (D.D.C. 2025) (granting preliminary injunction against President Trump's "for cause" removal of a member of the Federal Reserve Board of Governors), *petition for cert. filed*, No. 25A312, 2025 WL 2607761, at *1, *4, *38 (Sept. 18, 2025); Trump v. Illinois, 146 S. Ct. 432, 434 (2025) (declining to stay district court's temporary restraining order barring federalization and deployment of National Guard in Illinois and stating "[a]t this preliminary stage, the Government has failed to identify a source of authority that would allow the military to execute the laws in Illinois").

35. *See, e.g.*, *Biden v. Missouri*, 142 S. Ct. 647, 650, 655 (2022) (upholding statutory authority of Centers for Medicare and Medicaid Services for interim final rule mandating COVID-19 vaccination for staff of facilities participating in Medicaid and Medicare).

36. *See* 5 U.S.C. § 801(a)(2).

37. S.J. Res. 6, 107th Cong. (2001) (enacted).

38. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., IF10023, THE

30, 2021, President Biden signed into law three CRA resolutions nullifying regulations from President Trump's first term.[39]

Use of the CRA has reached its highest level during the first year of President Trump's second term, with twenty-two resolutions of disapproval signed into law as of February 4, 2026.[40] Moreover, some of these disapprovals involve particularly consequential rules. Most notable was the invalidation of three EPA preemption waivers for California to compel electric vehicles under President Biden's "whole of government" approach to climate policy.[41] These disapprovals and other recent actions have dealt major blows to the Biden Administration's climate agenda and could sideline such efforts at the federal level for years.[42] Of the forty-two resolutions of

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39. *See* S.J. Res. 13, 117th Cong. (2021) (enacted); S.J. Res. 14, 117th Cong. (2021) (enacted); S.J. Res. 15, 117th Cong. (2021) (enacted). These joint resolutions respectively nullified Trump I Administration rules on: (1) the Equal Employment Opportunity Commission's "Update of Commission's Conciliation Procedures"; (2) EPA's "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review"; and (3) the Office of the Comptroller of the Currency's "National Banks and Federal Savings Associations as Lenders."

40. *See, e.g.*, *FAQs on the Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/legal/congressional-review-act/faqs-on-the-congressional-review-act [https://perma.cc/93KE-7GBV] (last visited Feb. 23, 2026); Sarah Hay, *Congress Reviewed: The 119th Congress' Use of the Congressional Review Act*, GEO. WASH. UNIV. REGUL. STUD. CTR. 1, 4 (2025), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2025-08/insight_119th_reviewed_formatted.pdf [https://perma.cc/KN3V-DVJX]; *see also* Mina Vogel, *Trump Signs More Congressional Review Act Resolutions in 2025 Than in Every Previous Year Combined*, BALLOTPEDIA (Dec. 19, 2025), https://news.ballotpedia.org/2025/12/19/trump-signs-more-congressional-review-act-resolutions-in-2025-than-in-every-previous-year-combined/ [https: //perma.cc/ZW7F-5R32].

41. *See* H.J. Res. 87, 119th Cong. (2025) (enacted); H.J. Res. 88, 119th Cong. (2025) (enacted); H.J. Res. 89, 119th Cong. (2025) (enacted). These nullified three EPA preemption waivers for California, the predicates respectively for California's: (1) heavy-duty vehicle programs, including Advanced Clean Trucks (requiring increasing percentages of zero-emission truck sales, Zero Emission Airport Shuttles, and Zero-Emission Power Train Certification; (2) zero-emissions vehicle mandate for all new cars, trucks and SUVs sold in California by 2035); and (3) omnibus low NOx regulation for heavy-duty vehicles; *see also* H.J. Res. 61, 119th Cong. (2025) (enacted) (nullifying EPA's "National Emission Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing"). In December 2025, President Trump signed into law resolutions disapproving Bureau of Land Management resource management plans for areas of North Dakota, Montana, Wyoming, and Alaska. Vogel, *supra* note 40.

42. In the One Big Beautiful Bill Act of 2025, Congress also rolled back electric vehicle (EV) tax credits. One Big Beautiful Bill Act of 2025, Pub. L. No. 119-21, §§ 70,501–04, 139 Stat. 72, 250–51. The Trump EPA has also repealed the greenhouse gas endangerment

disapproval that have become law since enactment of the CRA in 1996 until February 4, 2026, thirty-eight were signed into law by President Trump.[43]

One of the downsides of relying heavily on CRA actions is that the process is somewhat divorced from the BCA framework that has developed since the Reagan years. A rule with positive net benefits may be repealed under the CRA; a rule with insufficient benefits to justify its costs may survive CRA review. Even more problematic, the CRA may not be used to amend a rule to make it more cost-effective; a CRA action is an all-or-nothing enterprise.

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finding, the legal predicate for EPA's greenhouse gas regulations. Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7,686 (Feb. 18, 2026) (providing that repeal of the endangerment finding will become effective on April 20, 2026). In December 2025, Ford Motor Company announced a $19.5 billion write-down for EVs and plans to boost production of gasoline-powered and hybrid vehicles. Sharon Terlep, *Ford Takes $19.5 Billion Hit in Detroit's Biggest EV Bust*, WALL ST. J. (Dec. 15, 2025, 8:28 PM), https://www.wsj.com/business/autos/ford-takes-19-5-billion-charge-to-write-down-ev-investments-333a9bc4?gaa_at=eafs&gaa_n=AWEtsqfH5ocl7THXD6nPKsjB821AHc6aPclix-NP9M8zLjrCLjOZLhoYwRYg&gaa_ts=697c302d&gaa_sig=hBxk-NeyNuRp6Xq7OXObDIDDW3lCrUU5vEakyByqE1mDha3Ex5lfx9QNd-oF_E1rF6VATPfOmHo4gg4dWmKjEQ%3D%3D [https://perma.cc/9EUD-29SV]. Ford reportedly was losing about $50,000 per EV sold. Matt Oliver, *Ford Loses $50,000 on Every Electric Car*, YAHOO FIN. (July 25, 2024), https://finance.yahoo.com/news/ford-loses-50-000-every-093945788.html [https://perma.cc/YKU5-SG6K]. In February 2026, Stellantis announced a $26 billion write-down tied to unraveling its prior investments in EVs. Luke Ramseth, *Stellantis Reports First Annual Loss After Massive EV Charges*, DETROIT NEWS (Feb. 26, 2026), https://www.detroitnews.com/story/business/autos/chrysler/2026/02/26/stellantis-reports-first-annual-loss-after-ev-charges/88868367007/ [https://perma.cc/M5CN-CHMD]. The European Union also back-tracked on its pledge to ban gasoline-powered cars by 2035. *See* Kim Mackrael & Stephen Wilmot, *Europe Reverses Course on Combustion-Engine Ban*, WALL ST. J. (Dec. 16, 2025, 4:37 PM), https://www.wsj.com/business/autos/europe-reverses-course-on-combustion-engine-ban-444aee3e?gaa_at=eafs&gaa_n=AWEtsqc2LJc45s6xkybGOTWtgYS-Vngot-YTm6XCRC_cBW433fPWSKNoYzFL&gaa_ts=697c3207&gaasig=3546vcHRobTTkaoginMyk3cqUrL6lznwJLD9myblmls6Fxlwa8X0dLodN0YVqI9rTXLbBlJ0sh9wdaw3CjjA2Q%3D%3D [https://perma.cc/8KCH-AHT2] (stating the EU's new proposals would require "a 90% reduction from baseline [emission] levels" by 2035, rather than a complete ban). The Securities and Exchange Commission also abandoned the legal defense of its climate-related disclosure rule, and the U.S. Court of Appeals for the Eighth Circuit has paused the litigation "to promote judicial economy" while the SEC reconsiders the rule by notice-and-comment rulemaking or renews its defense of the rule. Order, State of Iowa v. SEC, No: 24-1522 (Sept. 12, 2025).

