

Legislating A Negative Right to Health: Health Impact Assessments

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I. INTRODUCTION

In the U.S., we are accustomed to treating right-to-health arguments as non-starters, outside the realm of serious possibility.¹ Yet curiously, our American aversion to the health rights discourse does not necessarily reflect rejection of “health” as a value.² Instead, our attitude seems based on a misperception that health rights are inevitably a type of socio-economic right to *affirmative* state provision rather than a *negative* liberty from state action.³ This latter type of right, the negative liberty, is thought to be more congenial to the American legal tradition, while the former is regarded as a non-justiciable and quixotically foreign concept.⁴ However

¹ Even those who strongly favor such a right have judged U.S. health rights even after the enactment of the Affordable Care Act to be “unstable,” “weak,” and “elusive.” See Allison K. Hoffman, *A Vision of an Emerging Right to Health Care in the United States: Expanding Health Care Equity Through Legislative Reform*, in *THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY* 345, 345–346 (Colleen M. Flood & Aeyal Gross eds., 2014) (describing how even legislated rights are often weakened by courts); David Orentlicher, *Rights to Healthcare in the United States: Inherently Unstable*, 38 AM. J.L. & MED. 326, 326 (2012) (documenting the ways in which the Affordable Care Act fails to change the historical weakness of the right to health in the U.S.). See generally Jennifer Prah Ruger et al., *The Elusive Right to Health Care Under U.S. Law*, 372 NEW ENG. J. MED. 2558 (2015); Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325 (2010).

² See e.g., William W. Buzbee, *CPR Perspective: The Strategies of Regulatory Underkill*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspUnderki11.cfm> (last visited Oct. 18, 2019). Indeed, polls show *health care* was among the most important issues in the most recent midterms. See e.g., Robert Pearl, *Healthcare Is the No. 1 Issue for Voters; A New Poll Reveals Which Healthcare Issue Matters Most*, FORBES (Aug 13, 2018, 07:53 AM), <https://www.forbes.com/sites/robertpearl/2018/08/13/midterms/#38657bee3667>.

³ See e.g., RICHARD A. EPSTEIN, *MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE?* 59–79 (1997).

⁴ See, e.g., Frank Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 862 (2001). But see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV.

much we may value health, the argument runs, we would distort or break with our foundational legal character if we recognized health values in the form of a “right.”

Meanwhile, on another front, a different battle over rights is running its course. Observers note that our policymaking functions are now held to cost-benefit default requirements imposed both by courts,⁵ and by an executive order that has proven durable regardless of the President’s party affiliation.⁶ Even now, Congress is considering codifying such a requirement.⁷ This default requirement of cost-benefit analysis (CBA), assumed to apply unless Congress clearly intends a different regulatory standard, has come under criticism on a variety of fronts. CBA posits a utilitarian world in which values are aggregative and fungible, and thus capable of being added and traded-off against one another.⁸ In response, many have argued that the ascendance of cost-benefit analysis detracts from non-utilitarian values like rights, distribution, the integrity of human life, and dignity.⁹ For instance, CBA privileges efficiency over distributive goals, as one commentator has succinctly described: “[A]ll transfer programs flunk standard CBA: one side loses what another gains, plus somebody pays for administrative costs.”¹⁰ Moreover, rights are short-

2271, 2273, 2278–79 (1990).

⁵ See *Michigan v. EPA*, 135 S. Ct. 2699, 2706–08 (2015) (requiring agency to weigh costs against benefits, unless Congress clearly states otherwise). See generally Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

⁶ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (which has been retained in substantially similar form through Reagan, Bush I, Clinton, Bush II, and Obama Administrations).

⁷ Portman-Heitkamp Regulatory Accountability Act, S. 951, 115th Cong. § 3(b)(5) (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/951/text>. See also, Regulatory Accountability Act, H.R. 5, 115th Cong. (2017). The bill would require all agencies, including independent agencies, to consider a “reasonable number of [regulatory] alternatives” and select the “most cost-effective” rule, unless “the additional benefits of the more costly rule justify the additional costs of that rule.” This requirement is sometimes called the “super mandate.” See e.g., William Buzbee, *Regulatory Reform or Statutory Muddle: The “Legislative Mirage” of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L.J. 298, 306 (1996).

⁸ See e.g., SIDNEY SHAPIRO & ROBERT GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 54 (2002).

⁹ See e.g., Frank Ackerman & Liza Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1567 (2002) (discussing that it may not be possible to limit the effects of CBA to just those areas for which CBA is suitable because there are spillover or displacing effects, including that “cost benefit analysis turns public citizens into selfish consumers and interconnected communities into atomized individuals”). See generally MICHAEL SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* (2012); Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. ON REG. 213 (2016).

¹⁰ Adam Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279, 324 (2015)

shrifed under CBA's utilitarian approach insofar as rights bind without regard to individual case-by-case consequences.¹¹ The nature of rights is such that an individual's rights cannot be sacrificed to the greater collective welfare as a matter of course. Thus CBA, by subjecting all values to trade-off, fails to adequately acknowledge that some values take the form of rights.

What if we had a way to value health as a right while remaining squarely within the American tradition of rights as negative liberties from state action? And what if this method could also serve as a corrective to CBA's blind-spots on rights and distribution? I argue in this article that Health Impact Assessments (HIAs) would achieve precisely these things. Therefore, I propose that we require an assessment of all federal regulation and legislation for its potential impact on human health and its distribution, even if the policies lie outside what is traditionally considered the health sector. This HIA requirement, like the other regulatory impact analyses I discuss below, would also require Congress or an agency, if it were to pursue such action burdening human health, to expressly justify the adverse health effects imposed by such action.¹² If anything, the regulatory reform measures that are currently before Congress, rather than mandating CBA by statute, should include this modest, common-sense, new regulatory impact assessment requirement.¹³

My argument is indirect. Others have made strong cases for HIAs on the merits. I seek to demonstrate that HIAs should be institutionalized because we have already adopted a set of *other* regulatory impact assessments (RIAs) privileging non-health values such as economic freedom for small business, freedom from paperwork, economic protection for states and localities, religious liberty, and more,¹⁴ all of which compete with health. These existing RIAs represent the selective elevation, by rights-like means, of a highly biased set of priorities with which health ought to be placed on equal footing.

(citing Eric A. Posner, *Transfer Regulations and Cost-effectiveness Analysis*, 53 DUKE L.J. 1067, 1060–69, 1076 (2003)). This pithy conclusion depends upon CBA being administered without regard to the fact that the relation between wealth and utility varies non-linearly, such that the marginal decrease in a wealthy person's utility from the loss of a dollar might be lower than the marginal increase to a less well-off person from gaining a dollar.

¹¹ Even utilitarians can acknowledge rights as absolute and infeasible in this sense. John Stuart Mill, *Utilitarianism*, in UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT 1, 61–63 (H.B. Acton ed., 1972) (distinguishing rights from expedience).

¹² See *infra* Part V for full description.

¹³ See *e.g.*, *supra* note 7; Cross, *supra* note 4, at 863.

¹⁴ See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (arguing that religious liberty is a new guise for economic libertarianism).

A. *The Need to Consider Health Even Within Non-Health Policies*

The greatest health challenges today are complex and have many linked contributing factors, some of which operate far upstream, outside what we conventionally regard as health policy. It is by now widely recognized that policies beyond the traditional health-sector affect our health outcomes no less than policies within our so-called health system.¹⁵ An oft-cited early report from the Centers for Disease Control credited medical care with only ten to fifteen percent of the reductions in mortality achieved during the twentieth century.¹⁶ Our knowledge base has now grown to recognize how “social determinants of health” may have at least as much effect on health outcomes.¹⁷

Thanks to environmental law, many of us recognize that hazardous chemical exposures in our air, water, food, and workplaces burden human health. But we are increasingly learning more about the importance of our social and economic conditions as well.

Housing and our built environment are examples of distal or upstream factors, wrought by collective policy, that affect population health in complex socially-mediated ways.¹⁸ For instance, lopsided mortgage interest subsidies to the affluent divert resources from quality affordable housing options, which we know in turn subjects people to hazardous exposures such as lead or mold. Indeed, our policy paradigms, such as those that beget urban sprawl, have been associated with numerous other health effects. One study found that for every one percent increase in county compactness (a sprawl index), “traffic fatality rates fell by 1.49 percent and pedestrian fatality rates fell by 1.47 percent.”¹⁹ These effects are a function of government action.²⁰ For example, federal housing financing has long favored low-density single-family homes.²¹

¹⁵ See, e.g., Centers for Disease Control and Prevention, *Ten Great Public Health Achievements—United States 1900–1999*, 48 MORBIDITY AND MORTALITY WKLY. REP. 241 (April 1999).

¹⁶ *Id.*

¹⁷ See e.g., Jessica Mantel, *Tackling the Social Determinants of Health: A Central Role for Providers*, 33 GA. ST. U. L. REV. 217, 221 (2017).

¹⁸ Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFF. (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/>.

¹⁹ Reid Ewing & Shima Hamidi, *Compactness v. Sprawl: A Review of Recent Evidence from the United States*, 30 J. PLANNING LIT. 413, 425 (2015); PAULA BRAVEMAN ET AL., HOUSING AND HEALTH (2011), <https://www.rwjf.org/en/library/research/2011/05/housing-and-health.html>.

²⁰ KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 229–230 (1985).

