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Defragmenting the Regulatory Process

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Abstract

The regulatory process is often criticized for being cumbersome and slow, much like a computer whose hard drive is fragmented by files no longer used or useful. Like such a computer, the regulatory process contains many requirement of dubious utility. These include the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and numerous executive orders. While other parts of the regulatory process such as notice and comment and cost-benefit analysis have received much more academic attention, these other parts of the process deserve examination as well. This paper argues that such an examination will reveal that these statutes and executive orders add little of value to the regulatory process while consuming agency resources. An improved requirement for cost-benefit analysis with distributional analysis could easily replace virtually all of these requirements and improve regulations while reducing the time needed to promulgate regulations.

I Introduction

The federal regulatory process is under intense reexamination. Recently the Office of Management and Budget (OMB) solicited comments\(^1\) on the revision of Executive Order 12866\(^2\), which requires agencies to conduct regulatory-impact analyses and establishes oversight of the regulatory process by the Office of Information and Regulatory Affairs (OIRA). The request for comment yielded more than 130 responses, many of which were extensive and original.\(^3\)

Many of the comments focused on the role of cost- benefit analysis and on risk

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\(^1\) Federal Register February 26, 2009 74 FR 8819.
assessment.\textsuperscript{4} Others focused on the propriety of presidential oversight over agency regulatory decisionmaking.\textsuperscript{5} These are rightly considered critical issues in the regulatory process. Indeed, most of the academic literature on the regulatory process focuses on these issues as well as on the notice-and-comment process. However, there is also a vast reservoir of other requirements imposed on rule-making agencies; these requirements have received little attention from scholars or practitioners.

Many of these other requirements are statutory, such as those set out in the Unfunded Mandates Reform Act,\textsuperscript{6} the Regulatory Flexibility Act\textsuperscript{7} and the Paperwork Reduction Act.\textsuperscript{5} Others are found in executive orders instructing agencies to analyze the impacts of their regulations on state and local governments,\textsuperscript{9} tribes,\textsuperscript{10} energy supplies,\textsuperscript{11} and families.\textsuperscript{12} Although agencies treat many of these requirements in a pro forma manner, a subset of the statutory requirements consume significant agency time and resources.

The consumption of agency resources would not be an issue if these less frequently discussed procedures produced tangible benefits. Do they? There has been

\textsuperscript{4} For example, see Adam Finkel's comments at http://www.reginfo.gov/public/jsp/EO/fedRegReview/Adam_Finkel_comments.pdf last viewed July 20, 2009.
\textsuperscript{5} For example see Art Fraas' comments at http://www.reginfo.gov/public/jsp/EO/fedRegReview/Arthur_Fraas_Comments.pdf last viewed July 20, 2009.
\textsuperscript{8} Pub. L. No. 96-511, 94 Stat. 2812
\textsuperscript{9} Executive Order 13132 64 FR 43255.
\textsuperscript{10} Executive Order 13175 65 FR 67249.
\textsuperscript{11} Executive Order 13211 66 FR 28345.
\textsuperscript{12} Executive Order 13045 62 FR 19883.
almost no academic work assessing these procedures, but I will argue below that their impact on regulatory substance is probably very small. This conclusion is supported by evaluations by the non-partisan Government Accountability Office (GAO), the Office of Management and Budget (OMB), and by such academic studies as do exist. Furthermore, although most of these procedural requirements were implemented to reward particular constituencies, in practice they appear to be of very limited assistance, even to their intended beneficiaries.

I argue here for "defragmenting" the regulatory process. When a computer does not operate as quickly as possible, even though there is sufficient memory, often it is because the computer is "fragmented." Files are inefficiently stored, duplicative, and taking up computer memory when they do not need to. Similarly, the regulatory process is fragmented. There are too many requirements that do little to improve regulations. Many of the requirements duplicate work that could be done in a good cost-benefit analysis.

Removing these procedures will free up agency time to write regulations and focus on those procedures, like public comment and cost-benefit analysis, that do have the potential (not always realized) to change regulatory outcomes. The article proceeds as follows. In the next section (II), I review literature on cost-benefit analysis, executive review, and notice and comment, the aspects of the regulatory process that have gained the most attention. In Section III, I review the limited literature on the many unexamined procedures, and I evaluate the usefulness of these procedures. I conclude in Section IV

by arguing for a simpler, defragmented regulatory process, though I acknowledge the political obstacles to achieving this goal.

II. The Frequently Examined Portions of the Regulatory Process

The procedural requirements within the federal regulatory process that have received the most attention from scholars are notice and comment, cost-benefit analysis and executive (or presidential) review. What follows is a brief summary of academic analysis of these three procedures as well as a discussion of the argument that the rulemaking process has become overly proceduralized.