43. Lara Bonatesta, *President Trump Signed a Record Number of Congressional Review Act Resolutions in 2025*, BALLOTPEDIA (Dec. 18. 2025, 5:51 PM), https://news.ballotpedia.org/2025/12/18/president-trump-signed-a-record-number-of-congressional-review-act-resolutions-in-2025/ [https://perma.cc/S2A2-SZMX].

Although members of Congress may be made aware of the regulatory analyses prepared in support of rulemakings, there is no formal role for BCA under the CRA. Thus, studies are needed to determine whether BCA plays any significant role in the polarized settings for CRA actions.

Notably, not all ambitious rules proposed during the Biden Administration were finalized; some legally dubious rules that might have faced formidable challenges in the courts or Congress were withdrawn after the Republicans gained a trifecta in the November 2024 elections.[44] This avoided potentially larger long-term constraints on the agency's regulatory authority.

Given different presidential priorities and the relatively small size of OIRA's staff (between forty and sixty full-time equivalents in the post-1990 period),[45] OIRA does not play each of its roles to an equal degree in each administration. If OIRA serves only some of the above roles, it does not take much accomplishment to justify its modest costs to the taxpayer. For example, if OIRA causes even a single $1 billion rulemaking to have 10% more benefits or 10% fewer costs, the $100 million societal gain pays for OIRA's annual budget (less than $10 million) ten times over.[46] If OIRA also ensures that net-beneficial rules survive legal or political challenges, its return on investment can soar. It should not be surprising that both Democratic and Republican presidents have retained OIRA since its authorization in 1980 under President Carter's Paperwork Reduction Act.[47]

II. THE POTENTIAL DURABILITY OF BIDEN-ERA INITIATIVES

We turn now to an assessment of the potential durability of President Biden's regulatory reform initiatives. While most of them have already been repealed by President Trump, we argue that several are likely to reappear in

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44. *See, e.g.*, Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 90 Fed. Reg. 2,663 (Jan. 13, 2025) (withdrawing proposed rule); Federal Baseline Water Quality Standards for Indian Reservations; Withdrawal of Proposed Rule, 90 Fed. Reg. 1,909 (Jan. 10, 2025).

45. *See* MEGHAN M. STUESSY, TAYLOR N. RICCARD, MAEVE P. CAREY, TAYLOR R. KNOEDL & NATALIE R. ORTIZ, CONG. RSCH. SERV., R48546, THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA): OVERVIEW AND MAJOR RESPONSIBILITIES 20–21 (2025) (counting fifty-eight full-time staffers at OIRA for FY2025).

46. TAYLOR N. RICCARD, CLINTON T. BRASS & BARBARA L. SCHWEMLE, CONG. RSCH. SERV., RS21665, OFFICE OF MANAGEMENT AND BUDGET (OMB): AN OVERVIEW 29–33 (2023) (noting that, in round numbers, the Office of Information and Regulatory Affairs (OIRA) accounts for slightly more than about 10% of the 550 employees and $100+ million budget of OMB).

47. Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812, 44 U.S.C. §§ 3501–3521 (1980).

the future, at least in some form, because they are sensible and well supported. We also point to a few that might not have legs or will likely reappear only in a modified form.

A. Should the Public Be Permitted to Arrange Electronic Meetings with OIRA to Discuss Rules Under Review?

Prior to the Biden Administration, most OIRA meetings with the public about rules under review were held in person at OMB after a written request was made by an outside party. To make it easier for the public to express their concerns, the Biden Administration made routine use of electronic meetings, so a concerned party did not need to travel to Washington, DC or hire a Washington-based lawyer to make their case to OIRA.[48] While there are benefits to in-person meetings, electronic meetings are likely to continue in the future. There is a risk that the electronic policy could induce more meetings than the small OIRA staff can accommodate, but the new approach to meetings needs to be implemented through at least two administrations to assess the severity of this problem.[49]

B. When Is a Rule Important Enough to Justify OIRA Review?

President Biden's Executive Order (EO) 14,094 narrowed the basis for deciding whether a rule is significant enough to justify OIRA review. Previously, an OIRA desk officer could insist upon review of a rule if it raised "novel" legal or policy issues even though it was otherwise non-significant. EO 14,094 deleted the role of the OIRA desk officers on novel issues and allowed review of such rules only if the OIRA Administrator personally determined that the rule raised issues of policy significance to the administration (essentially a political test of significance).[50]

We believe that the Biden Administration's case for altering the role of the OIRA desk officer was not made adequately. No evidence was presented that OIRA desk officers had used the authority inappropriately. Based on

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48. Jackson Nichols, *White House Seeks to Modernize Its Public Engagement Over Regulation*, REGUL. REV. (Jan. 1, 2024), https://www.theregreview.org/2024/01/01/white-house-seeks-to-modernize-its-public-engagement-over-regulation/ [https://perma.cc/HMV3-RDRP].

49. In administrations where OIRA is active in reviewing and modifying rulemaking packages, the incentive for stakeholders to meet with OIRA is high. *See* OFF. OF INFO. AND REGUL. AFF., OFF. OF MGMT. & BUDGET, *Office of Information and Regulatory Affairs (OIRA) Executive Order Submissions Under Review*, https://www.reginfo.gov/public/do/eoReviewSearch [https://perma.cc/M37L-9WPK] (showing rules under active OIRA review) (last visited Feb. 23, 2026).

50. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 161.

our experience, OIRA's professional staff were quite capable of determining whether a draft rule might raise novel legal or policy issues. When the staff made that determination, there was an opportunity for political officials to weigh in if they disagreed, though we cannot recall disagreeing with the staff. We do not expect this deletion to reappear in the future. If an agency official wishes to dispute an OIRA desk officer's novelty determination, they can elevate, request a meeting with the OIRA Administrator, and make that case, just as they can with any other significance determination based on the other considerations in EO 12,866.

C. When Should an Agency Be Required to Perform a Benefit-Cost Analysis of a Rule?

In April 2024, President Biden's EO 14,094 raised the threshold value for a required benefit-cost analysis from an annual regulatory impact on the economy of $100 million to $200 million or more.[51] The threshold had not been updated for inflation since it was first established in the 1970s. The Order also directed OMB, in the future, to update the threshold every three years. Professor Revesz argues that the change will conserve scarce governmental resources by avoiding detailed formal analysis of low-impact rules.[52]

We believe this issue is more complex than it appears at first blush, though there is merit in considering inflation as one factor in a readjustment. First, while Professor Revesz is correct that "$100 million is not what it used to be"[53] due to inflation, the question is whether the costs required to perform BCA for rules with "an annual effect on the economy of $100 million"[54] to $200 million are justified by the benefits of BCA. Professor Revesz assumes the answer is no—but evidently without having conducted any analysis to support his conjecture. He also asserts that the traditional $100 million threshold "was sweeping in more regulations than had initially been intended."[55] We are unaware of any intention by the original drafters of Reagan's EO 12,291, Clinton's EO 12,866, or indeed any other EO, that it apply to a specific number of rules (which inevitably would change over time, depending on the particular statutes being implemented and the policy preferences of each administration). However, we do not doubt that the traditional $100 million threshold was meant to roughly sort high-

51. Exec. Order No. 14,094, § 1(f)(1), 88 Fed. Reg. 21,879, 21,879 (Apr. 11, 2023).

52. *See* Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 160 (noting that agencies can focuses resources on rules that have bigger impacts and require more analysis); Revesz, *Managing Regulatory Review, supra* note 1 (describing the tradeoff the change makes between of costs and benefits of more analysis).