²¹ See *id.* See also Heather Hughes, *Securitization and Suburbia*, 90 OR. L. REV. 359, 391–94 (2011) (tracing how laws governing commercial finance facilitate sprawl); Emily Badger, *How the Federal Government Dramatically Skews the U.S. Real Estate Market*,

Government-financed roads literally paved the way for the automobile.²² Development assumed its particular character because of single-use zoning laws as well as ordinances stipulating setbacks and parking.²³ The effects on human well-being, through physical, mental, and social pathways, are manifold.²⁴ Meanwhile, housing instability among renters gravely harms health, especially the health of children in the household.²⁵ Yet the U.S. Department of Housing and Urban Development is pursuing new work requirements to encumber the restricted housing assistance that is available.²⁶

The governance of work itself has permitted scheduling and other arrangements to offload ever more contingency onto workers, increasing toxic stress and fatigue.²⁷ And each sector we examine reveals the source of additional health burdens. Our transportation policies often create new accident and other risks, as the rise of the railroad²⁸ and the automobile have made clear.²⁹

CITYLAB (Jan. 8, 2013), <https://www.citylab.com/equity/2013/01/how-us-government-dramatically-real-estate-market/4337/> (documenting that, even recently, “FHA, for instance, funneled just one-tenth of its \$1.2 trillion in loan guarantees over the past five years toward multi-family housing”).

²² See Jackson, *supra* note 20.

²³ *Id.*

²⁴ Andrew L. Dannenberg et al., *The Impact of Community Design and Land-Use Choices on Public Health: A Scientific Research Agenda*, 93 AM. J. PUB. HEALTH 1500, 1500–08 (2003).

²⁵ Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS 1, 1 (2018).

²⁶ Kriston Capps, *HUD May Push New Work Requirements for Public Housing Residents*, CITYLAB (Feb. 2, 2018), <https://www.citylab.com/equity/2018/02/hud-floats-work-requirements-for-public-housing-residents/552173/>.

²⁷ See, e.g., HUMAN IMPACT PARTNERS, *SCHEDULING AWAY OUR HEALTH: HOW UNPREDICTABLE WORK HOURS AFFECT HEALTH AND WELL-BEING* (2016), http://www.humanimpact.org/wp-content/uploads/Scheduling-Away-Our-Health_rev3.pdf. Such transformation of the workforce has been facilitated by government designation of these workers as outside certain categories of protection. See, e.g., Karla Walter & Kate Bahn, *Raising Pay and Providing Benefits for Workers in a Disruptive Economy*, CTR. FOR AM. PROGRESS (Oct. 13, 2017), <https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/>. See generally JEFFREY PFEFFER, *DYING FOR A PAYCHECK* (2018).

²⁸ See generally MARK ALDRICH, *DEATH RODE THE RAILS: AMERICAN RAILROAD ACCIDENTS AND SAFETY 1828–1965* (2006). For discussion of how tort law responded to this externalization of costs by railroads onto others, see MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, 97–101 (1977) (observing that “most of the cases involving injuries to persons or property after 1840 were brought about by the activity of canals or railroads”).

²⁹ See generally JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1991). See e.g., Sandro Galea, *Making the Acceptable Unacceptable*, B.U. SCH. PUB. HEALTH (June 4, 2015), <https://www.bu.edu/sph/2015/06/14/making-the-acceptable-unacceptable/> (observing that “[d]espite a dramatic increase in number of vehicle miles

Our agricultural and economic development subsidies may be transferring risk from agricultural and fast-food enterprises to individuals. When we subsidize corn rather than fruits and vegetables, even as cheap high-fructose corn syrup has fostered excessive consumption of added sugars, do we consider the potential health effects?³⁰ Meanwhile the Small Business Administration has poured funding into fast-food franchises in low-income neighborhoods in the name of urban revitalization,³¹ even as land use, zoning and other regulations deterred supermarkets from locating there.³²

Socioeconomic conditions, including relative social position,³³ are powerful determinants of health.³⁴ Even when poverty and deprivation recede as health threats, the health problems due to socio-economic status (SES) factors do not disappear. The level of inequality in a society itself can impose health burdens on the community.³⁵ Comparing equally wealthy countries, health outcomes are superior in egalitarian societies compared to ones with steeper economic gradients.³⁶ Yet our tax policies

traveled, we reduced, in just one generation, the risk of motor vehicle fatality five-fold [through] road safety, advocacy for safer driving, and legal disincentives for unsafe driving”). For a recent example of our subsidization of transportation technologies, including self-driving automobiles presumably with inadequate regard for health risk, see Jerry Hirsh, *Elon Musk’s Growing Empire Is Fueled by \$4.9 Billion in Government Subsidies*, L.A. TIMES (May 30, 2015), <http://www.latimes.com/business/la-fi-hy-musk-subsidies-20150531-story.html>.

³⁰ See, e.g., Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, 112 ENVTL. HEALTH PERSP. A820, A821 (2004). See generally David Wallinga, *Agricultural Policy and Childhood Obesity: A Food Systems and Public Health Commentary*, 29 HEALTH AFF. 405 (2010).

³¹ Karina Christiansen, *Franchising Inequality*, 36 HEALTH AFF. 1141, 1141 (2017) (reviewing CHIN JOU, *SUPERSIZING URBAN AMERICA: HOW INNER CITIES GOT FAST FOOD WITH GOVERNMENT HELP* (2017)).

³² Alan Ehrenhalt, *The Grocery Gap*, GOVERNING (April 2006), <http://www.governing.com/topics/mgmt/Grocery-Gap.html>.

³³ See generally MICHAEL MARMOT, *STATUS SYNDROME: HOW SOCIAL STANDINGS AFFECT OUR HEALTH AND LONGEVITY* (2004); R.G. WILKINSON, *UNHEALTHY SOCIETIES: THE AFFLICTIONS OF INEQUALITY* (1996); R.G. WILKINSON, *MIND THE GAP: HIERARCHIES, HEALTH AND HUMAN EVOLUTION* (2000); Angus Deaton, *Health Inequality and Economic Development*, 41 PRINCETON J. ECON. LIT. 113 (2001). See also, Joshua Holland, *High Inequality Results in More US Deaths than Tobacco, Car Crashes and Guns Combined*, MOYERS & Co. (Apr. 19, 2014), <http://billmoyers.com/2014/04/19/high-inequality-results-in-more-us-deaths-than-tobacco-car-crashes-and-guns-combined/#.VY1GJPrs9dk.twitter>.

³⁴ See generally NORM DANIELS ET AL., *IS INEQUALITY BAD FOR OUR HEALTH?* (2001).

³⁵ NORMAN DANIELS, *JUST HEALTH CARE* 83–87 (2008).

³⁶ RICHARD WILKINSON, *MIND THE GAP: HIERARCHIES, HEALTH AND HUMAN EVOLUTION* (2000). See also MARMOT, *supra* note 33; Kate Pickett & Richard Wilkinson, *Income Inequality and Health: A Causal Review*, 128 SOC. SCI. & MED. 316 (2015); NANCY E. ADLER ET AL., *REACHING FOR A HEALTHIER LIFE: FACTS ON SOCIOECONOMIC STATUS AND HEALTH IN THE U.S.* (2008), http://www.macses.ucsf.edu/downloads/reaching_for_a_healthier_life.pdf.

are ever more unequal with predictable health impacts.³⁷ For instance, every ten percent reduction in the Earned Income Tax Credit increases infant mortality by 23.2 per 100,000 births.³⁸

Education is arguably the SES factor most profoundly correlated with health outcomes. Globally, educational status, especially that of the mother,³⁹ as well as literacy, particularly male-female disparity in adult literacy, are among the strongest predictors of life-expectancy.⁴⁰ Meanwhile our system leaves far too many behind as the fashioning of choice or charter policies and diversion of funding to private schools reinforce disparity in educational opportunity.⁴¹

Meanwhile, incarceration policies harm prisoner health in lasting ways, not to mention their effect on the children of incarcerated parents, and even on the health of those who merely live in communities with “toxic exposure” to mass incarceration.⁴²

As yet uncertain-health threats lurk in other non-health sector policies. For instance, special immunities granted to social media platforms

³⁷ See Tax Cuts and Jobs Act of 2017 (TJCA), Pub. L. No. 115-97, 131 Stat. 2054 (2017). See William Gale et al., *A Preliminary Assessment of the Tax Cuts and Jobs Act of 2017*, 71 NAT'L TAX J. 589 (2018) (assessing the TJCA and concluding that its effect would be to make the distribution of after-tax income less equal).

³⁸ See Peter A. Muennig et al., *Cost Effectiveness of the Earned Income Tax Credit as a Health Policy Investment*, 51 AM. J. PREVENTIVE MED. 874, 874–881 (2016). See also William H. Dow et al., *A Way Out from Rock Bottom: Economic Policies Can Reduce Deaths of Despair*, VOX CEPR POLICY PORTAL (July 7, 2019), <https://voxeu.org/article/economic-policies-can-reduce-deaths-despair>.

³⁹ See Emmanuela Gakidou et al., *Increased Educational Attainment and Its Effect on Child Mortality in 175 Countries Between 1970 and 2009: A Systematic Analysis*, 376 LANCET 959, 959 (2010).

⁴⁰ See DANIELS, *supra* note 35, at 88.

⁴¹ Dana Goldman & James P. Smith, *The Increasing Value of Education to Health*, 72 SOC. SCI. & MED. 1728, 1728 (2011); Stuart J. Olshansky et al., *Differences in Life Expectancy Due to Race and Educational Differences Are Widening, and Many May Not Catch Up*, 31 HEALTH AFF. 1803, 1803–04 (2012). See also Bruce D. Baker, *Exploring the Consequences of Charter School Expansion in U.S. Cities*, ECON. POL'Y INST. (Nov. 30, 2016), http://www.epi.org/publication/exploring-the-consequences-of-charter-school-expansion-in-u-s-cities/#_ref14.