The notice and comment process has its modern origins in the Administrative Procedure Act. Agencies are required to publish a notice of proposed rulemaking, solicit public comments on the proposed rule, and respond to those comments in a preamble to the final rule. Political scientists have produced various works examining the role of notice and comment in the rulemaking process. Much of this literature indirectly assesses the question of whether the notice and comment process adds value to the regulatory process. Golden reviewed eleven rules from three agencies and found that in these cases, public comments were unlikely to lead to significant changes. West looked at forty-two rules and found that the role that comments played most successfully was to provide information to political overseers about constituents' views. He noted that because the comment period comes so late in the regulatory process, it is of limited

usefulness. Yackee examined 40 rules from four agencies that received between 2 and 200 comments and found that comments made a difference on low salience rules particularly when commenters were in agreement on a change. Shapiro studied nine rules and found that comments were more influential in more complex rulemakings and in low salience rulemakings.

In sum, the recent literature suggests that public comment plays a limited but useful role in some rulemakings. Some have argued that the movement toward electronic rulemaking has the potential to increase the utility of public comment. This utility, coupled with the fact that notice and comment provides an element of democratic oversight to the rulemaking process, suggest that notice and comment should and will continue to remain a part of the rulemaking process.

The role of OIRA has also received considerable attention. Executive Order 12866 gave OIRA two roles in the regulatory process: it is the guardian of cost-benefit analysis and enforcer of presidential oversight. The cost-benefit analysis requirement, requires agencies to calculate the costs and benefits of all rules with an impact of more

17 Yackee defines all rules with fewer than 200 comments as having a low salience.
22 Supra Note 2.
than $100 million in any given year. Cost-benefit analysis has been alternately criticized by supporters of regulation for subverting important regulatory goals\textsuperscript{24} and by opponents of regulation as ineffective in achieving its intended purpose of making regulations more economically efficient.\textsuperscript{25} Recently, a literature has emerged arguing that cost-benefit analysis can be modified so that it favors regulatory goals.\textsuperscript{26} In short, little consensus exists on the impact of cost-benefit analysis on the regulatory process.

Despite this lack of consensus on the actual impact of cost-benefit analysis, advocates on both sides of the debate agree that cost-benefit analysis has the potential to play an important role in decisionmaking. While advocates (and scholars) disagree about whether this role is positive or negative, depending on their policy preferences, the fact that cost-benefit analysis has been the subject of debate for nearly three decades indicates its potential influence. With the appointment of Cass Sunstein, a well known advocate of cost-benefit analysis\textsuperscript{27} as OIRA Administrator by President Obama, it is clear that despite the criticisms cost-benefit analysis is here to stay.

As for the other aspect of OIRA's function, most scholars seem to agree that presidential oversight does have an influence on the regulatory process. Kagan, citing the Clinton Administration’s use of executive review, argues that the president is uniquely positioned to enhance both the accountability and the efficiency of administrative

\textsuperscript{24} Heinzerling, Lisa., and Frank Ackerman. \textit{Priceless: On Knowing the Price of Everything and the Value of Nothing} New Press 2005.
\textsuperscript{27} See for example, Cass Sunstein. \textit{Risk and Reason} Cambridge University Press 2002.
decisions. Others support executive review on the grounds that it yields better management of executive agencies and implementation of a uniform regulatory policy; that it encourages policy coordination, political accountability, and more balanced decisionmaking; and that the president is more likely to advance national over factional interests. In the late 1980s, the Administrative Conference of the United States and the American Bar Association endorsed executive oversight of the regulatory process.

Critics writing during the Reagan Administration contended that executive review gave unelected bureaucrats authority over Cabinet officials who were supposed to be responsible to Congress. When President Clinton’s endorsed executive review by issuing Executive Order 12866, opposition to the unitarian position of executive control over rulemaking has abated. It has not, however, vanished. Farina, writing more recently, assailed the new assertions of presidential power over the regulatory regime as inherently anti-regulatory and as increasing the likelihood that the regulatory system

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34 Supra note 35.
would collapse under its own weight.\textsuperscript{36} Schultz-Bressman and Vandenbergh criticize the lack of transparency in White House oversight and the overemphasis on reducing regulatory costs instead of maximizing regulatory benefits.\textsuperscript{37}

Like cost-benefit analysis, presidential oversight produces varied normative evaluations among scholars. Also like cost-benefit analysis, however, presidential oversight is seen as a permanent part of the regulatory process. Scholars across the ideological spectrum also agree that presidential oversight has played an important role in regulatory decisions since the Reagan Administration and will continue to do so.