53. Revesz, *Managing Regulatory Review*, *supra* note 1.

54. Exec. Order No. 12,866, § 3(f)(1), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

55. Revesz, *Managing Regulatory Review*, *supra* note 1.

consequence, higher priority rules that deserved the resources required to perform BCA from those that did not or were less deserving.

Based on our experience, we suspect that the problem may be the opposite of what Professor Revesz assumes: agencies are not conducting *too much* BCA, they are conducting *too little* BCA; and even where agencies are conducting BCA, it far too often is of *insufficient quality*.[56] Other leading scholars who have carefully studied the regulatory process share our perspective.[57] One EPA study found that "the return to society from improved environmental regulations is more than one thousand times EPA's investment in the benefit-cost analyses."[58] Finally, as we have discussed above, we believe that going forward under the *Loper Bright* doctrine agencies will endanger the viability of their regulations if they do not embrace BCA.[59] Thus, we believe it is penny-wise and pound-foolish to curtail BCA. We also were not surprised when President Trump rescinded this change when he rescinded President Biden's EO 14,094.[60]

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56. *See, e.g.*, Noe & Graham, *supra* note 23, at 93–94 & nn. 21–26 (raising concerns about poor compliance with benefit-cost executive orders and guidelines, OIRA's lack of resources, the volume of rules not submitted for OIRA review, the institutional limitations of agencies and OIRA, including bureaucratic turf battles, failure to use internal and external expertise, bias, interest group dynamics and presidential electoral politics, and the lack of judicial enforcement); John D. Graham & Paul R. Noe, *Beyond Process Excellence: Enhancing Societal Well-Being*, *in* ACHIEVING REGULATORY EXCELLENCE 72–86 (Cary Coglianese ed., 2016).

57. *See, e.g.*, Jonathan Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORN. L. REV. 87, 100–02 (2016) (documenting gross non-compliance with the applicable BCA requirements; through a survey of 106 major rules issued from 2010–2013, finding that only two rules fully quantified costs and benefits and concluding that "regulatory agencies are regulating in the dark"); Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, *in* RISKS, COSTS, AND LIVES SAVED 208, 239 (Robert W. Hahn, ed., Oxford Univ. Press 1996) (comprehensively reviewing major rules issued between 1990–1995 and concluding that the quality of BCA varied widely from very poor to very good; estimates of net benefits likely are substantially overstated; half the rules would not pass a cost-benefit test; and agencies could dramatically improve the average quality of BCA by following a few simple guidelines); *see also* Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, *in* RISKS, COSTS, AND LIVES SAVED 167, 172–73 (Robert W. Hahn, ed., Oxford Univ. Press 1996) (finding that reallocation of lifesaving resources could save 60,000 more lives per year at no increased cost, or save $31 billion annually with equivalent benefits).

58. EPA, EPA-230-05-87-028, EPA'S USE OF COST-BENEFIT ANALYSIS: 1981–1986 5-2 (1987); *id.* at S-3, S-4 (documenting successful examples of EPA saving tens of millions to billions of dollars by using BCA in regulatory decisions but also documenting many instances where EPA exercises its discretion to interpret statutory provisions to prohibit or impede the use of BCA).

59. *See id.* at 1–3.

60. Exec. Order No. 14,148, 90 Fed. Reg. 8,237 (Jan. 28, 2025).

That said, it is possible that a new threshold for BCA could reappear in the future, but our hope is that this would be decided based on a broader reanalysis of the threshold. In the future, it would be worth investigating how much the cost of undertaking BCAs has changed since the 1970s. On the one hand, the compensation paid to benefit-cost analysts (especially in contracting firms outside the federal government) has likely grown faster than the rate of inflation, as have wages throughout the information economy.[61] On the other hand, agencies are now better equipped to undertake BCA more efficiently than they were in the 1970s—they have in-house expertise, computerized data systems, OIRA guidelines, agency-specific guidelines, standardized valuation tools (e.g., value of statistical life), templates from previous rulemakings, and access to targeted training courses on how to produce and interpret BCAs. The Society for Benefit-Cost Analysis and the Society of Risk Analysis did not exist in the 1970s; both now play a helpful role in making BCA a more efficient, competent, and accessible process.[62]

Likewise, the benefits of BCA need to be carefully considered. These benefits include not only more efficient, higher quality regulations, but also regulations that are more likely to withstand judicial scrutiny under the *Loper Bright* doctrine, as well as political scrutiny. In the future, we think that innovations such as artificial intelligence and "big data" platforms could make BCA both more robust and less expensive to undertake than it is today.[63]

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61. *See* David Hope & Angelo Martelli, *The Transition to the Knowledge Economy, Labor Market Institutions, and Income Inequality in Advanced Democracies*, 71 WORLD POL. 236, 237 (2019).

62. The Society for Benefit-Cost Analysis hosts professional workshops for analysts in government and elsewhere who seek to upgrade their skills. *Workshops*, SOC'Y FOR BENEFIT-COST ANALYSIS, https://sbca.memberclicks.net/workshops [https://perma.cc/V39J-3KAC] (last visited Feb. 13, 2026). "The Society for Risk Analysis Economics and Benefits Analysis Specialty Group (EBASG) focuses on the use of economic analyses to support risk-management decisions. These analyses provide information on the costs, benefits, and other impacts of alternative approaches for reducing risks. [The] goals include encouraging better integration between risk assessors, economists, and others involved in risk-management decisions, as well as enhancing the data and methods available for conducting economic analyses." *Economics and Benefits Analysis*, SOC'Y FOR RISK ANALYSIS, https://www.sra.org/risk-analysis-specialty-groups/economics-and-benefits-analysis/ [https://perma.cc/34CU-VMDG] (last visited Feb. 13, 2026).

63. *See, e.g.*, Paul R. Noe, Response to OMB Request for Information on Deregulation, Comment on "Systemic Regulatory Reform Recommendations," REGULATIONS.GOV (May 12, 2025), https://www.regulations.gov/comment/OMB-2025-0003-8004 [https://perma.cc/44UC-LQMQ] (recommending support for a comparative study of AI and traditional approaches to benefit-cost analysis); *see also* FEDERAL DATA SCIENCE: TRANSFORMING GOVERNMENT AND AGRICULTURAL POLICY USING ARTIFICIAL INTELLIGENCE (Feras A. Batarseh & Ruixin Yang eds., Academic Press 2018) (examining the nexus of data analytics,

Thus, while we believe Professor Revesz has raised a fair point that the requirement for BCA itself should be subjected to periodic BCAs, to our knowledge, he did not perform an adequate analysis to justify curtailing BCA. Indeed, we would not be surprised if future developments in AI increase the applicability of BCA rather than curtail it.

D. When an Agency Performs a Benefit-Cost Analysis, What Rate of Discount Should Be Applied to Benefits and Costs That Occur in the Future?

For rules that have costs and benefits that occur at different times, the rate of discount used in benefit-cost analysis can influence the comparison of rulemaking alternatives. From 2003 to 2023, OIRA—pursuant to OMB Circular A-4—instructed agencies to report estimates of benefits and costs with at least two rates of discount, 3% and 7%. (Prior to 2003, OIRA recommended first a single rate of 10%, which was lowered to 7% in the George H.W. Bush Administration).[64] A single rate was not recommended in 2003 because of a lack of consensus in the economics profession over what that single rate should be.[65]

Biden's OIRA revisited this issue and, after a rigorous process of peer review and public comment, required agencies to present results using the single rate of 2%.[66] However, most of the peer reviewers did not support selection of a single rate; they preferred presentation of results with more than one rate to avoid false precision.[67] All past presidents of the Society for

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government software, intelligent systems, and policymaking). *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105980, ARTIFICIAL INTELLIGENCE: AGENCIES HAVE BEGUN IMPLEMENTATION BUT NEED TO COMPLETE KEY REQUIREMENTS (2023) (identifying over 1,200 planned and current AI use cases in the federal government); Press Release, ACUS, ACUS Announces Two New Roundtables on Artificial Intelligence and Alternative Dispute Resolution (June 9, 2021), https://www.acus.gov/newsroom/news/acus-announces-two-new-roundtables-artificial-intelligence-and-alternative-dispute [https://perma.cc/7DTX-CNY8] (announcing roundtable on AI in federal agencies).