⁴² See ERNEST DRUCKER, *A PLAGUE OF PRISONS: AN EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2013) (describing in Chapter 8 the effects of the “toxic exposure” to mass incarceration on individuals and their communities”); Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, 105 AM. J. PUB. HEALTH 138, 138 (2015); Christopher Wildeman, *Imprisonment and (Inequality in) Population Health*, 41 SOC. SCI. RES. 74, 74 (2012) (showing that parental incarceration substantially increases infant mortality risk); Ingrid A. Binswanger et al., *Epidemiology of Infectious Disease-Related Death After Release from Prison, Washington State, United States, and Queensland, Australia: A Cohort Study*, 131 PUB. HEALTH REPS. 574, 574 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4937119/>; @brujacontumbao, TWITTER (Jul. 5, 2019), <https://twitter.com/brujacontumbao/status/1147238292448075777>.

subsidize them at the expense of young people who face more mental health risks, particularly if they are vulnerable because of gender, sexual identity, or other characteristics.⁴³ Whole literatures exist to examine the relationship between global trade and human development.⁴⁴ Indeed, large-scale ideologically clustered policies, such as neoliberalism itself, have been interrogated for their role in population health and the wave of so-called “deaths of despair.”⁴⁵

A structured regime of HIAs would provide a way to frame some of these arguments in the language of a procedural right. We already in some contexts and in some states, provide that when non-health laws are deliberated, people are entitled to demand an accounting of the associated health burden and a justification of the attendant suffering.⁴⁶

When trade agreements and economic legislation affect health, as they have by fostering the global spread of tobacco, why are the trade proponents exempt from proving that there is no less health-restrictive alternative?⁴⁷ After all, nations that impose sanitary and phytosanitary policies must justify them as the least-trade-restrictive.⁴⁸ Health should be accommodated when laws grant government monopolies that raise the price of drugs, and indeed there are scattered but underutilized provisions for public health-based exceptions from government-granted exclusivities to inventions and plant varieties.⁴⁹ In theory, health rights could also trim back federal grants of liability relief to gun manufacturers.⁵⁰

⁴³ See 47 U.S.C. § 230 (2018) (providing liability relief to internet platforms). See also David D. Luxton et al., *Social Media and Suicide: A Public Health Perspective*, 102 AM. J. PUB. HEALTH S195, S195 (2012); Rae Ellen Bichell, *Suicide Rates Climb in U.S., Especially Among Adolescent Girls*, NAT'L PUB. RADIO (Apr. 22, 2016), <http://www.npr.org/sections/health-shots/2016/04/22/474888854/suicide-rates-climb-in-u-s-especially-among-adolescent-girls>.

⁴⁴ See, e.g., AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

⁴⁵ Ted Schrecker, *Neoliberalism and Health: The Linkages and the Dangers*, 10 SOC. COMPASS 952, 952–71 (2016). See also AUDREY CHAPMAN, *GLOBAL HEALTH, HUMAN RIGHTS, AND THE CHALLENGE OF NEOLIBERAL POLICIES* (2016).

⁴⁶ See *infra* text accompanying notes 82–88.

⁴⁷ See, e.g., BENN MCGRADY, *TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET* (2011).

⁴⁸ See Benn McGrady & Christina S. Ho, *Identifying Gaps in International Food Safety Regulations*, 66 FOOD & DRUG L.J. 183, 190 (2011).

⁴⁹ 7 U.S.C. § 2404 (2018); 28 U.S.C. § 1498(a) (2018); 35 U.S.C. § 203 (2018). See also 42 U.S.C. § 7608 (2018) (allowing compulsory licenses for devices for reducing air pollution); WORLD INTELL. PROP. ORG., *EXCLUSIONS FROM PATENTABILITY AND EXCEPTIONS AND LIMITATIONS TO PATENTEES' RIGHTS 2* (2015), https://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex1.pdf.

⁵⁰ 15 U.S.C. §§ 7901–7903 (2018). See also Charles E. Koop & George Lundberg, *Violence in America: A Public Health Emergency Time to Bite the Bullet Back*, 267 JAMA 3075 (1992). See also ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* (2003) (describing a case where a

Others have made more comprehensive cases for the “Health in All Policies” approach. The evidence continues to mount, and I cannot do it justice here. My case for HIAs is different; I aim to show that without HIAs, our current regime of regulatory analysis privileges competing non-health values using rights-grammar in a way that has long gone unobserved and unexplained. HIAs must be institutionalized in order to level the playing field. These other purposes compete with and burden health and we need some means of checking them. There are human costs to the unfettered pursuit of human welfare and development narrowly construed as consumption, production, and trade.⁵¹ HIAs supply a way of making these arguments so that government action advancing neoliberal interests at the expense of the populace can be blocked or mitigated.

B. HIA as a Negative Right

Use of HIA to call for an accounting of such government policies would not be a right to affirmative provision, but a claim of freedom from these health-harming measures. The claim contrasts with the approach of some libertarian scholars who conceptualize the negative right to health as a freedom from government restriction of *choice* in medical treatment.⁵² This narrower medical autonomy right would disfavor mandatory vaccination and possibly invalidate FDA pre-market drug approval requirements.⁵³ This is a blinkered, and not necessarily health-promoting view of the government’s role in health, as Jennifer Prah Ruger and others have lamented.⁵⁴ My project aims to show that a negative right to health properly conceived in the form of an HIA regime would meaningfully address some of the major health challenges we confront today.

Texas district court judge held that a man’s constitutional right to bear arms trumps the public safety policy encoded in by a federal law forbidding domestic violence offenders from owning firearms) (citing *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev’d and remanded* 270 F.3d 203, 261–63 (5th Cir. 2001) (reversed on the basis that though the federal law protecting public safety did not protect a right, it was sufficiently narrowly drawn to co-exist with the right to firearms)).

⁵¹ See, e.g., ORG. FOR ECON. COOPERATION AND DEV., FOR GOOD MEASURE: ADVANCING RESEARCH ON WELL-BEING METRICS BEYOND GDP (Joseph E. Stiglitz et al. eds., 2018), <https://doi.org/10.1787/9789264307278-en>.

⁵² See e.g., Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209, 2210–11 (2011); Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Nonfundamental Liberties*, 64 FLA. L. REV. 639 (2012); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1816 (2007).

⁵³ See Volokh, *supra* note 52, at 1816.

⁵⁴ Jennifer Prah Ruger, *Governing Health*, 121 HARV. L. REV. F. 43 (2017) (responding to Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007)).

A caveat first: the divide between positive and negative rights is overdrawn, and I would rather not reinforce it here. We live in such a complex world, and there is almost nothing about our current set of conditions that is not a function of some kind of state action.⁵⁵ Therefore, it is possible to characterize any action either as a demand to be free from state action of one particular kind, or as a demand for state action or forbearance of another.⁵⁶ Our existing economic rights are not negative rights exactly: they are decisions to assure government backing for certain economic holdings.⁵⁷

To the degree that such artificial divisions between positive and negative rights are still used to police the boundaries of U.S. rights discourse, however, I am arguing that a right to health in the form of a right to HIA falls well within these boundaries.

C. *What is a Health Impact Assessment?*

HIA has been defined as “a combination of procedures, methods, and tools by which a policy, program, or project may be judged as to its potential effects on the health of a population, and the distribution of those effects within the population.”⁵⁸ In short, the HIAs I propose would subject federal government action to a routine accounting of its impact on health and the distribution of health.⁵⁹

⁵⁵ See, e.g., CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 17 (1997) (“Whether people have a preference for a commodity, a right, or anything else is in part a function of whether the government has allocated it to them in the first instance. There is no way to avoid the task of initially allocating an entitlement (short of anarchy).”). See also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470, 470 (1923).

⁵⁶ SUNSTEIN, *supra* note 55, at 17; Hale, *supra* note 55, at 470.

⁵⁷ See also BERNARD HARCOURT, *THE ILLUSION OF A FREE MARKET: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 47 (2010) (explaining, “In all markets, the state is present. Naturally, it is present when it fixes the price of a commodity such as wheat or bread. But it is also present when it subsidizes the cultivation or production of wheat, when it grants a charter to the Chicago Board of Trade, when it permits trading of an instrument like a futures contract, when it protects the property interests of wheat wholesalers.”).

⁵⁸ Andrew L. Dannenberg et al., *Use of Health Impact Assessment in the U.S.: 27 Case Studies, 1999–2007*, 34 *AM. J. PREVENTATIVE MED.* 241, 241 (2008) (citation omitted). See also COMM. ON HEALTH IMPACT ASSESSMENT ET AL., *IMPROVING HEALTH IN THE UNITED STATES: THE ROLE OF HEALTH IMPACT ASSESSMENT* 5 (2011) [hereinafter “For the Public’s Health”] (defining HIA much as the Gothenburg paper, *infra* note 74, does, to mean “a systematic process that uses an array of data sources and analytic methods and considers input from stakeholders to determine the potential effects of a proposed policy, plan, program, or project on the health of a population and the distribution of those effects within the population. HIA provides recommendations on monitoring and managing those effects.”).

⁵⁹ In this article, I explore the policy of a federal HIA requirement, although, HIA requirements at state, transnational and other levels are also important steps forward.