The proceduralization of the rulemaking process, particularly cost benefit analysis and executive review, have also been criticized for making it take longer to write regulations. In a 1992 article, Thomas McGarity coined the term, "ossification of the rule-making process."\textsuperscript{38} He argued that stringent judicial review of agency regulations and the preponderance of analytical requirements imposed upon rulemaking agencies had made rulemaking so burdensome that agencies were avoiding rulemaking altogether. Mashaw and Harfst made a similar point in examining the movement away from rulemaking at the National Highway Traffic and Safety Administration (NHTSA) and toward recalls of automobiles.\textsuperscript{39}

Coglianese has cast doubt on Mashaw and Harfst's conclusions about NHTSA.\textsuperscript{40} Similarly, Johnson has cast doubt on the ossification hypothesis at EPA.\textsuperscript{41} Informal studies of the numbers of rules and the number of pages annually in the Federal Register show no pattern of decline.\textsuperscript{42}

A few works also examine the time it takes an agency to complete a regulation. The most notable work is over 15 years old and examines only rules at EPA. Kerwin and Furlong examined a variety of factors that affect the time it takes to promulgate a rule. They describe their results as erratic and admit that "much remains to be explained."\textsuperscript{43} In a recent, more general study, Yackee and Yackee assert that ossification is not the reality in most circumstances.\textsuperscript{44}

While these empirical studies cast doubt on the ossification hypothesis, they are too broad to draw any conclusions about the impacts of specific regulatory procedures.


\textsuperscript{44} Yackee, Jason Webb. and Susan Webb Yackee. \textit{Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making Ossified?} \textit{Journal of Public Administration Research and Theory} Published online June 10, 2009. (2009)
In addition, neither Kerwin and Furlong\textsuperscript{45} nor Yackee and Yackee\textsuperscript{46} sufficiently control for important characteristics that vary across regulations; these characteristics include a regulation’s political salience and its complexity.

Despite the ossification argument, notice and comment, cost-benefit analysis, and executive review are all prominent parts of the regulatory process and will remain so for the foreseeable future.\textsuperscript{47} While the effects of each one are still debated, there is a rough consensus that all three play important roles and will likely continue to do so. However, as mentioned above, there are many other steps in the regulatory process that have received much less attention.

III The Less Examined Portions of the Regulatory Process

While academics have devoted less attention to many other aspects of the regulatory process, such as the Paperwork Reduction Act, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act, the same is not true of GAO. A recent GAO report gave an overview of the entire regulatory process. The report compiled a list of the requirements that agencies must follow when promulgating a regulation. Their table on the most commonly applicable requirements is reproduced below.

\footnotesize{\textsuperscript{45} \textit{Supra} note 43. \\
\textsuperscript{46} \textit{Supra} note 44. \\
<table>
<thead>
<tr>
<th>Source of requirements</th>
<th>Characterization of agencies’ responsibilities</th>
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<tbody>
<tr>
<td><strong>Requirements applicable to rules of all agencies</strong></td>
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<tr>
<td>Administrative Procedure Act</td>
<td>Procedures required for informal rulemaking, also known as notice-and-comment rulemaking</td>
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<tr>
<td>Congressional Review Act</td>
<td>Submission of rules to Congress for review</td>
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<td>Endangered Species Act</td>
<td>Analysis of impact on endangered or threatened species</td>
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<td>National Environmental Policy Act</td>
<td>Analysis of environmental impacts</td>
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<td>National Technology Transfer and Advancement Act</td>
<td>Use of voluntary consensus standards</td>
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<tr>
<td>Paperwork Reduction Act (PRA)</td>
<td>Analysis of paperwork burden and submission to OIRA for approval of new information collections</td>
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<tr>
<td>Regulatory Flexibility Act (RFA)</td>
<td>Consideration of regulatory alternatives to lessen the burden on small entities</td>
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<td><strong>Requirements applicable to rules of cabinet departments and independent agencies, but not to rules of independent regulatory agencies</strong></td>
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<tr>
<td>Unfunded Mandates Reform Act</td>
<td>Analysis of costs and benefits of federal mandates and consideration of alternatives</td>
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<tr>
<td>Executive Order 12372</td>
<td>Consultation with state and local elected officials</td>
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<tr>
<th>Executive Order</th>
<th>Analysis of impact on constitutionally protected property rights</th>
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<tbody>
<tr>
<td>Executive Order 12866</td>
<td>Submission of significant rules for OIRA review and analysis of costs, benefits, and regulatory alternatives</td>
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<tr>
<td>Executive Order 12898</td>
<td>Consideration of environmental justice impact on minority and low-income populations</td>
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<tr>
<td>Executive Order 12988</td>
<td>Ensuring clarity of regulatory language regarding legal rights and obligations</td>
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<tr>
<td>Executive Order 13045</td>
<td>Evaluation of environmental health or safety effects on children</td>
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<tr>
<td>Executive Order 13132</td>
<td>Consultation with state and local officials on federalism implications</td>
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<tr>
<td>Executive Order 13175</td>
<td>Consultation with Indian tribal governments</td>
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<tr>
<td>Executive Order 13211</td>
<td>Analysis of effects on energy supply, distribution, or use</td>
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GAO studied 139 "major" rules in its report and concluded:

In the 139 major rules we reviewed, the agencies mentioned at least 29 different broadly applicable requirements, but most rules only triggered a handful of the requirements . . . [T]he only analytical requirements triggered by more than 45% of all rules were the PRA, the RFA, and Executive Order 12866 . . . Agencies also frequently cited the UMRA and Executive Order 13132 related to federalism but the rules seldom triggered those requirements.⁴⁹

Agencies emphasized the impacts of the PRA and the RFA.

⁴⁹ Id. at 25-26
Officials from case-study agencies identified two long standing analytical and procedural requirements, the PRA regarding information collections and the RFA regarding analysis of rules' effects on small entities as having had more significant effects on time and resources than the more recent requirements. Agency officials at FDA and SEC reported that compliance with the PRA information collection requirements may add a year or more to the timeline of regulatory development.

The Executive Orders, the PRA, RFA, and UMRA are rarely discussed in the academic literature. An analysis of the executive orders is the most straightforward. All of the Executive Orders (with the exception of E.O. 12866 which gives OIRA regulatory review authority) have several things in common. First, they direct regulating agencies to consider the impact of their regulations on some constituency (Native American tribes, state and local governments, children and families) or some sector (energy, environmental justice, property rights). Second, agencies routinely fulfill their obligations with one-paragraph summaries in the preambles to their regulations. Many rules contain a sentence, like the following, asserting that the impact on constituency or sector is insignificant:

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50 Yackee and Yackee supra note 16, provide a counterexample, citing a bureaucrat who claims that the RFA did not slow regulation down because the agencies just hire more lawyers to clear the procedural hurdles imposed by Congress.

51 Id. at 28.
This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.\textsuperscript{52} Wagner gives a particularly striking example of an EPA air-pollution regulation in which two of these executive orders (No. 12898 on environmental justice, and No. 13045 on children's health) are deemed inapplicable even in a case where they clearly should have applied.\textsuperscript{53} This is evidence that agencies can ignore these executive orders whenever doing so suits their needs. Finally, as mentioned above, the GAO report indicates that few agencies consider any of these executive orders, hurdles to issuing regulations.

As such, leaving these executive order requirements in place or removing them is likely to have no substantive impact on regulatory decisions. The pro forma language used to fulfill the requirements of these executive orders indicates a general lack of effort to fulfill the intentions of the executive orders. From the point of view that agencies should only be required to do things that have some likelihood of actually improving their regulations, it would be better to cancel these executive orders. There is little doubt that the orders were issued with noble intentions. However, even their strongest advocates would have a hard time arguing that the orders have had anything approaching their intended impact.

\textsuperscript{52} Federal Register 74 FR 16126 April 9, 2009.
I focus the remainder of this discussion on the three statutes whose requirements affect the greatest number of regulations. The PRA and RFA affect nearly all regulations. In addition to these two statutes, the Unfunded Mandates Reform Act was cited in the GAO report as a significant consumer of agency resources. How have these three statutes affected regulatory decisionmaking?

*The Paperwork Reduction Act*

The Paperwork Reduction Act (PRA) was passed in the waning days of the Carter Administration. It created OIRA, and gave it the power to coordinate information policy and review any agency’s collection of information from ten or more people. The PRA serves a myriad of intended purposes: it has, for example, been successful in managing and coordinating information, as well as in highlighting the burden of paperwork on the American public.

The PRA requires that agencies take certain steps any time a regulation that they wish to promulgate requires the collection of information from the public. These steps include giving notice of the information collection, calculating the burden on the public, accepting comments on the collection, and explaining how the agency has minimized the

54 Supra note 48.
55 Supra Note 8.
paperwork burden.\textsuperscript{57}

Academic literature evaluating the PRA is limited. Despite the fact that the Act was passed in 1980 and has been in effect ever since, there are no academic empirical studies of its impact. However, OIRA puts out an annual report, its "Information Collection Budget,"\textsuperscript{58} that is informative on this point. In 2009, the report observed that over the past ten years, the information burden on the American public has increased from 7 billion hours to over 9 billion hours.\textsuperscript{59} While this is mainly due to demographic changes (e.g., a greater number of people are filing tax returns) and statutory changes (e.g., new information collections required by homeland-security statutes),\textsuperscript{60} a two billion hour increase does call into question the success of the Act in reducing information collection burden on the American public. The idea that the PRA has not accomplished its statutory goals has also been voiced by GAO in several reports on the Act.\textsuperscript{61}