64. JOHN D. GRAHAM, REGULATORY REFORM FROM NIXON TO BIDEN: POLITICS, ECONOMICS, AND LAW 222–23 (2024).

65. Presentation of multiple rates remains a common recommendation of experts in the field, especially in climate rulemakings where the discount rate has a large impact on the results of BCA. *See* Arthur G. Fraas, John D. Graham, Kerry M. Krutilla, Randall Lutter, Jason F. Shogren, Linda Thunström, et al., *Seven Recommendations for Pricing Greenhouse Gas Emissions*, 14 J. OF BENEFIT-COST ANALYSIS 191, 195 (2023).

66. OFF. OF MGMT. & BUDGET, CIRCULAR A-4 77 (2023).

67. Glenn C. Blomquist, *What OIRA Peer Reviewers Advised Regarding Notable Proposed Updates to Circular A-4: An Ignored Consensus?*, J. OF BENEFIT-COST ANALYSIS, May 15, 2025, at 4–5, https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/article/what-oira-peer-reviewers-advised-regarding-notable-proposed-updates-to-circular-a4-an-ignored-

Benefit-Cost Analysis also opposed use of a single rate.[68] The Trump Administration has returned to the previous practice of presenting results using both 3% and 7%.[69] In the future, we expect that OIRA will require use of multiple rates, but not necessarily 3% and 7%.[70]

For rules with benefits extending many decades into the future (e.g., climate rules), the Biden-era guidance authorizes agencies to use a rate of discount that declines over time.[71] Although the Trump Administration rescinded this authorization, the 2003 OIRA guidance did not preclude agencies from presenting results with a discount rate that declines over time (in addition to results with 3% and 7%). The declining discount rate has significant support in the environmental economics community,[72] and thus likely will become more common in the future.

E. How Can the Value of Ecosystem Services Play a More Prominent Role in BCA?

Ecosystem services are the benefits that humans derive from ecosystems, such as food, water, and air quality.[73] A special focus is often given to rivers, lakes, oceans, wetlands and forests.[74] In recent decades, the fields of ecology and environmental economics have made great strides in elucidating the value of ecosystem services and providing tools for their measurement in BCA. Under Professor Revesz's leadership, OIRA produced the first formal

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consensus/097FF84444DC55604087602C42423E47 [https://perma.cc/GU9X-R9NU].

68. Letter from Former Presidents, Soc'y for Benefit-Cost Analysis and Former Editors, J. of Cost-Benefit Analysis, to Richard Revesz, Adm'r, Off. of Info. and Regul. Affs. (Aug. 28, 2023), https://www.benefitcostanalysis.org/assets/docs/Letter%20from%20former%20SBCA%20Presidents%20and%20JBCA%20editors.pdf [https://perma.cc/7KLR-EB56]. *But see* Frikk Nesje, Moritz A. Drupp, Mark C. Freeman & Ben Groom, *Sense and Sensitivity: An Argument Against Reporting Multiple Net Present Values* (CESifo, Working Paper No. 11547, 2024) (arguing that presentation of results with multiple rates confuses regulators).

69. Exec. Order No. 14,192, 90 Fed. Reg. 9,065, 9,067 (Jan. 31, 2025) (repealing the Biden Administration's Circular A-4 and reverting to the 2003 edition of the Circular).

70. On why 7%—even if a valid estimate of the average real (inflation-adjusted) rate of return on capital in the private sector—is too large to use as the discount rate for benefit streams that stretch many decades in the future, see RICHARD G. NEWELL, WILLIAM A. PIZER & BRIAN C. PREST, RES. FOR THE FUTURE, ISSUE BRIEF 22-08, THE SHADOW PRICE OF CAPITAL: ACCOUNTING FOR CAPITAL DISPLACEMENT IN BENEFIT–COST ANALYSIS (2022).

71. *See* OFF. OF MGMT. & BUDGET, CIRCULAR A-4 75 (2023).

72. Kenneth J. Arrow, Maureen L. Cropper, Christian Gollier, Ben Groom, Geoffrey M. Heal, Richard G. Newell, et al., *Should Governments Use a Declining Discount Rate in Project Analysis?*, 8 REV. OF ENV'T ECON. & POL'Y 145, 160 (2014).

73. *See* OFF. OF MGMT. & BUDGET, CIRCULAR A-4 51 (2023).

74. *See* OFF. OF INFO. & REGUL. AFFS., GUIDANCE FOR ASSESSING CHANGES IN ENVIRONMENTAL AND ECOSYSTEM SERVICES IN BENEFIT-COST ANALYSIS 21 (2024).

guidance for agencies on how to better incorporate the value of ecosystem services in BCA of spending projects and regulations.[75] Since this technical guidance is supported by developments in the literature, it is likely to reappear in future administrations. We also believe the guidance might serve as a model for future guidance from OIRA on specialized topics such as the monetary valuation of health and safety improvements, the impacts of regulation on consumption and investment, and the impacts of regulation on trade. Since Circular A-4 is intended as general guidance on BCA, OIRA guidance on specialized topics is likely to require separate publications.

F. Should Benefit-Cost Analysis or Cost-Effectiveness of Future Climate Rulemakings Be Conducted?

Starting with the Obama Administration, agencies monetized the benefits of climate rules using the social cost of carbon (SCC), which is expressed as a dollar value per ton of pollution prevented.[76] Some analysts who favor stringent climate regulations believe that agencies should be using cost-effectiveness analysis (CEA) rather than BCA in climate rulemakings because the SCC ignores important complexities in the climate science (e.g., potentially catastrophic tipping effects).[77] Until the scientific basis of the SCC improves, BCA of climate regulations may have only limited influence on policy. Indeed, the Biden EPA refused to use the SCC and BCA when setting the CO_2 performance limitations for motor vehicles.[78] This is a concern that Biden's OIRA did not address adequately. An alternative solution would be to conduct both BCA and CEA of climate rulemakings; Biden's OIRA moved in the opposite direction by weakening the instruction to agencies to

75. OFF. OF INFO. & REGUL. AFFS., GUIDANCE FOR ASSESSING CHANGES IN ENVIRONMENTAL AND ECOSYSTEM SERVICES IN BENEFIT-COST ANALYSIS (2024).

76. For a comprehensive approach describing the Obama Administration's social cost of carbon (SCC), including recommendations to improve that approach, see NAT'L ACADS. OF SCIS., ENG'G & MED., VALUING CLIMATE DAMAGES: UPDATING ESTIMATION OF THE SOCIAL COST OF CARBON DIOXIDE (2017).

77. *See* M. Granger Morgan, Parth Vaishnav, Hadi Dowlatabadi & Inês L. Azevedo, *Rethinking the Social Cost of Carbon*, ISSUES IN SCI. & TECH, Summer 2017, https://issues.org/rethinking-the-social-cost-of-carbon-dioxide/ [https://perma.cc/3BXW-T3A6]; Nicholas Stern, Joseph Stiglitz & Charlotte Taylor, *The Economics of Immense Risk, Urgent Action and Radical Change*, 29 J. OF ECON. METHODOLOGY 181, 192, 205–07 (2022).

78. The Biden EPA did use the SCC in its analysis but declined to use it to inform the stringency of the standard because it was too uncertain. *See, e.g.*, 89 Fed. Reg. 27,842, 27,859, 28,091 (Apr. 18, 2024) ("data and modeling limitations [] constrain the ability of SC–GHG estimates to include all the important physical, ecological, and economic impacts of climate change . . .").

conduct CEA as well as BCA of health, safety and environmental rulemakings.[79] If CEA is used without BCA and the SCC, regulators will make intuitive policy judgements as to whether a specific investment in climate mitigation is worthwhile or too expensive.