HIAs conventionally involve six stages: screening, scoping, assessment, recommendation, reporting, and finally, monitoring and evaluation.⁶⁰ Sometimes called the Liverpool approach, the sequence of steps has been specified in the literature as follows:

[A]pplying a screening procedure to select policies or projects for assessment; defining the scope of the health impact assessment in terms of depth, duration, spatial and temporal boundaries, methods, outputs, and the like; policy analysis; profiling the areas and communities likely to be affected by the policy; collecting qualitative and quantitative data on potential impacts from stakeholders and key informants, using a predefined model of determining health impact; evaluating the importance, scale, and likelihood (and, if possible, cost) of potential impacts; searching for the evidence to validate data; undertaking option appraisal (i.e., developing and choosing from alternative options) and developing recommendations for action; and monitoring and evaluating results following implementation.⁶¹

HIA differs from some related tools.⁶² Risk assessments, for instance, are focused on discrete chemical exposure scenarios rather than the comprehensive consideration of a wider array of upstream health determinants.⁶³ CBA includes less qualitative information than HIA, and HIA emphasizes a deliberative process, rather than an analytical approach, especially in the screening, scoping, assessment, and recommendation steps.⁶⁴

1. Link Between Health Impact Assessment and Equity

Built into the conventional way HIA is conducted are a number of equity-promoting features, even leaving aside for the moment how equity may already be necessary to the project of population health.⁶⁵ First, the

⁶⁰ See For the Public's Health, *supra* note 58, at 7.

⁶¹ Eileen O'Keefe & Alex Scott-Samuel, *Human Rights and Wrongs: Could Health Impact Assessment Help?*, 30 J.L. MED. & ETHICS 734, 734–35 (2002).

⁶² See, e.g., *Different Types of Health Assessment*, CTR. FOR DISEASE CONTROL AND PREVENTION: HEALTHY PLACES, https://www.cdc.gov/healthyplaces/types_health_assessments.htm (last updated Oct. 21, 2016); *Other Impact Assessments*, WORLD HEALTH ORG., http://www.who.int/hia/tools/other_IA/en/ (last visited Jan. 15, 2018).

⁶³ JAMES G. HODGE, KIM WEDENAAR, & LEILA BARRAZA, THE NETWORK FOR PUB. HEALTH LAW, INTEGRATION OF HEALTH AND HEALTH IMPACT ASSESSMENTS VIA ENVIRONMENTAL POLICY ACTS 8 (2016), https://www.networkforphl.org/_asset/ltcwv8/PE-W-HIA-NEPA-Stage-1—Report-FINAL.pdf.

⁶⁴ For the Public's Health, *supra* note 58, at 127–28.

⁶⁵ See, e.g., DANIELS, *supra* note 35, at 85 (explaining that because the effect of SES factors on health is steeper for those who are worse off, therefore “transfers of resources from the best-off to the worst-off SES groups would improve aggregate health and would

identification of affected groups and communities is integral to the methodology, as is evident in the six stages described above.⁶⁶ Also, HIAs are inseparable from assessments of health disparity. HIAs by nature screen for differential impact, thereby necessarily identifying inequity. Moreover, an HIA detects disparities in baseline health in the process of measuring for differential impact and therefore involve health disparity impact assessment as well. Furthermore, the analytical steps described above specifically call for the participation of stakeholders in contributing information or data to be deliberatively considered.⁶⁷ Some observers have also argued that when non-health policies impose detrimental health burdens, those burdens “disproportionately affect[] the already disadvantaged”⁶⁸ such that focusing on health impacts will tend to be equity-focused, rather than neutral to distribution.⁶⁹

There is also accumulating evidence, as discussed earlier, that inequality is a major determinant driving poor health outcomes, and therefore any measure that screens for detriment to health will tend to identify and capture policies that exacerbate inequality.⁷⁰

As is the case with all rights, however, this equity-promoting valence of HIAs can be disrupted or reversed.⁷¹ The National Research Council

have little negative effect, if any, on the best-off groups”). The implication is that improving population health, certainly doing so within a resource horizon, necessitates equity. Moreover, inequality itself may negatively impact health outcomes. See DANIELS, *supra* note 34. For another view of how population health inherently contemplates health equity see David Kindig & Greg Stoddart, *What Is Population Health?*, 93 AM. J. PUB. HEALTH 380, 380–81 (2003).

⁶⁶ STAKEHOLDER PARTICIPATION WORKING GRP. OF THE 2010 HIA IN THE AMS. WORKSHOP, GUIDANCE AND BEST PRACTICES FOR STAKEHOLDER PARTICIPATION IN HEALTH IMPACT ASSESSMENT -VERSION 1.0- (2012), http://www.pewtrusts.org/~media/assets/2012/03/01/guidance_best_practices_stakeholder_participation_hia.pdf.

⁶⁷ See *supra* text accompanying note 64.

⁶⁸ See O’Keefe & Scott-Samuel, *supra* note 61, at 735.

⁶⁹ *Id.* See also Ray Quigley et al., *Health Impact Assessment International Best Practice Principles: Special Publication Series Number 5*, INT’L ASS’N FOR IMPACT ASSESSMENT: FARGO USA (2006), (on file with author) (outlining a set of values underlying HIAs). But see For the Public’s Health, *supra* note 58, at 94.

⁷⁰ Richard Wilkinson & Kate Pickett, *The Science Is In: Greater Equality Makes Societies Healthier and Richer*, EVONOMICS (Jan. 26, 2017), <http://evonomics.com/wilkinso-n-pickett-income-inequality-fix-economy/>. See also *supra* text accompanying notes 33–36.

⁷¹ See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2188 (2013); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1589 (1984); Morton J. Horwitz, *Rights*, 23 HARV. C.R-C L. L. REV. 393, 396–97 (1988); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 182 (Wendy Brown & Janet Halley eds., 2002); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26 (1993); Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 893 (2014); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714 (2011); Peter

report is careful to note that the equity-favoring tilt of HIAs is a contingent and possibly temporary feature: “HIA could conceivably contribute to health inequities if more socioeconomically or politically advantaged communities develop greater capacity to demand HIA or if health issues that are highlighted in HIA are focused on the health needs of the advantaged.”⁷²

D. History and Precedent

Some have sourced the HIA tool’s origins in the World Health Organization (WHO) Ottawa Charter on Health Promotion of 1986, which called for the “systematic assessment of the health impact of a rapidly changing environment—particularly in areas of technology, work, energy production, and urbanization.”⁷³ WHO followed with a Gothenburg Consensus document on HIAs in 1999.⁷⁴ In 2006, HIAs were recommended as standard in screening large World Bank projects and are now adopted by the Bank’s private sector counterpart, the International Finance Corporation.⁷⁵ Their use has proliferated globally. British Columbia and Quebec require HIAs for all government legislation.⁷⁶ HIAs are included in the Thai constitution.⁷⁷ The London mayor’s office construed HIAs as part of the office’s statutory remit for a number of years.⁷⁸ Finland, Australia, New Zealand, Wales, and the European Community have to varying extents adopted HIA practices.⁷⁹ WHO has

Westen, *The Rueful Rhetoric of “Rights”*, 33 UCLA L. REV. 977, 1003 (1986). See also Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS. 33, 34 (2009). See also Solomon R. Benatar, *Human Rights in the Biotechnology Era*, 2 BMC INT’L HEALTH AND HUM. RTS. 1, 3 (2002). See also JONATHAN WOLFF, *THE HUMAN RIGHT TO HEALTH* 36–38 (2012).

⁷² For the Public’s Health, *supra* note 58, at 94.

⁷³ WORLD HEALTH ORG., *THE OTTAWA CHARTER FOR HEALTH PROMOTION* (1986), <https://www.who.int/healthpromotion/conferences/previous/ottawa/en/index1.html>.

⁷⁴ See generally EUR. CENTRE FOR HEALTH POL’Y & WHO REG’L OFF. FOR EUR., *GOTHENBURG CONSENSUS PAPER: HEALTH IMPACT ASSESSMENT MAIN CONCEPTS AND SUGGESTED APPROACH* (1999), http://www.healthedpartners.org/ceu/hia/hia01/01_02_gothenburg_paper_on_hia_1999.pdf.

⁷⁵ Ben Harris-Roxas & Elizabeth Harris, *Differing Forms, Differing Purposes: A Typology of Health Impact Assessment*, 31 ENVTL. IMPACT ASSESSMENT REV. 396, 396 (2010).

⁷⁶ For the Public’s Health, *supra* note 58, at 131.

⁷⁷ *Thailand’s Constitution of 2017*, CONSTITUTE PROJECT § 58 (Aug. 13, 2019), https://www.constituteproject.org/constitution/Thailand_2017.pdf?lang=en.

⁷⁸ J. Mindell et al., *Health Impact Assessment as an Agent of Policy Change: Improving the Health Impacts of the Mayor of London’s Draft Transport Strategy*, 58 J. EPIDEMIOLOGY & COMTY. HEALTH 3, 169, 169–71 (2004), <http://jech.bmj.com/content/58/3/169>.