In one report, GAO discusses the lack of seriousness with which agencies pursue burden reduction under the Act:

\begin{quote}
Among the PRA provisions aimed at helping to achieve the goals of minimizing burden while maximizing utility is the requirement for [Chief
\end{quote}

\textsuperscript{57} See, for example, \textit{Information Collection Budget of the United States Government}, produced annually by the Office of Management and Budget. The 2008 report can be found on http://www.whitehouse.gov/omb/assets/omb/inforeg/icb/2008_icb_final.pdf.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

Information Officer] CIO review and certification of information collections. GAO's review of 12 case studies showed that CIOs provided these certifications despite often missing or inadequate support from the program offices sponsoring the collections. Further, although the law requires that support be provided for certifications, agency files contained little evidence that CIO reviewers had made efforts to get program offices to improve the support they offered. Numerous factors have contributed to these problems, including a lack of management support and weaknesses in OMB guidance. Because these reviews were not rigorous, OMB, the agency, and the public had reduced assurance that the standards in the Act--such as minimizing burden--were consistently met.62

The PRA applies to information collections both within and outside of regulatory requirements (such as the Census).63 In both circumstances, inside and outside of the rulemaking process, the information from OMB and GAO appears to indicate that the PRA has had a limited impact.

In October 2009, OIRA solicited comments on the PRA and possible reforms to it.64 Most of the comments indicated that the PRA was in need of significant improvement and that it consumed considerable agency resources. There were also numerous comments suggesting that the PRA did little to improve information

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62 GAO report 06-477 Summary.
63 Supra Note 8.
64 Federal Register October 27, 2009. 74 FR 55269.
Furthermore the core test of the PRA is whether the practical utility of an information collection justifies the burden it imposes on the public. 66 This is much like the test in Executive Order 12866, which asks agencies to determine whether the benefits of a regulation justify its costs. 67 Practical utility could be incorporated into the benefit side of a cost-benefit analysis and paperwork burden is already considered regularly as part of the costs of regulations. If the PRA was eliminated from the regulatory process, a well done cost-benefit analysis would be able to perform the same function.

Would eliminating the PRA provide any benefits? As noted above, agency officials told GAO that the act adds nearly a year to the regulatory process. 68 While this estimate deserves a healthy dose of skepticism -- as agency officials are likely to be prone to overestimate the effect of anything that creates more work -- the PRA does have built in time frames that ensure a certain amount of delay. Eliminating this delay would streamline the regulatory process and allow the faster promulgation of regulations that provide benefits for society. 69

66 Supra Note 8.
67 Supra note 2.
68 Supra note 48.
69 It is true that not all regulations provide net benefits for society. However in every annual report issued by OMB to Congress on the costs and benefits of regulations, the benefits of regulation far outweigh its costs. See http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/ (last viewed August 17, 2009) for all of the reports.
The Regulatory Flexibility Act

Congress passed the Regulatory Flexibility Act in 1980, the same year as the PRA. The Act culminated a decade's worth of effort to assist small businesses in the regulatory process. Under the Act, agencies must perform a Regulatory Flexibility Analysis for any regulation that will "have a significant impact on a substantial number of small entities." This analysis requires discussion of alternatives to the regulation and efforts by the agency to minimize the impact of the regulation on small businesses.

The primary source of information on the impact of the RFA is the Office of Advocacy within the Small Business Administration. The Office of Advocacy has a considerable stake in defending the RFA since the RFA gives it a role in the regulatory process. The Office of Advocacy has claimed that the RFA has saved small businesses $70 billion -- $11 billion in FY 2008 alone -- but these numbers have never been verified by independent sources. While Keith Holman, a former Chief Counsel of Advocacy, was able to provide a few examples of regulations that were made more flexible for small businesses, it is impossible to tell whether the RFA was the only (or most important) cause of these improvements.

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70 Supra note 7.
72 Supra Note 7.
of E.O. 12866 may also have contributed to these changes, and might even have caused them in the absence of the RFA.