G. Should Benefit-Cost Analysis of Climate Rulemakings Include Global Benefits?

A related issue with SCC is whether the benefits of U.S. climate-control rulemakings should include benefits that accrue only to the U.S. public, whether all global benefits should be counted, or whether agencies should report separate estimates for national and global benefits.[80] The 2003 guidance, while not addressing climate specifically, called for agencies to give primary emphasis to benefits to U.S. citizens but it also allowed agencies to report benefits and costs that occur to people around the world.[81] The Biden-era guidance emphasizes global benefits by giving agencies the option of not reporting national benefits if it is not practical to estimate them.[82] Given the extent of technical uncertainty in estimating the global SCC, it seems implausible that a rough estimate of the U.S. SCC cannot be provided. We expect future versions of the guidance to require separate reporting of global and national estimates of the benefits and costs of climate rulemakings, thereby allowing policymakers to decide how much to weigh the alternative estimates in decisionmaking.

H. How Should Behavioral Economics Be Integrated into Market-Failure Analysis and Regulatory Design?

Behavioral economics is the study of human behavior using insights from psychology, sociology, and neuroscience as well as economics. It goes beyond classical economics because it explores systematic departures from

79. Mark Febrizio, Sarah Hay & Zhoudan Xie, *Comparing the Draft and Final Circular A-4*, REGUL. STUD. CTR., GEO. WASH. UNIV. (2023), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-11/insight_comparing_the_draft_and_final_circular_a4_final2.pdf [https://perma.cc/6859-BN76].

80. Fraas, et al., *supra* note 65, at 193–94; *see also* Art Fraas, Randall Lutter, Susan Dudley, Ted Gayer, John Graham, Jason F. Shogren & W. Kip Viscusi, *Social Cost of Carbon: Domestic Duty*, 351 SCI. 569 (2016).

81. Some presentation of global benefits is useful since it may encourage other countries to consider the impacts of their climate rulemakings on the United States. *See* William Pizer, Matthew Adler, Joseph Aldy, David Anthoff, Maureen Cropper, Kenneth Gillingham, et al., *Using and Improving the Social Cost of Carbon*, 346 SCI. 1189, 1190 (2014) ("[T]he moral, ethical, and security issues . . . [and the] strategic foreign relations question . . . are compelling reasons to focus on a global [social cost of carbon].").

82. *See* OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-4 7–9 (2023).

rational choice, including policy strategies to cope with the limitations of human rationality.[83] The 2003 version of Circular A-4 did not ignore behavioral economics, but the coverage was quite limited. In the twenty years after the publication of OMB Circular A-4, the literature on behavioral economics exploded.[84]

The market failure provision of EO 12,866[85] has long been neglected by many agencies but emphasized by OIRA. A benefit of the Biden-era version of Circular A-4 is that it offers some explicit guidance to agencies about how to think about market failure and regulatory design using insights from behavioral economics.[86] Whether the revised guidance gets the specifics right is a source of continuing debate within the scholarly community.[87] Since the revised guidance was rescinded by President Trump, there is time to make sure the specifics are correct. There is no question, however, that the Biden-era guidance took a step forward by recognizing the importance of behavioral economics in market-failure analysis and decisionmaking.

We recommend that OIRA launch a robust market failure initiative.[88] We believe this is a golden age of innovation when the need for the federal government and state and local government to avoid unwarranted market disruptions is critical in many cases, while reasonable regulation may be needed in others. To name just one such example, for both economic and national security reasons, it is urgent that the United States maintains its leadership in AI innovation and quickly and greatly increases the energy and infrastructure needed to support it. A market failure initiative could help avoid costly mistakes that inadvertently could harm highly beneficial innovations. The stakes are high.

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83. NAT'L ACADS. OF SCIS., ENG., & MED., BEHAVIORAL ECONOMICS: POLICY IMPACT AND FUTURE DECISIONS (2023).

84. Niels Geiger, *The Rise of Behavioral Economics: A Quantitative Assessment*, 41 SOC. SCI. HIST. 555 (2017).

85. Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) ("Federal agencies should promulgate only such regulations as are . . . made necessary by compelling public need, such as material failures of private markets . . . .").

86. *See* OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-4 14–26 (2023).

87. See, for example, the critiques of the Biden-era guidance authored by Don Kenkel and Susan Dudley, both leaders of the Society for Benefit-Cost Analysis. Susan Dudley, SBCA Presidents' and *JBCA* Editors' Comments on Revised U.S. Analytic Guidance (working paper), https://www.benefitcostanalysis.org/assets/docs/Working%20Paper%20-%20Dudley.pdf [https://perma.cc/JJN9-FFKA].

88. *See, e.g.*, Noe, *supra* note 63, at 4 (recommending that OIRA "strongly implement" the market failure requirement of EO 12,866 and "provide agencies with guidance" on how to perform market failure analysis).

I. What Type of Distributional Equity Analysis Should Agencies Undertake to Complement Benefit-Cost Analysis?

Since the 1940s, benefit-cost analysis—when implemented using the Kaldor-Hicks test—has been criticized for focusing solely on overall societal efficiency; notions of distributional equity are not incorporated in conventional BCAs.[89] By the end of the Obama Administration, virtually no progress had been made on equity analysis.[90] The issue was not a priority for the Trump OIRA.

Biden's OIRA took a bold step by authorizing agencies to weight benefits and costs inversely based on household income (i.e., benefits/costs to the poor receive far greater numerical weight than benefits/costs to the rich).[91] Although there were articles supporting this approach in the peer-reviewed literature, there is no definitive scientific case for any specific weighting system, including the conventional approach (i.e., a social value judgment is required about the weights).[92] OIRA's peer-review and public-comment processes uncovered serious objections to income weighting.[93] Although the Biden-era guidance instructed agencies to present both conventional and income-weighted results of BCA, there was much criticism—and only limited support for—treating income-weighted results as the primary results of a BCA.[94] Had agencies attempted to implement income weighting on a widespread basis, the technical implementation challenges would have been daunting.[95]

In the future, a more modest approach to distributional analysis could protect the welfare of low-income Americans (e.g., a separate benefit-cost calculation that reveals how rulemaking alternatives affect low-income

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89. One of the first scholarly critiques of welfare economics was by the British economist IMD Little, who happened to be a student of John Hicks's. He emphasized the need for a distributional test in BCA. IAN MALCOLM DAVID LITTLE, A CRITIQUE OF WELFARE ECONOMICS (1957), https://archive.org/details/critiqueofwelfar00n4litt [https://perma.cc/2TKG-VKPA].

90. Lisa A. Robinson, James K. Hammitt & Richard J. Zeckhauser, *Attention to Distribution in U.S. Regulatory Analyses*, 10 REV. ENV'T ECON. & POL'Y 308 (2016).

91. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-4 63–67 (2023).

92. *See, e.g.*, Matthew D. Adler, *Benefit–Cost Analysis and Distributional Weights: An Overview*, 10 REV. OF ENV'T ECON. & POL'Y, 264 (2016); James K. Hammitt, *Accounting for the Distribution of Benefits and Costs in Benefit-Cost Analysis*, 12 J. OF BENEFIT-COST ANALYSIS 64 (2021).

93. *See, e.g.*, W. Kip Viscusi, *Why Office of Management and Budget's (OMB) Social Welfare Function Is Not Society's Social Welfare Function*, 15 J. OF BENEFIT-COST ANALYSIS 252 (2024).

94. *See* Blomquist, *supra* note 67.