⁷⁹ For the Public’s Health, *supra* note 58, at 15, 141, 144, 159, 162; LAURA GOTTLIEB & PAULA BRAVEMAN, *HEALTH IMPACT ASSESSMENT: A TOOL FOR PROMOTING HEALTH IN ALL POLICIES* 6 (2011), https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rw

also promoted HIA methods in part through the WHO Healthy Cities European Network.⁸⁰

This practice is already in increasingly extensive, if sporadic, use in U.S. states and localities.⁸¹ In one study, twenty-two of thirty-six sampled jurisdictions in the U.S. have made some legal provision for HIAs when environmental and energy policies are considered, while seven out of the thirty-six jurisdictions do so for agriculture or transportation policies.⁸² HIAs are sometimes included as part of the environmental impact assessment required by the National Environmental Policy Act (NEPA), which I discuss in greater depth in Part II.C. NEPA regulations include health among the “direct, indirect, and cumulative effects” of the proposed action and alternatives that must be considered in environmental impact reporting.⁸³ While EPA can take health into account by using alternative tools, it has deliberately chosen the HIA methodology within its environmental assessments as part of its Sustainable and Healthy Communities Research Program.⁸⁴ EPA concluded in its April 2014 briefing paper that employment of the HIA methodology “helped raise awareness and bring health into decisions outside traditional health-related fields.”⁸⁵ During Obama’s second term, Susan Bromm declared an EPA preference for HIAs over narrower risk assessments in the environmental impact reporting process because they capture the range of direct, indirect,

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⁸⁰ Erica Ison, *Health Impact Assessment in a Network of European Cities*, 90 J. URB. HEALTH 105, 105 (2013); *Health Impact Assessment*, WORLD HEALTH ORG. REG’L OFF. FOR EUR., <http://www.euro.who.int/en/health-topics/environment-and-health/urban-health/activities/health-impact-assessment> (last visited October 24, 2019).

⁸¹ Dannenberg et al., *supra* note 58. See also, JONATHON HELLER ET AL., PROMOTING EQUITY THROUGH THE PRACTICE OF HEALTH IMPACT ASSESSMENT 8 (2013), <https://kresge.org/sites/default/files/Promoting-equity-through-health-impact-assessment-2013.pdf>.

⁸² ALICIA CORBETT ET AL., LEGAL REVIEW CONCERNING THE USE OF HEALTH IMPACT ASSESSMENTS IN NON-HEALTH SECTORS 4 (2012), <https://www.issuelab.org/resources/13060/13060.pdf>. See also Doug Farquhar, *An Analysis of State Health Impact Assessment Legislation*, NAT’L CONFERENCE ST. LEGISLATURES (July 17, 2014), <http://www.ncsl.org/research/environment-and-natural-resources/an-analysis-of-state-health-impact-assessment-legislation635411896.aspx>.

⁸³ 40 C.F.R. §1502.16 (2019); § 1508.7–8.

⁸⁴ Memorandum from Susan E. Bromm & Michael Slimak to Regional NEPA Directors (Nov. 10, 2015), https://www.epa.gov/sites/production/files/2016-3/documents/hia_memo_from_bromm.pdf [hereinafter Bromm & Slimak Memo].

⁸⁵ SCIENCE IN ACTION: INNOVATIVE RESEARCH FOR A SUSTAINABLE FUTURE, OFF. RES. AND DEV., U.S. ENVTL. PROT. AGENCY (2014) (on file with the author). See also Jessica Wentz, *Incorporating Public Health Assessments into Climate Change Action*, in CLIMATE CHANGE, PUBLIC HEALTH, AND THE LAW 403, 415 (Michael Burger & Justin Gundlach eds., 2018).

and cumulative effects.⁸⁶ For various reasons, however, including institutional insularity and gaps in research connecting policies to their ultimate health effects, this HIA mechanism remains underutilized, and health effects are not always identified in the environmental impact assessment process.⁸⁷ Furthermore, NEPA-based health assessments cannot account for the health effects of many policies like tax measures that operate through economically or socially mediated pathways.⁸⁸

E. Model of a Right as a Privileged Distributed Interest Triggering Special Justification Duties

So far, I have shown some ways to deploy HIAs, but I have not yet demonstrated my claim that HIAs are a form of a right to health. Here, I use an account of rights as weighted or prioritized political norms with three features we would plausibly recognize as characteristic of rights.

Rights are typically (though to varying extents) differentiated from “utilitarian goals” or “policy” values.”⁸⁹ For instance, Ronald Dworkin observes that these non-rights values can be pursued in a cumulative way, and indeed frictionlessly traded-off against one another, while rights cannot be handled thus.⁹⁰ By contrast, policies, unlike rights, can be pursued and maximized in the aggregate.⁹¹ Thus “policy goals” constitute a category of political norms that can be handled through CBA.⁹²

1. Individuation/Claiming

A right, however, is a value that resists cumulative consideration. First, it requires some sort of individuation to be properly honored.⁹³ “Goals” are advanced in any instance where they prevail such that if one person’s welfare suffers in any given transaction, another transaction can make up for that welfare loss. The impairment of a right in one case (say the deprivation of a right to vote), however, is not rectified by giving someone two votes next time. In Dworkin’s example, the protection of an

⁸⁶ Bromm & Slimak Memo, *supra* note 84.

⁸⁷ See HODGE, *supra* note 63, at 19–20.

⁸⁸ See e.g., PUB. HEALTH ENG., PSYCHOSOCIAL PATHWAYS AND HEALTH OUTCOMES: INFORMING ACTION ON HEALTH INEQUALITIES 50 (2017), <https://www.gov.uk/government/publications/psychosocial-pathways-and-health-outcomes>.

⁸⁹ For instance, there are those whose positions are more strictly grounded in the deontological tradition, and those who are on the more rule-utilitarian end of the spectrum. See e.g., Samaha, *supra* note 10, at 290.

⁹⁰ See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 91–92 (1978).

⁹¹ *Id.* at 91.

⁹² See, e.g., Ackerman & Heinzerling, *supra* note 9, at 1556. See also Sidney Shapiro & Christopher Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 438 (2008).

⁹³ DWORKIN, *supra* note 90, at 91 (describing rights as an “individuated political aim”).

individual's liberty to purchase contraception does not mean that the next individual's liberty can be violated because "enough sexual liberty" has been secured.⁹⁴ No matter how much you serve the value that is a "right," the value is still undermined if it is not recognized in any single case to which it applies. This individuation follows from Dworkin's imputation of principled integrity and consistency as features of rights.⁹⁵

Though the individuation of rights for Dworkin flows from his distinctive account, other scholars also insist upon the individuated aspect of rights, though grounded in their own outlooks. Feinberg operationalizes this characteristic of rights in an even more demanding way, arguing that true rights must be able to be "claimed" by the rights-holder to distinguish them from duty-based obligations which may have incidental beneficiaries.⁹⁶ This characteristic that rights can be claimed by the individual rights-holder is widely recognized, but dialed up or down in stringency based on the theory of rights.

MacCormick describes the line between rights and duties as less a demarcation and more an adaptable continuum:

There may indeed be simple cases in which some general duty—e.g. a duty not to assault—is imposed upon everyone at large with a view to protecting the physical security of each and every person in society, and where the 'right not to be assaulted' is simply the correlative of the duty not to assault; no doubt in such simple cases the 'terminology of rights' does not enable us to say very much more than can be said in the terminology of duty. But it may be well adapted even in this simple case to expressing a reason why people aggrieved by breaches of certain duties *should* be empowered to take various measures and actions at law to secure remedies therefore.⁹⁷

⁹⁴ DWORKIN, *supra* note 90, at 88.

⁹⁵ See DWORKIN, *supra* note 90, at 81.

⁹⁶ See e.g., Joel Feinberg, *The Nature and Value of Rights*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 143, 154–55 (1980).

⁹⁷ Donald N. MacCormick, *Rights in Legislation*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 189, 203–04 (Peter Hacker & Joseph Raz eds., 1979). See also, Donald N. MacCormick, *Dworkin as a Pre-Benthamite*, 87 PHIL. REV. 585, 599 (1978) [hereinafter *Pre-Benthamite*] (on the difference between rights and duties: "When positive laws establish rights . . . what they do is secure individuals . . . in the enjoyment of some good or other. But not by way of a collective good collectively enjoyed, like clean air in a city, but rather an individual good individually enjoyed by each, like the protection of each occupier's particular environment as secured by the law of private nuisance. Such protection is characteristically achieved by imposing duties on people at large, for example, not to bring about certain kinds of adverse changes to the environment of land or premises occupied by someone else, and further duties, which may be invoked at the instance of any aggrieved occupier, to make good damage arising from adverse environmental change.").

Feinberg himself does not require that claimability necessarily include the ability to invoke judicial redress or even a legal rather than moral claim.⁹⁸ Moreover, Raz cites examples, such as children's rights (which children are often not empowered to raise) that belie the notion that "to have a legal right is to have control over its corresponding duty, i.e. to have legal powers to take protective legal action."⁹⁹

Nevertheless, rights do need to be distinguished from general duties to the public at large and therefore in making the case for impact assessments as rights, we must prove that the obligations they impose can be described as distributed to some individual rights-holder, regardless of whether the rights-holder can always seek legal redress for violations.

2. Privileged: Needing Special Justification to Overcome Presumption

In addition to some claimability, however loosely or stringently construed, rights have other distinctive characteristics.

In a rough way we might say for values to be rights, they must presumptively withstand compromise in favor of competing values.¹⁰⁰ One must offer special justification surmounting the presumption in order to harm a value that has the status of a right.¹⁰¹ By one account, rights are prioritized, or even ranked¹⁰² by means of "heavier weighting for principles concerning rights than for pure policies."¹⁰³ While MacCormick uses the term "weighting" to describe even Dworkin's view of the priority of rights, Dworkin himself might have demurred.¹⁰⁴ His prioritization of the right would permit the countervailing value to outweigh only (1) when "the values protected by the original right are not really at stake," (2) "some competing right . . . would be abridged," or (3) "the cost to society . . . would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved."¹⁰⁵ To the extent one could characterize this view of rights as

⁹⁸ Feinberg, *supra* note 96, at 154.