External studies have cast serious doubt on the efficacy of the RFA. The primary way that agencies become subject to the act is by promulgating regulations that "have a significant impact on a substantial number of small entities." Shive notes that the agencies, however, are permitted to articulate their own definitions of the terms "significant impact" and "substantial number," and courts grant agencies a great deal of deference. Thus, it is relatively easy for agencies to avoid making changes that the Act might seem to require.\textsuperscript{76} Section 610 of the RFA, intended to ensure that agencies review their regulations regularly, is also routinely undermined by agencies and results in few changes to existing regulations.\textsuperscript{77}

GAO has conducted a number of studies on the RFA. GAO concluded in 1994 that "agencies' compliance with the Act varies widely."\textsuperscript{78} In 2001, reporting on the RFA and on subsequent amendments, GAO noted that "their full promise has not been

\textsuperscript{76} Supra note 46. See also Michael See Willful Blindness: Federal Agencies Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement -- And Current Proposals to Invigorate the Act 33 FORDHAM URBAN LAW JOURNAL 1199 (2006) and Government Accountability Office Regulatory Flexibility Act: Key Terms Still Need to Be Clarified Report 01-669 (2001).

\textsuperscript{77} See Supra note 46.

realized.\textsuperscript{79} Finally, in 2006, GAO noted the problem described by Shive, above:

"A recurring finding was that uncertainties about RFA's requirements and key terms, and varying interpretations by federal agencies, limited the Act's application and effectiveness."\textsuperscript{80}

Judicial review also minimizes the impact of the RFA. Grengs summarizes a series of cases in which courts deferred to agencies’ decisions to issue regulations in spite of their evident impacts on small businesses.\textsuperscript{81} Grengs sees the decision in \textit{American Trucking v. EPA}\textsuperscript{82} as particularly important, because it allows agencies to ignore “indirect” impacts on small businesses.\textsuperscript{83}

The RFA was amended in 1995 by the Small Business Regulatory Enforcement Fairness Act (SBREFA).\textsuperscript{84} Among other things, SBREFA required that before issuing a rule, EPA and the Occupational Safety and Health Administration convene panels of small business owners to review rules that would impact small businesses. The effects of these panels has not been systematically analyzed, but one case study of a single rule

\textsuperscript{79} Government Accountability Office Regulatory Flexibility Act: Key Terms Still Need to Be Clarified Report 01-669T (2001).


\textsuperscript{82} 175 F. 3rd 1027 (D.C. Cir. 1999) (per curiam) aff'd in part rev'd in part and remanded , 121 S. Ct. 903 (2001).

\textsuperscript{83} Id.

\textsuperscript{84} \textit{Supra} Note 7.
observed panels that had no effect on regulatory substance. On the other hand, EPA appears to have adopted SBREFA panel recommendations in a number of rulemakings.

The analysis of costs conducted within a cost-benefit analysis generally focuses on the cost to businesses. It would not be difficult to break out the costs of a regulation on small businesses. Requiring a separate RFA is time consuming and in many cases redundant. As described above, the RFA has probably had limited benefits for small businesses. At the same time, it increases agency costs and to the extent that it delays socially beneficial regulations, it imposes significant social costs.

**The Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act (UMRA) was passed by the 104th Congress as part of the Contract With America. It is broader in its reach than the PRA or the RFA, as it is intended to affect both regulation and legislation. Regarding regulation, it requires explanation of the costs and benefits of any rule that costs more than $100 million/year; it also requires agencies to consult with states and local governments in

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86 See e.g. Federal Register May 26, 2009. 74 FR 24904.
87 Supra note 6.
89 These requirements are largely repetitive of those in Executive Order 12866 for "economically significant regulations." Of course, UMRA puts those requirements in statute rather than executive order.
It is impossible to disentangle the impact of the economic-analysis provisions of UMRA from the cost-benefit-analysis requirements of E.O. 12866 because they overlap so closely. As for the remainder of the requirements in UMRA, GAO issued a report in 1998 entitled "Unfunded Mandates Reform Act Has Had Little Effect on Agency Rulemaking Actions." While the title is self-explanatory, GAO goes through the various sections of the act and details the lack of demonstrated impacts on regulatory activities. GAO issued several subsequent reports that echoed the conclusion that UMRA has had little impact. There have been no academic studies of the impact of UMRA on regulations.

The unexamined portions of the regulatory process have probably remained so for a reason: they haven't had an appreciable impact on the regulatory process. Their costs have largely been small or borne by regulatory agencies (and therefore not visible to the public or the focus of interest group attention. To the extent that they delay beneficial...
regulations, they may produce significant net social costs.\textsuperscript{95} Yet these costs may be hidden, meaning that these statutes do not get criticized to the same extent as cost-benefit analysis or the recent Bush regulatory reforms which have gotten significant attention from advocacy groups because of their controversial origins.