95. Arthur G. Fraas, John D. Graham, Kerry Krutilla, Randall Lutter, Jason F. Shogren & W. Kip Viscusi, *Improving Distributional Analysis in Regulatory Evaluation: An Assessment of the 2023 Circular A–4*, 19 REV. OF ENV'T ECON. & POL'Y, 210 (2025).

people); this approach might gain some traction in administrations of both partisan persuasions.[96] The traditional efficiency-based BCA would be presented separately from the BCA for low-income Americans; both would be part of the standard regulatory impact assessment. While there are a range of expert opinions about the best approach, the Biden OIRA made a significant contribution by nudging OIRA and agencies to consider more distributional equity analysis in rulemaking; a comprehensive study of agency RIAs is needed to determine how much practical progress the agencies made on equity analysis under President Biden.

III. ALTERNATIVE HISTORICAL PERSPECTIVES

In his article, Professor Revesz seeks to persuade progressives that presidential control of social regulators through BCA is legitimate by pointing to pathbreaking developments in the Franklin D. Roosevelt (FDR) and Lyndon B. Johnson (LBJ) administrations.[97] Like Professor Revesz, we certainly would like to see more support for OIRA and BCA from progressives. However, while there is some merit in the Professor's argument, there are important limitations as well, which we explain in detail below. Briefly, modern progressives tend to be more concerned about the application of BCA to social regulation of business (e.g., health, safety, and environmental issues) than to traditional economic regulation (e.g., competition issues) and public spending projects (e.g., water resources).[98] As we explain below, FDR and LBJ extended BCA to selected public spending projects but not to regulation of business, so we do not expect progressives to be moved much by the BCA-related developments under FDR and LBJ.

Professor Revesz points to FDR's creation of the Bureau of the Budget (BOB) as a separate entity from the U.S. Department of the Treasury and

96. This has been called a "basic needs" approach to equity analysis in BCA. *See* Arnold C. Harberger, *Basic Needs versus Distributional Weights in Social Cost–Benefit Analysis*, ECON. DEV. & CULTURAL CHANGE, 32(3): 455, 460–62 (1984). One such approach entails applying a Kaldor-Hicks test to advance the welfare of low-income Americans as well as a Kaldor-Hicks test to advance the welfare of society as a whole. John D. Graham, *Incorporating Environmental Justice into Benefit-Cost Analysis of Federal Rulemakings*, 25 RICH. PUB. INT. L. REV. 149 (2022); *see also* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 516–524 (2008) (arguing for a separate benefit-cost calculation to ensure the poor are treated fairly in regulations).

97. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 141.

98. Environmentalists have long advocated greater cost-benefit scrutiny of dams and other water resources projects. Margaret Gwynne, *The Debate Over Dams*, VITERBI CONVERSATIONS IN ETHICS (May 21, 2018), https://vce.usc.edu/volume-2-issue-1/the-debate-over-dams/ [https://perma.cc/6YFF-3US4].

BOB's early role overseeing information collections.[99] Nixon later transformed BOB into the Office of Management and Budget (OMB).[100] Professor Revesz also points to FDR's interest in evaluating the benefits and costs of public spending projects such as dams and other water resource projects.[101] Why did FDR not apply BCA to federal regulation of business?

FDR had plenty of opportunities to do so. One opportunity emerged during FDR's multi-year confrontation with the GOP-majority Congress over the amount of power that should be granted to federal departments and agencies. Professor Revesz does not mention that FDR vetoed legislation that would have made the departments and agencies subservient to the federal judiciary.[102] FDR could have, but did not, incorporate BCA checks into this legislation. Compromise legislation, the Administrative Procedure Act (APA) of 1946, was later signed by President Truman; the APA authorized judicial review of agency action but declined to place federal departments and agencies in the judicial branch.[103] Neither FDR nor Truman insisted that the APA require an explicit balancing of benefits and costs of regulation.[104] Another opportunity occurred earlier, in 1936, when the U.S. Congress mandated that a flood control project funded by the U.S. Army Corps of Engineers must have "benefits to whomsoever they may accrue [that] are in excess of the estimated costs."[105] FDR and Congress made no effort to extend this analytic practice to regulations of the private sector.

In fairness, BCA was in its infancy in the Roosevelt era. Two British economists, Nicholas Kaldor and John Hicks, published the pioneering theoretical papers on the social efficiency test in BCA in 1939.[106] Even in the water resources area, where BCA was applied first, BCA was not utilized in

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99. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 142–43.

100. *Id.* at 145.

101. *Id.* at 167–68.

102. *Veto of a Bill Regulating Administrative Agencies*, NAT'L PRES. CTR., https://www.presidency.ucsb.edu/documents/veto-bill-regulating-administrative-agencies [https://perma.cc/5W2B-9PMP] (last visited Mar. 12, 2026).

103. JOHN D. GRAHAM, REGULATORY REFORM FROM NIXON TO BIDEN 19–21 (2024).

104. Fortunately, in our view, courts over time interpreted the APA arbitrariness standard as requiring the reasonable use of BCA in rulemaking. *See supra* notes 23–24 and accompanying text.

105. Flood Control Act of 1936, § 1, ch. 688, 49 Stat. 1570, 1570 (1936) (codified as amended at 33 U.S.C. § 701(a) (2000)).

106. John Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

U.S. project decisionmaking until the 1950s.[107] As Professor Revesz points out, there was no practical guidance for comparing costs and benefits until the Green Book of 1950, so it may be unrealistic to expect that FDR would have been a pioneer of BCA of regulation.[108] Risk assessment tools, which are essential for estimating the risk-reduction benefits for BCA of health and safety regulations, such as chemical exposure regulations, were pioneered by EPA in the 1970s.[109] And the applied methods for monetizing the benefits of social regulation—both revealed preferences and stated preferences—were not established until the 1960s and 1970s.[110]

Professor Revesz is also correct that President Johnson was not only a champion of Great Society anti-poverty and economic development programs; he favored formal evaluations to determine whether spending programs were effective in achieving their social goals.[111] Formal evaluation of federal spending was first recommended in 1947 by the Commission on the Organization of the Executive Branch of the Government (also known as the first Hoover Commission, as it was chaired by former President Herbert Hoover).[112] The Kennedy and Johnson administrations fostered formal program evaluation as part of the performance-based budgeting process.

The practical implementation of performance budgeting began at the U.S. Department of Defense in the 1950s, where Robert McNamara, who served as Secretary of Defense under Presidents Kennedy and Johnson,

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107. Jiang Wei & Rainer Marggraf, *The Origin of Cost-Benefit Analysis: A Comparative View of France and the United States*, COST EFFECTIVENESS & RES. ALLOCATION 1, 7–9 (2021). A major development was in the 1950s when US economists, led by Otto Eckstein, developed modern CBA methods for the management of and investment in water resources and flood management. From 1950, annual reports were published on U.S. river management appraisals.

108. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 168–69.

109. NAT'L RSCH. COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 105–109 (1983) (Section III describes the creation of the Carcinogen Assessment Group (CAG) at EPA in 1976, the first unit in the federal government to perform quantitative risk assessment of carcinogen exposures).

110. For the pathbreaking work on revealed preferences for occupational safety, see W. KIP VISCUSI, EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE (1979). The seminal papers on the stated preference method were not published until 1978. *See* ROBERT CAMERON MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 9–10 (1989) (discussing the early development of the field, including references to the pioneering papers in the 1960s and 1970s).

111. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 143–44.