⁹⁹ Joseph Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 4, 19 (1984).

¹⁰⁰ See DWORKIN, *supra* note 90, at 93 (making clear that background moral rights are not necessarily justiciable rights). DWORKIN, *supra* note 90, at xi (describing rights as "political trumps held by individuals[,] such that merely choosing to favor one interest is insufficient to justify an act promoting that interest, particularly if it comes at the expense of another kind of privileged interest).

¹⁰¹ DWORKIN, *supra* note 90, at 199.

¹⁰² DWORKIN, *supra* note 90, at 117.

¹⁰³ See *Pre-Benthamite*, *supra* note 97, at 592.

¹⁰⁴ Others have challenged whether Dworkin himself really adhered to this view. See generally Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 310 (2000).

¹⁰⁵ DWORKIN, *supra* note 90, at 200.

a presumption that could be overcome by a weighty consideration, the consideration would have to be extremely weighty indeed.

Others however, are not so strict. Schauer characterizes values as rights if they, like armor, can resist “low justification” or “small bore” countervailing reasons, but not larger bore reasons for violation.¹⁰⁶ Robert Alexy has formulated a theory that rights are subject to a form of weighted balancing.¹⁰⁷ Nevertheless, certain structural features of a right are similar, even if the stringency of the standards to qualify under each property might vary with the theory of rights to which one subscribes.

All accounts share the requirement of special justification to overcome a right, and that special justification is structured often as a “proportionality test.” Alison Young explains why:

[R]ights . . . rul[e] out some methods of balancing and giv[e] an element of additional weight to . . . rights in the balancing process Proportionality is the best means of achieving this balancing because the test of proportionality is capable of assigning greater weight to . . . rights in the balancing exercise, and of restricting the range of justifications that can be used to restrict a . . . right.¹⁰⁸

David Beatty also concludes that “proportionality review is the ‘ultimate’ rule of law for resolving constitutional questions about rights,”¹⁰⁹ and Aharon Barak claims, “[p]roportionality, therefore, can be defined as the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible.”¹¹⁰

¹⁰⁶ Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993).

¹⁰⁷ See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 388 (Julian Rivers trans., 2002).

¹⁰⁸ Alison L. Young, *Proportionality Is Dead: Long Live Proportionality!*, in *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* 43, 47 (Grant Huscroft et al. eds., 2014).

¹⁰⁹ Vicki Jackson, *Constitutional Rights in an Age of Proportionality*, 124 YALE L. J. 3094, 3094 n.1 (2015) (quoting DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159–188 (2004)).

¹¹⁰ AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 3 (2012). He goes on to identify the “four sub-components of proportionality” under which “a limitation of a constitutionally protected right will be constitutionally permissible if:

- (i) it is designated for a proper purpose, (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose, (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) . . . a proper relation (. . . or ‘balancing’) between the importance of achieving the proper purpose and the social importance of preventing the limitation of the constitutional right.

It is therefore no surprise that the presumption-privileged tradeoff of a right in U.S. law figures commonly as a species of triggered proportionality test with pre-set weights.¹¹¹ Our constitutional rights doctrine often requires (1) a showing of sufficiency of purpose, (2) means-ends rationality, and (3) least-restrictive means. I will refer to these last two inquiries under the umbrella term, “fit.” The tradeoff must meet a fit threshold presumably because the right is so important that the infringement, indeed the entire extent of infringement, must be justified by the sufficiently weighty countervailing purpose, without excess.¹¹² Many of these accounts of proportionality also add an explicit “balancing” prong, which I exclude here because it is implicit in the notion that the privileged value can be overcome by the decision-makers in this context.¹¹³

3. Three Common Elements

From the accounts summarized above, I distill a minimal set of common elements. They are not the only ways to protect a right.¹¹⁴ These elements, if present, however, signal that a value is being treated as a right, particularly against the background of flat CBA by default, which predominates in the policy realm.¹¹⁵ We can be alerted to rights-reasoning at work whenever we see an interest whose trade-off requires a special showing of 1) sufficiency of purpose, 2) a special showing of fit, and 3) confers some claim upon an individual rights-holder, albeit not always a judicial claim.

Id.

¹¹¹ See generally Jackson, *supra* note 109 (documenting how many tests for U.S. constitutional rights qualify as proportionality tests, with some exceptions such as in First Amendment doctrine concerning speech inciting violence, and Fourth Amendment law). See also Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1316–1317 (2008).

¹¹² See ALEXY, *supra* note 107, at 229, 395–97, 399 (subdividing the “fit” prong into “suitability” and “necessity” inquiries, while excluding the “purpose” or “ends-test” as a necessary step, but separate from proportionality analysis, which he maintains is neutral as to ends).

¹¹³ See Jackson, *supra* note 109, at 3118–19, 3140–41, 3141 n.222 (describing how in the U.S. we assimilate the balancing step to the “less restrictive means” prong. The elision lies in how courts will demand a less restrictive means, but fail to say whether the alternate means would be “equally effective in carrying out the government’s legitimately relevant interests, or instead that even if the [means] were less effective, [it] would be a sufficient alternative given the relatively greater importance of [the right intruded upon.]”). Jackson, *supra* note 109, at 3118–19.

¹¹⁴ See Jackson, *supra* note 109, at 3094 (discussing other methods in the U.S. constitutional tradition, like categorical rules). See also BARAK, *supra* note 110, at 493–527 (discussing methods like categorization or absolute rights, particularly as applied to a right’s “core”).

¹¹⁵ See *supra* text accompanying notes 5–7.

II. RIGHTS IN REGULATORY AND LEGISLATIVE IMPACT ASSESSMENT STATUTES

Fundamental rights under U.S. substantive due process doctrine receive strict scrutiny, as do certain First Amendment rights.¹¹⁶ Vicki Jackson has pointed out other areas of U.S. constitutional law, like Takings doctrine, where proportionality is used.¹¹⁷ Fallon describes how strict scrutiny in the form of “compelling interest” and “narrow tailoring” requirements arose to privilege certain constitutional rights over other constitutional values in the decades after the *Lochner*-era, when courts were trying to both a) correct for a lopsided solicitude for economic libertarian concerns (as I claim exists now in RIA domain) and b) render meaningful the protection of some rights even amid an overall acceptance of policy-tradeoffs (which the current vogue for CBA represents as well).¹¹⁸

Few proceed to note, however, that RIA requirements are also rife with this three-part logic of heightened justification.

The scholarly attention in this erstwhile backwater of administrative law has focused mostly on CBA and its critiques, chief among which is the methodology’s insensitivity to non-fungible, non-utilitarian values.¹¹⁹ But it turns out that CBA is not the only kind of regulatory analysis that must be routinely conducted. We have accrued a list of special burdens that trigger their own procedural requirements and even substantive judicial review. These RIA measures include the Paperwork Reduction Act (PRA), the Regulatory Flexibility Act (RFA) as amended by the Small Business Enforcement Regulatory Flexibility Act (SBERFA), the Unfunded Mandates Reform Act (UMRA), and the National Environmental Policy Act (NEPA).

Apart from these widely recognized RIAs,¹²⁰ my inventory includes a number of less-canonical provisions that are similar in structure. The Endangered Species Act permits burdens to biodiversity only under strict conditions including those of fit and purpose. The Family Impact Assessment, which applied for a few years in the late 1990’s, arguably qualifies even though it was passed as a rider to an appropriations bill. Some Executive Orders (EO’s) even resemble these rights-like RIAs, despite the lack of judicial enforcement available for EO’s.¹²¹ For instance,

¹¹⁶ See Fallon, *supra* note 111, at 1316–17.

¹¹⁷ See Jackson, *supra* note 109, at 3104–05.

¹¹⁸ See Fallon, *supra* note 111, at 1270.

¹¹⁹ See *supra* note 9.

¹²⁰ MAEVE P. CAREY, CONG. RES. SERV., COST-BENEFIT AND OTHER REQUIREMENTS IN THE RULEMAKING PROCESS 2–15 (2014), <https://fas.org/sgp/crs/misc/R44813.pdf> (including these four in the discussion).

¹²¹ See PETER STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASE AND

the Reagan-era EO 12630 (1988) required special assessment of regulatory burdens on private property even when the scrutinized regulations did not rise to the level of regulatory takings.

The Religious Freedom Restoration Act (RFRA), passed in 1993, is analogous because independently of the Constitution, it singles out certain burdens as triggering heightened justification involving showings of fit and purpose for valid regulatory or legislative action. The chief difference between RFRA and the classic RIA is that such showings can be enforced by the mechanism of judicial review. We shall, however, see that in the Regulatory Flexibility Act, NEPA, Title II of UMRA, and the Endangered Species Act, judicial review is available as well.¹²²

I argue that in each of these examples, we have elected to impose a heightened justification requirement that has the structure of a right, exhibiting three key elements 1) requiring sufficiency of purpose, 2) demanding careful fit, and 3) conferring some degree of claim to enforcement. Claimability may not rise to full judicial recourse but may simply mean that individual beneficiaries have some procedural avenue for demanding the promised justification such that they are plausibly considered rights-holders as distinct from incidental beneficiaries.