In addition to having a potentially significant cost, these procedural requirements have few benefits, either from a social welfare perspective or to the constituencies they were enacted to help. With the exception of the Small Business Administration’s favorable (but hardly neutral) assessment of the RFA, there have been no demonstrations that any of these procedures lead to better, less costly, or more protective regulations. In fact, despite the existence of the procedures, small businesses have experienced an increased paperwork burden and higher regulation-related costs. The overall level of regulation has also increased. One could argue that these metrics would be higher if the procedures were not in place, but there is no evidence to support this claim.

It is also possible that agencies have refrained from rulemakings entirely due to these unexamined procedural requirements. This would parallel the argument made by Mashaw and Harfst a generation ago about NHTSA's reaction to increased judicial scrutiny of its regulations.\textsuperscript{96} However, even the NHTSA "retreat from rulemaking" has now been disputed,\textsuperscript{97} and it is hard to imagine agency officials and their supporters in the advocacy community would have passed up any opportunity to blame these requirements

\textsuperscript{95} Stuart Shapiro \textit{Evaluating the Benefits and Costs of Regulatory Reforms: What Questions Need to be Asked?} 31 \textit{EVALUATION AND PROGRAM PLANNING} 223 (2008).

\textsuperscript{96} \textit{Supra} note 39.

\textsuperscript{97} \textit{Surpa} note 40.
for regulatory inaction.

It is hard therefore to make anything other than a symbolic argument (such as "small businesses deserve a seat at the table when regulatory decisions are made") that the procedures discussed in this section should be kept in place. Giving symbolic weight to particular parties in the regulatory process is not without value. It is unclear, however that such symbolism is worth the cost to agencies and the cost imposed by regulatory delay.

What would a regulatory process look like if these requirements were removed? I now turn to a description of a defragmented or simplified regulatory process.

IV Arguing for a Simpler Regulatory Process

Eliminating the procedures discussed in Part III above (the Executive Orders and the PRA, RFA, UMRA statutes) would streamline, defragment, and "clarify" the regulatory process and regulations themselves. No longer would preambles to regulations be cluttered with off the shelf language asserting that the agency was

98 Supra note 16.
99 The regulatory reforms put in place by the Bush Administration are not discussed here. These include most prominently, the implementation of the Information Quality Act and regulatory peer review. While there are good reasons to be skeptical that these reforms would be any different than the others discussed in this section (Stuart Shapiro An Evaluation of the Bush Administration Reforms to the Regulatory Process PRESIDENTIAL STUDIES QUARTERLY 37:270 2007.), they have been in place too short a time to do any meaningful empirical evaluation.
100 I am not proposing to eliminate the non-regulatory portions of these statutes. Information collections that are not part of proposed rules would still be subject to the Paperwork Reduction Act and the information management provisions of the UMRA should remain intact. Similarly, evaluating the legislative provisions of the Unfunded Mandates Reform Act is beyond the scope of this article.
complying with these statutes. Regulations would be easier to understand and to evaluate. Agencies wouldn't have to spend time achieving pro forma compliance with the language of the PRA and the RFA without actually achieving the goals of these statutes. So what is the downside?

With the possible exception of the Paperwork Reduction Act, each of these procedures was put in place to satisfy a particular constituency. Small businesses vigorously support the Regulatory Flexibility Act. State and local governments support UMRA. Each of the executive orders was put in place to satisfy a constituency that cares a great deal about the issues addressed.

Standard political science teaches that when benefits of a regulation or statute are concentrated and the costs are diffuse, the group that receives the benefit will lobby much harder than those bearing the costs. The statutes discussed in this article (again with the possible exception of the PRA) fall squarely in this category. Small businesses will fight hard against attempts to repeal or weaken the Regulatory Flexibility Act. Those who bear the costs of such statutes (agencies and the beneficiaries of regulation) will not mount a similar fight, in part because of the diffuse nature of those who bear the costs and in part because of the hidden costs. Repealing these acts and executive orders is therefore a considerable political challenge.

102 Those who bear the costs of these procedures are those who reap the benefits of regulations, consumers of safer toys, safer foods, breathers of safer air, are not aware that these procedures impose costs upon them and would find it difficult to mobilize to repeal these statutes.
In order to address this political challenge, it behooves us to imagine what the regulatory process would look like if these statutes and executive orders were repealed. The notice and comment process would remain at the center of rulemaking. Numerous academic studies have supported its utility.\textsuperscript{103} Even if it didn't have practical value, notice and comment imbues the regulatory process with a sense of accountability and representativeness.\textsuperscript{104}

Indeed, the ability of notice and comment to improve regulations may increase with the further development of electronic rulemaking. Many ideas about electronic rulemaking have percolated in the academic literature and it is likely that many of them will be tried in the years ahead.\textsuperscript{105} However it is unlikely that even an enhanced notice and comment procedure will mollify groups upset over the repeal of statutes or executive orders that explicitly give these groups special status in the regulatory process.