112. An Act for the Establishment of the Commission on Organization of the Executive Branch of the Government, Pub. L. No. 80-162, 61 Stat. 246 (1947); VIRGINIA A. MCMURTRY, CONG. RSCH. SERV., RL32164, PERFORMANCE MANAGEMENT AND BUDGETING IN THE FEDERAL GOVERNMENT: BRIEF HISTORY AND RECENT DEVELOPMENTS (2005).

pioneered the Planning Programming Budgeting System (PPBS).[113] McNamara began with analytic applications to costly weapon systems and later extended PPBS throughout the Defense Department.[114] PPBS featured not BCA but CEA, which is a close cousin of BCA. CEA measures effectiveness in natural, unmonetized units (e.g., payload capacity of a weapon system or number of tooth cavities prevented) whereas BCA, whenever feasible, expresses effectiveness and any other benefits in monetary units and determines whether the benefits justify the costs. The Department of Defense drew on analytic expertise from the RAND Corporation, a national security think tank that had spun out of the Air Force after World War II.[115] One of the strongest proponents of PPBS was McNamara's deputy, Dr. Alain Enthoven, who hired analysts from industry and universities to help implement PPBS.[116] President Johnson was so impressed with McNamara's initiative that, in October 1965, he extended the requirement for PPBS to spending programs throughout the federal government, including the Great Society anti-poverty programs and economic development programs.[117]

The reaction of progressives to formal analytic methods was influenced by the activities of the "Whiz Kids," ten ambitious analysts from the statistical-

113. *Robert S. McNamara*, HIST. OFF., U.S. DEP'T OF DEF., https://history.defense.gov/Multimedia/Biographies/Article-View/Article/571271/robert-s-mcnamara/ [https://perma.cc/YR33-J3D2] (last visited Mar. 12, 2026).

114. *Id.*

115. DAVID NOVICK, ORIGIN AND HISTORY OF PROGRAM BUDGETING (1966); OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, 33 FOREIGN RELATIONS OF THE UNITED STATES 1964–1968, at 98–99 (David C. Humphrey & James E. Miller, eds., 2004).

116. McNamara recruited Enthoven from the RAND Corporation in 1960; Enthoven served as Deputy Assistant Secretary of Defense from 1961 to 1965; he then served as Assistant Secretary of Defense for Systems Analysis from 1966 to 1970. *See Faculty Profile: Alain C. Enthoven*, STAN. GRADUATE SCH. OF BUS., https://www.gsb.stanford.edu/faculty-research/faculty/alain-c-enthoven [https://perma.cc/SA8M-TD7P] (last visited Feb. 14, 2026).

117. OFF. OF THE HISTORIAN, *supra* note 115, at 98–99 ("At a breakfast meeting with Cabinet members and agency heads on August 25, 1965, President Johnson directed each agency to introduce an integrated Planning-Programming-Budgeting System (PPBS). Once in operation, he stated, the system would enable each agency to identify its goals with precision, 'choose among those goals the ones that are most urgent,' and 'search for alternative means of reaching those goals most effectively at the least cost.'") (quoting Statement by the President to Cabinet Members and Agency Heads on the New Government-Wide Planning and Budgeting System, 2 PUB. PAPERS 916–917 (August 25, 1965)). On October 12, in Bulletin No. 66–3, the Bureau of the Budget issued instructions and set deadlines for establishing PPBS. *See id.* (citing BUREAU OF THE BUDGET, EXEC. OFF. OF THE PRES., Bull. No. 66–3, PLANNING-PROGRAMMING-BUDGETING SYSTEM (1965)).

control arm of the Air Force (the most famous being Robert McNamara) who were hired as a group by Ford Motor Company after World War II.[118] They brought the new tools of systems analysis, a broader term that includes CEA and BCA, to Ford and private industry first, and later to the defense and civilian sides of the federal government.[119]

However, BCA of private-sector regulation did not begin in the Johnson Administration. Influenced by the Whiz Kids, a team at the U.S. Army Corps of Engineers, which reported to Dr. Enthoven, invented the idea of applying systems analysis to federal regulation of the private sector as well as federal spending programs.[120] They found no support for this idea in the Johnson Administration (except at the Army Corps); several analysts at the Corps, who were inspired by McNamara and Enthoven, later moved to BOB and OMB where they found receptive ears for BCA of private-sector regulation in the Nixon Administration.[121]

The Kennedy-Johnson Administration's experience with systems analysis and PPBS was by no means an unqualified success. At the Pentagon, masterful systems analyses addressed virtually every aspect of U.S. military strategy against the Viet Cong and the North Vietnamese.[122] Putting the war effort into rational performance indices proved to be enormously challenging.[123] The tools were ultimately maligned when they were misused by the RAND Corporation, which was under great pressure from the Air Force to show progress against the North Vietnamese; RAND studies made extraordinary yet unverified claims of bombing effectiveness. Other exquisite RAND studies, which revealed the real motives of the Viet Cong, received less attention.[124]

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118. JOHN A. BYRNE, THE WHIZ KIDS: THE FOUNDING FATHERS OF AMERICAN BUSINESS AND THE LEGACY THEY LEFT US (1993).

119. *Id.*

120. Allan Schmid, *Effective Public Policy and the Government Budget: a Uniform Treatment of Public Expenditures and Public Rules*, *in* PRIORITIES AND EFFICIENCY IN FEDERAL RESEARCH AND DEVELOPMENT: A COMPENDIUM OF PAPERS SUBMITTED TO THE SUBCOMMITTEE ON ECONOMY AND GOVERNMENT OF THE JOINT ECONOMIC COMMITTEE 579–91 (William D. Carey, Louis Fisher, Edwin Mansfield, Albert H. Rubenstein, & Lester C. Thurow, eds., 1975).

121. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37, 40–41 (2011) (explaining regulatory review was suggested by the Army Corps under LBJ but did not begin until Nixon).

122. *See, e.g.*, U.S. ASSISTANT SEC'Y OF DEF. (SYS. ANALYSIS), 2 A SYSTEMS ANALYSIS VIEW OF THE VIETNAM WAR 1965-1972 (Thomas C. Thayer, ed., 1975).

123. Michele Chwastiak, *Rationality, Performance Measures and Representations of Reality: Planning, Programming and Budgeting and the Vietnam War*, 17 CRITICAL PERSPECTIVES ON ACCOUNTING 29 (2006).

124. *See* MAI ELLIOTT, RAND IN SOUTHEAST ASIA: A HISTORY OF THE VIETNAM WAR ERA (2010); John F. Farrell, *RAND in Southeast Asia: A History of the Vietnam War Era*, STRATEGIC

Not surprisingly, many progressives—who were active in the anti-war movement—developed some skepticism about the formal analytic tools.

Perhaps more importantly, PPBS was never embraced by the Congress in legislation, in part because the administrative process of PPBS—which was created separately from the standard budget process—proved to be a bureaucratic nightmare. Professor Revesz notes only in a footnote that PPBS died quickly in the Nixon Administration;[125] what survived were the analytic tools and a new generation of analysts who had applied them to problems as diverse as health care quality and military strategy.[126] In the 1990s, formal evaluations of budgetary programs were mandated by the Government Performance and Results Act.

Many Americans know little about Richard Nixon other than that he was the only president to resign from office due to revelation of criminal behavior.[127] Less is known about Nixon's hand in the expansion of social regulation of business for clean air, clean water, safe drinking water, toxic substances control, endangered species protection, worker safety and health, automotive safety, childhood poisoning prevention, consumer product safety, pesticide safety, environmental impact statements, the rights of women, anti-smoking efforts, voting rights for young adults, rights of the disabled, and telecommunications reform.[128] Nixon was dubbed "the last liberal Republican."[129] Even less well known is the business community's backlash against Nixon; Nixon's response was an executive initiative to supervise social regulators using BCA.[130] Nixon made limited progress on his BCA policy because it was revolutionary and encountered stiff resistance from progressives. The practical implementation of formal analysis of social regulation unfolded during the Ford and Carter administrations through the work of the Council on Wage and Price Stability, the Council of Economic Advisors, and OMB, but only a limited number of regulations were analyzed, and regulators often ignored the results.