Not all RIAs are rights-like, and some fall outside my model, as I explain later.¹²³ First, certain RIAs exhibit no vision of specific claimants. They therefore resemble duties to the public-at-large far more than rights.¹²⁴ Single-sector impact assessments also fall outside the model.¹²⁵ I discuss later why these impact assessments, which do not privilege the value against *all* competing values, are also excluded from my catalog of rights-like RIAs.¹²⁶

For those examples that I contend do fall within the domain of rights-like impact assessments, I will demonstrate that each of the three rights-distinguishing elements is present, although to varying degrees.

A. *The Paperwork Reduction Act (PRA)*

I start by examining the Paperwork Reduction Act (PRA), 44 U.S.C. §3501 et seq. This legislation prohibits regulatory action that imposes information collection without a procedural review of the paperwork burden. The procedural review required under the PRA must be cleared through the Office of Management and Budget (OMB) in the Executive

COMMENTS 173–76, 213–29 (11th ed. 2011). *See also, infra* text accompanying note 327.

¹²² *See infra* Part III.F and III.G.

¹²³ *See infra* Part III.F and III.G.

¹²⁴ *See infra* Part III.F and accompanying notes 349–352.

¹²⁵ *See infra* Part III.G and accompanying notes 353–357.

¹²⁶ *See infra* Part III.G and accompanying notes 353–357.

Office of the President.

Moreover, PRA, like many RIA measures, advances important hidden purposes that are not reflected in the outward-facing title of the measure. For instance, the PRA accomplishes the important task of authorizing the Office of Information and Regulatory Analysis (OIRA) within the OMB. This entity, which serves as a clearinghouse for regulations and certain other administrative actions, has roots in a deregulatory agenda.¹²⁷ Whether it retains this cast today is in some dispute,¹²⁸ but the creation of the OIRA, if nothing else, centralizes the Administration's control over regulations, a policy goal that does not necessarily coincide with paperwork reduction. As we will see, hidden policy goals are a common feature among the measures instituting RIAs.

1. Scope

Each of the RIAs I examine demands additional procedure and heightened justification beyond background cost-benefit judgments. To differentiate the especially encumbered actions from background governmental action, we need some standard to determine when the heightened scrutiny applies. The RIA procedures are only triggered based on whether there is some threshold burden to the chosen value. The fact that RIAs emphasize their "impact assessment" function derives in part from the necessary assessment of threshold "impact" before the "right" of heightened justification is triggered. Thus, I examine the threshold trigger, or scope of application, of each RIA.

The PRA's requirements are not triggered by paperwork, per se, but by regulatory action imposing "information collection." Information collection is defined in the regulations as "[t]he obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information . . . imposed on, ten or more persons." and

¹²⁷ See, e.g., Nestor M. Davidson & Ethan J. Lieb, *Regleprudence at OIRA and Beyond*, 103 GEO. L. J. 259, 280, n.95, n.76 (2015) (describing Nixon's deregulatory agenda as crucial in the history of regulatory review). See also, Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37 (2011). See also Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1248 (1987) (recounting the origins of regulatory analysis in the Nixon, then Ford, Carter and Reagan administrations.).

¹²⁸ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–2319 (2001) (describing how the Clinton Administration used OMB and OIRA in a pro-regulatory way, including through the use of "prompt letters" and other Presidential directives). See also Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). But see Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 332 (2014) (discussing how the Obama White House used OIRA to block regulatory action).

“[i]ncludes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.”¹²⁹ As we shall see, this information collection could well occur electronically, without imposing any “paperwork” at all, but such burden would still garner special scrutiny.¹³⁰

This condition upon agency information collection applies not only to Cabinet-level agencies but independent regulatory agencies as well.¹³¹

The provisions of the PRA impose a presumption against this type of burden which must be surmounted by means of special justification corresponding to the three features of rights.¹³²

2. Sufficiency of Purpose

Under 44 U.S.C. § 3506(c), “[E]ach agency shall . . . establish a process . . . to review each collection of information . . . for ‘an evaluation of the *need* for the collection of information.’”¹³³ The need must be articulated in terms such as whether “the information has practical utility,” according to the certification requirement under § 3506(c)(3)(A), and the claim of “practical utility” must be subjected to public comment.¹³⁴ Thus, a declaration of utility and need, or in other words, “sufficient purpose,” must be produced.

3. Fit

Meanwhile under 44 U.S.C. § 3506(c)(2)(A) and (3)(A), the agency must “[E]valuate whether the proposed collection of information is *necessary* for the proper performance of the functions of the agency.”¹³⁵ This requirement of necessity demands a level of means-ends fit between the action imposing the burden and the purpose which it is meant to serve.

Section 3506(2)(A)(iv) tasks the agency with certifying whether it has “minimize[d] the burden of the collection of information on those who are to respond” ostensibly demanding the least-restrictive means.

The fit requirement is even more rigorous should the paperwork burden fall on members of the special protectorate of small businesses.

¹²⁹ 5 C.F.R. § 1320.3(c) (2019).

¹³⁰ See *infra* text accompanying notes 152–159 (describing the E-Government Act of 2002 which amended and supplemented the PRA).

¹³¹ CAREY, *supra* note 120, at 14–15 (saying that “independent agencies, as well as independent regulatory agencies” fall within the PRA’s coverage. By contrast, Executive Orders, including those that impose default cost-benefit analysis requirements, do not always reach independent or independent regulatory agencies.).

¹³² See *supra* Part I.

¹³³ 44 U.S.C. § 3506(c)(1)(A)(i) (2018); 5 C.F.R. § 1320.5(d)(1)(iii) (2019).

¹³⁴ 44 U.S.C. § 3506(c)(2)(A)(i).

¹³⁵ *Id.* § 3506(c)(2)(A), (3)(A) (emphasis added); § 3506(c)(3)(A).

Section 3506(c)(3) obliges the agency not merely to “certify . . . that each collection of information . . . (C) reduces . . . the burden [of information collection] on persons . . . including with respect to small entities.” It also proceeds to list specific mitigation measures for small businesses that could be used to achieve this “reduc[tion] to the extent practicable and appropriate,” such as different compliance standards, timetables, or exemptions.¹³⁶ This additional specification increases the pressure for some kind of exemption or special treatment of small entities in the collection of information. This apparatus further illustrates the hidden purposes and privileging of groups that may not be apparent from the outward framing of the RIA measure.¹³⁷

PRA contains a rather strict mechanism forcing lookback tailoring of even prior approved information collections. Under §3507(g), the OMB Director “may not approve a collection of information for a period in excess of 3 years.” Any extension would then require another process of review. Meanwhile under § 3513, the OMB Director “shall periodically review selected agency information resource management activities,” thus serving as another channel of accountability for continual adjustment of fit and monitoring for continued sufficiency of purpose.¹³⁸

4. Claiming

Under § 3508, the Director of OMB may provide “the agency and other interested persons an opportunity to be heard, or to submit statements in writing.” This hearing provision serves as one way for beneficiaries to enlist someone, namely the OMB Director, to hold the agency to account for the PRA requirements. Section 3508 admonishes that “[t]o the extent, if any, that the Director determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information.” The necessity determination, by the terms of § 3508, “includ[es] whether the information shall have practical utility.” Thus, insufficient purpose or lack of means-ends rationality can be claimed by a rights-holder in a hearing to invalidate the measure imposing a paperwork burden.

This OMB hearing provision admittedly employs the permissive term “may,” but another provision, § 3517(b) provides that “[a]ny person may request the Director to review any collection of information conducted by

¹³⁶ *Id.* § 3506(c)(3)(C)(i)–(iii).

¹³⁷ I will later suggest that one “hidden” or “complementary” purpose of HIAs is equity and will show how that can be built into the HIA. *See infra* text accompanying notes 377.

¹³⁸ I will also later suggest that lookback monitoring for continued justification should be built into HIAs so that existing arrangements can be subjected to HIA as well. *See infra* text accompanying notes 391–395.

or for an agency to determine, if, under this subchapter, a person shall maintain, provide, or disclose the information to or for the agency. Unless the request is frivolous, the Director *shall* . . . , respond to the request within 60 days . . . and take appropriate remedial action, if necessary.”¹³⁹

Moreover, persons can claim individualized immunities under § 3512, the “Public Protection” provision of the PRA. The section stipulates that “[n]o person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter” if the agency has not received OMB approval of its compliance with the PRA in the form of a valid OMB control number. Under § 3512(b), “[t]he protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.” The PRA implementing regulations apply this section to benefits conditional upon the information collection as well: “the agency shall not treat a person’s failure to comply, in and of itself, as grounds for withholding the benefit or imposing the penalty. The agency shall instead permit respondents to prove or satisfy the legal conditions in any other reasonable manner.”¹⁴⁰

Apart from the normal administrative law requirement to take comments into account,¹⁴¹ the PRA statute insists under § 3507(d)(2) that in the final rule, an agency “shall explain how any collection of information contained in the final rule responds to the comments, if any, filed by the Director or the public, or the reasons such comments were rejected.”¹⁴²

Thus, the heightened justification requirement triggered by paperwork burdens is arguably held and enforceable by individual members of the public, rather than constituting a mere duty to uphold the collective good.

5. History

Freedom from paperwork was not a value suddenly elevated to this privileged status without prior groundwork. It was originally recognized as a concern in the Federal Reports Act of 1942,¹⁴³ but this legislation was criticized in the 1970’s as ineffectual, and was finally superseded by the PRA in 1980.¹⁴⁴ Stuart Shapiro and Deanna Moran observe that the interest groups supporting the PRA were principally businesses and state

¹³⁹ 44 U.S.C. § 3517 (b)(1)–(2) (emphasis added). *See also* 5 C.F.R. § 1320.14(c) (2019).