Other procedures that are likely to remain part of the regulatory process (and that this author believes should remain as part of the process) offer more possibilities for enhancing the role of particular interest groups that the government believes should have special standing in the regulatory process. First among these is an enhanced role for cost-benefit analysis. As noted above, cost-benefit analysis is controversial.\textsuperscript{106} However with the recent appointment of cost-benefit analysis advocate, Cass Sunstein, as the Administrator of OIRA, it is clear that cost-benefit analysis is here to stay.

\textsuperscript{103} Supra notes 26 and 27. See also Mariano-Florentino Cuellar \textit{Rethinking Regulatory Democracy} 57 Administrative Law Review 411 (2005).
\textsuperscript{104} Supra note 16.
\textsuperscript{105} Supra note 20.
\textsuperscript{106} Supra note 24.
There are many reasons to be skeptical that cost-benefit analysis can make up for some of the things that would allegedly be lost in repealing the PRA, RFA, UMRA, and the executive orders. First among these is the concern that cost-benefit analysis as it is currently constituted does not have the impact on regulations that is intended.107 However, one of the primary reasons for the limited effect of cost-benefit analysis, is that agency regulations rarely, if ever, are rejected by courts for poor analysis.108 The instructions to agencies on how to correctly conduct a cost-benefit analysis are in Executive Order109 and an OMB circular.110 The requirements in these documents are not judicially reviewable.

Making the quality of a cost-benefit analysis judicially reviewable would have considerable appeal to those who would be upset about losing the regulatory requirements in the PRA, RFA, UMRA, and executive orders. Even if the requirement was only that agencies use analysis to justify their regulations (as is the case in the current executive order) and not apply a strict cost-benefit test, judicial review would force agencies to be more careful in their analyses and more transparent in their assumptions. This alone would lead to better analysis and hopefully better regulations.111

In addition, there have been numerous calls for agency cost-benefit analyses to do

107 Supra note 25.
108 Supra note 82.
109 Supra note 2.
111 See Harrington et. al. supra note 34.
more to incorporate equity concerns.\textsuperscript{112} Several scholars have suggested methods by which distributional analysis could be done.\textsuperscript{113} The requirement to do distributional analysis could also be codified and made judicially reviewable. If Congress were to decide that cost-benefit analysis should consider the impacts of regulations on other groups (such as small businesses or states and localities), this could also be made part of such a statutory requirement. This could also mollify small businesses and states and localities upset about the repeal of the RFA and UMRA.

Would a statutory requirement for a high-quality cost-benefit analysis with distributional impacts make for better policy? Would it be politically feasible? I think the answer to the first question is relatively clear. As discussed above the current regulatory framework has done little to improve regulations or even help the constituencies of particular statutes. Cost-benefit analysis has the potential (often unrealized) to contribute to policy and the addition of distributional components to cost-benefit analysis only makes this potential greater.

As for the political feasibility, this is an entirely hypothetical question. The groups that oppose cost-benefit analysis would likely support the repeal of other burdens on the regulatory process but would obviously oppose enhancing the role of cost-benefit analysis. The constituencies who would oppose repealing the RFA, UMRA, and parts of the PRA would have to be convinced that judicially reviewable distributional cost-benefit


\textsuperscript{113} Id.
analysis would result in regulations at least as favorable to them as the current framework. This is a tall order but should not be an impossible one especially since the existing statutes appear to do little to help these constituencies.

Finally it is clear that OIRA review will remain as part of the regulatory process. Freed from its responsibilities under the PRA and the RFA (as well as it’s responsibility for ensuring that all of the Executive Order "boxes are checked"), OIRA will be able to better focus on the substance of regulations and the quality of analysis. The defragmentation of the regulatory process would also defragment OIRA’s role and better allow them to oversee regulation from the executive branch.

This paper has laid out the case for defragmenting the regulatory process by repealing numerous statutes and executive orders and replacing them with enhanced cost-benefit analysis. The case is largely based on the limited impacts of the current regulatory procedures and the delay they impose on the regulatory process. Further research into these statutes would help flesh out this argument. Scholars should focus on the Regulatory Flexibility Act, Unfunded Mandates Reform Act, and Paperwork Reduction Act and attempt to quantify their impacts. If particular pieces of these acts (like for example SBREFA panels under the RFA) work well, then they should be maintained or enhanced. If not then these requirements are simply making it harder for agencies to pursue their missions without producing any benefits to society or to particular groups.

\[ ^{114} \text{Supra note 101.} \]