FOCUSED J. U.S. A.F. (Oct. 22, 2010), https://www.airuniversity.af.edu/SSQ/Book-Reviews/Article/1194637/rand-in-southeast-asia-a-history-of-the-vietnam-war-era/ [https://perma.cc/Z6LX-4YYX].

125. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 144 n.72.

126. Harry S. Havens, *Looking Back at PPBS: Image vs. Substance*, GAO REV., Winter 1977, at 10, https://www.gao.gov/assets/looking_back_at_ppbs__1977.pdf [https://perma.cc/H75W-9REL].

127. *The American Public's Attitudes About Richard Nixon Post-Watergate*, ROPER CTR. FOR PUB. OP. RSCH. (Aug. 9, 2014), https://ropercenter.cornell.edu/blog/american-publics-attitudes-about-richard-nixon-post-watergate [https://perma.cc/NK9Q-KGXZ].

128. *See generally* JOHN ROY PRICE, THE LAST LIBERAL REPUBLICAN: AN INSIDER'S PERSPECTIVE ON NIXON'S SURPRISING SOCIAL POLICY (2021).

129. *Id.*

130. GRAHAM, *supra* note 103, at 12, 49, 80–81.

The regulatory agencies and progressive Democrats in Congress strongly opposed the efforts to apply BCA to social regulation.[131]

President Reagan was the first to formally require BCA of private-sector regulation (including social regulations), as Ford and Carter had formally required analysis of only costs and regulatory effectiveness, a form of CEA.[132] Professor Revesz states that the Reagan benefit-cost order and the OIRA's new role were not a "disruptive change."[133] This statement is not correct, as Reagan's program was so disruptive that it triggered a backlash in Congress that almost led to OIRA's abolition.[134]

In Executive Order 12,866, President Clinton, seeking to address concerns about overreliance on quantitative BCA, modified Reagan's benefit-cost test (to benefits must "justify," not "outweigh," costs) to account for qualitative impacts.[135] The Clinton order, like the Reagan order, also directs agencies to "maximize net benefits," but unlike the Reagan order, explicitly includes "distributive impacts" and "equity."[136] Clinton's nuanced benefit-cost test was retained by each succeeding administration. While it is possible that further changes could come in President Trump's second term, to date he has retained Clinton-era Executive Order 12,866 and extended it to the so-called independent agencies,[137] a change we[138] and many others[139] have long supported.

The bottom line is that it was Nixon and Reagan who played the pivotal roles in the history of BCA of social regulation. Neither FDR nor LBJ initiated this agenda. Given a proper understanding of this history, we should not expect that progressives will be easily persuaded to join Professor Revesz's call for a stronger role for BCA and OIRA in social regulation. For progressives, BCA and social regulation may remain a somewhat uneasy marriage.

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131. *Id.* at 65–67 (BCA under Nixon); *id.* at 93–96 (Ford); *id.* at 108–09 (opposition to BCA in Congress during the Ford Administration); *id.* at 124–28 (BCA under Carter and opposition).

132. *Id.* at 167.

133. Revesz, *Evolution of Regulatory Review*, *supra* note 1, at 141.

134. *See* GRAHAM, *supra* note 103, at 162–167 (how the Reagan EO and OIRA disrupted existing federal practices); *id.* at 186–187 (backlash against OIRA and budgetary threats to OIRA's very existence).

135. *Id.* at 240.

136. Exec. Order No.12,866, 58 Fed. Reg. 51,735, 51,735–51,736 (Sept. 30, 1993).

137. *See* Exec. Order No. 14,215, 90 Fed. Reg. 10,447, 10,448 (Feb. 18, 2025).

138. *See*, *e.g.*, Noe & Graham, *supra* note 23, at 136.

139. See *supra* note 7 for a brief discussion of the longstanding support of the Administrative Conference of the United States and the ABA Section of Administrative Law and Regulatory Practice for presidential review of rulemaking from independent agencies; *see also* Exec. Order No. 13,272, 67 Fed. Reg. 53,461, 53,461 (Aug. 16, 2002), in which President George W. Bush directed both executive and independent regulatory agencies covered by the Regulatory Flexibility Act to enhance their compliance with the Act.

CONCLUSION

Now that we are well into the second year of the second Trump Administration, it is tempting for scholars of regulatory review to focus only on current developments, without reflecting on what happened in the Biden era. That would be a mistake. Much can be learned from OIRA's initiatives in the Biden era and, as we have argued, some of Professor Revesz's initiatives could lead to long-term changes in White House oversight and in analytic practices at OIRA and federal regulatory agencies.

Professor Revesz's impression is that the revised OIRA guidelines for BCA received a "predominantly positive response."[140] Our impression is that the reception in the relevant expert communities was mixed. We fear that future administrations may be more inclined, based on the Biden-era experience, to change the guidance in ways that comport with their political philosophy toward regulation.[141] While that may be inevitable, we would prefer that OIRA practices retain the bipartisan orientation that has been evident since President Clinton revised OIRA's mandate through EO 12,866 and Circular A-4 was issued in the George W. Bush Administration. Although we considered a new executive order on regulatory review when we began our service at OIRA in 2001, we became convinced—particularly by the wise advice of OIRA's professional staff—that the better course was to retain EO 12,866 in the interests of stability in the regulatory review process. On the details of BCA practices, what should be most important is what new textbooks on BCA recommend and what methods analysts use in future peer-reviewed applications of BCA in the literature. OIRA guidance that is disconnected from the state of the art will not be sustainable or credible.

In the future, we believe OIRA's staffing will need to increase significantly since the volume and depth of its workload has greatly expanded, including reviewing rules of the so-called independent agencies[142] and meeting new demands of administrative law. Unfortunately, OIRA's staff and resources have declined significantly since the early 1980s (when it had up to ninety-seven staff), even as its responsibilities have markedly increased[143] and agency

140. Revesz, *Evolution of Regulatory Review*, supra note 1, at 173.

141. *See* Susan Dudley & W. Kip Viscusi, *Biden's OMB Politicizes Cost-Benefit Analysis*, WALL ST. J. (Aug. 28, 2023, 5:44 PM), https://www.wsj.com/opinion/bidens-omb-politicizes-cost-benefit-analysis-regulation-social-justice-2534e819 [https://perma.cc/UR8A-LG55] (expressing similar fears).

142. Exec. Order No. 14,215, 90 Fed. Reg. 10,447, 10,448 (Feb. 24, 2025).

143. In addition to EO 14,215 including independent agencies under OIRA review, many other requirements have been added over time. *See, e.g.*, E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899 (2002); Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-

staff roughly doubled.[144] We suggest that OIRA's staff and resources be commensurately increased, though we acknowledge that this case is awkward to make during a period when the Trump Administration and Congress are slashing agencies' budgets.

We think that both sides of the political spectrum could benefit from the invaluable insights of Professor Revesz. The goal of benefit-cost analysis is neither inherently pro-regulation nor anti-regulation, but to enhance societal well-being. Benefit-cost analysis not only is inevitable, it is desirable; when the government takes important actions, it must know the consequences. Recent developments in administrative law and politics demand effective management of the regulatory state through the benefit-cost framework. There is an enormous return on investment in OIRA for more evidence-based, efficient and sustainable rulemakings—whether they be regulatory or deregulatory—that can stand the test of time. Thus, OIRA's role has never been more important.[145]

121, 110 Stat. 857 (1996); Congressional Review Act, Pub. L. No. 104-121, 110 Stat. 868 (1996); Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 515, 114 Stat. 2763; Small Business Paperwork Relief Act, Pub. L. No. 107-198, 116 Stat. 729 (2002); and various appropriations riders.

144. *See* Noe & Graham, *supra* note 23, at 93 n.22.

145. Revesz, *Managing Regulatory Review*, *supra* note 1.