¹⁴⁰ 5 C.F.R. § 1320.6(c).

¹⁴¹ *See United States v. Nova Scotia Food Products*, 568 F.2d 240, 252 (2d Cir. 1977).

¹⁴² 44 U.S.C. § 3507(d)(2).

¹⁴³ Federal Reports Act of 1942, Pub. L. No. 77-831, 56 Stat. 1078.

¹⁴⁴ Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

and local governments.¹⁴⁵ Meanwhile, the diffuse nature of the benefits from paperwork meant that no interest group came forward and supported its collection.¹⁴⁶

As Samaha notes, the PRA itself was followed by the Paperwork Reduction Reauthorization Act of 1986,¹⁴⁷ then further amended in the Paperwork Reduction Act of 1995,¹⁴⁸ the Economic Growth and Regulatory Paperwork Reduction Act of 1996,¹⁴⁹ the Government Paperwork Elimination Act of 1998,¹⁵⁰ and the Small Business Paperwork Relief Act of 2002.¹⁵¹

This history suggests that any of the RIAs that are not now easily classifiable as a form of subconstitutional “right” may still be a “right-in-the-making.”

Congress’ ongoing shaping of the PRA also injected additional or supplementary values into the right. For instance, in 2002, Congress passed the E-government Act of 2002, which exists now as a statutory note to the provisions codifying the Paperwork Reduction Act.¹⁵² This note imposed a so-called “Privacy Impact Assessment” as an auxiliary to the PRA requirements, and indeed they are often completed together as one process.¹⁵³ Section 208(b)(1)(A)(B) of the E-Government Act¹⁵⁴ requires

¹⁴⁵ See Stuart Shapiro & Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 141, 161–62, 161 n.116, 162 n.124 (2016).

¹⁴⁶ *Id.* at 161 n.113; see Tozzi, *supra* note 127, at 55 (President Carter himself signed the PRA over the objections of his Cabinet).

¹⁴⁷ Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-335 (Title VIII, §§ 801–820 of the Continuing Appropriations Resolution).

¹⁴⁸ Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163.

¹⁴⁹ Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered titles of the U.S. Code).

¹⁵⁰ Government Paperwork Elimination Act of 1998, Pub. L. No. 105-277, §§ 1701–10, 112 Stat. 2681, 2749–51 (codified at 44 U.S.C. § 3504 (2018)) (involving electronic submissions).

¹⁵¹ Small Business Paperwork Relief Act of 2002, Pub. L. No. 107-198, 116 Stat. 729 (codified in scattered sections of 44 U.S.C.).

¹⁵² E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, Pub. L. No. 107-347, 116 Stat. 2921; 44 U.S.C. § 3501 note (2018) (Waiver of Paperwork Reduction).

¹⁵³ OFF. MGMT. & BUDGET, EXEC. OFF. PRESIDENT, M-03-22, OMB GUIDANCE FOR IMPLEMENTING THE PRIVACY PROVISIONS OF THE E-GOVERNMENT ACT OF 2002 Attachment A, § II(D) (2003) [hereinafter OMB Guidance Attachment A, § II(C)(2)], https://obamawhitehouse.archives.gov/omb/memoranda_m03-22/ (providing that agencies undertaking new electronic information collections may conduct and submit the privacy impact assessment [PIA] to OMB . . . jointly, and listing the items that must be then added for PIA purposes, such as “a statement detailing the impact the proposed collection will have on privacy” and “1. whether individuals are informed that providing the information is mandatory or voluntary[;] 2. opportunities to consent, if any, to sharing and submission of information[;] 3. how the information will be secured.”).

Certain procedures are also triggered under the E-government Act when there are no “information collections” but simply upon procurement of an information system. Because

that before “initiating a new collection of information that will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting . . . contacting of a specific individual . . . each agency shall . . . conduct a privacy impact assessment.”¹⁵⁵

The privacy impact assessment also consists of requirements to address sufficiency of purpose, i.e., “why the information is being collected” and its “intended use.”¹⁵⁶ Fit is demanded in the form of a requirement to consider less-restrictive means, namely by addressing “opportunities to consent . . . to sharing and submission of information” and addressing “how the information will be secured.”¹⁵⁷

Also, to the extent that the electronic information collection results in the maintenance of a “system of records” with individually identifiable information,¹⁵⁸ that system of records is then governed by another regime, the Privacy Act of 1974 which states, “[e]ach agency that maintains a system of records shall maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order.”¹⁵⁹

The value of liberty from government-imposed paperwork is thus elided with the value of privacy.

*B. Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (“SBREFA”)*¹⁶⁰

The RFA, like the PRA, was modified by Congress, most notably by the SBREFA in 1996. The RFA enshrines a different favored value, namely small business freedom from economic burden. An agency imposing such a burden must make a special showing of heightened justification, and this justification is expressly subject to judicial review.

here I am interested in impact assessments that apply across a range of agency policy-making activity, not just, for instance, building IT systems, I de-emphasize the procurement-related impact assessment in this discussion and focus on the privacy impact assessment triggered by information collection.

¹⁵⁴ E-Government Act § 208 (b)(1)(A)(ii)–(B)(i).

¹⁵⁵ *Id.*

¹⁵⁶ E-Government Act § 208 (b)(2)(B)(ii)(II)–(III); 44 U.S.C. § 3501 note (Waiver of Paperwork Reduction).

¹⁵⁷ E-Government Act § 208(b)(2); 44 U.S.C. § 3501 note. *See also* OMB Guidance Attachment A, § II(C)(2), *supra* note 153.

¹⁵⁸ 5 U.S.C. § 552a(a) (4)–(5) (2018) (defining “system of records” and “record”).

¹⁵⁹ *Id.* § 552a(e)(1).

¹⁶⁰ *Id.* §§ 601–612.

1. Scope

The RFA, like the PRA, applies to independent regulatory agencies as well.¹⁶¹ For the justification requirements to attach though, a rule must reach the threshold of having a “significant economic impact on a substantial number of small entities.”¹⁶² Because these terms are malleable, an agency head must certify if she finds that a rule does *not* meet those standards and is therefore not subject to the analysis requirements.¹⁶³ As discussed *infra*, this certification, which must be accompanied by a statement of factual basis, is subject to judicial review.¹⁶⁴

Small entities are defined to include small businesses, small nonprofits, and “small government jurisdictions.”¹⁶⁵

The RFA also applies to “interpretative rules” of the IRS, so long as they are published in the Federal Register, and “only to the extent that such interpretative rules impose on small entities a collection of information requirement.”¹⁶⁶ The concerns of the PRA and the RFA intertwine once more, suggesting that many of these RIAs are part of an interconnected agenda.

2. Sufficiency of Purpose

The initial regulatory analysis that must accompany the proposed rule is called the initial “reg-flex.”¹⁶⁷ In it, an agency must describe “reasons why action by the agency is being considered.”¹⁶⁸ The agency must also supply “a statement of the need for, and objectives of, the rule.”¹⁶⁹ These showings must be made above and beyond the mere statement of the “impact of the rule on small entities,” to which the required analysis presumably could have been restricted and still have constituted a “regulatory impact analysis.”

3. Fit

The initial reg-flex must also describe “any significant alternatives to the proposed rule which accomplish the stated objectives . . . and which minimize any significant economic impact of the proposed rule on small

¹⁶¹ CAREY, *supra* note 120, at 13.

¹⁶² 5 U.S.C. § 605(b).

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 611(a)(2).

¹⁶⁵ *Id.* § 601(3)–(6).

¹⁶⁶ *Id.* § 603(a). See also Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L. REV. 123, 128 (1997).

¹⁶⁷ Richard J Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 546 (1998).

¹⁶⁸ 5 U.S.C. § 603(b)(1).

¹⁶⁹ *Id.* § 604(a)(1). See also *id.* § 603(b)(2).

entities.¹⁷⁰ The statute then lists particular alternatives that should be discussed including, “differing compliance or reporting requirements or timetables,” “clarification, consolidation, or simplification of compliance,” “use of performance rather than design standards” and “exemption.”¹⁷¹ Agencies are therefore subject to a fairly stringent least-restrictive means analysis. When the final rule is promulgated, each final “reg-flex” must also include:

[A] description of the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the . . . reasons for selecting the alternative adopted . . . and why each one of the other significant alternatives to the rule . . . was rejected.¹⁷²

The measure also imposes a lookback requirement. Each agency must review its rules every ten years to see if they fall within the scope of the RFA and whether they must be changed or rescinded “to minimize any significant economic impact of the rules upon a substantial number of such small entities.”¹⁷³

4. Claiming

Small businesses must be notified so they have an opportunity to comment, and § 604(a)(2) requires that the final reg-flex contain a summary of comments and responses to those comments.

Initially, RFA did not separately authorize judicial review of agencies’ actions. Courts, however, would consider the contents of the reg-flex analysis in determining whether the rule was “arbitrary and capricious” under the Administrative Procedure Act (APA)¹⁷⁴ SBREFA, passed by the Gingrich Congress in 1996,¹⁷⁵ added a judicial review provision. Small entities can now go to court to challenge an agency’s actual analysis of final rules, an agency’s threshold certification of no significant impact, and the agency’s ten-year lookback review outcomes.¹⁷⁶ Relief can include a deferment of enforcement against small entities, which is considerably more favorable than the usual remand *nonvacatur* which leaves the contested rule in place while the agency reconsiders the rule on remand.¹⁷⁷

¹⁷⁰ *Id.* § 603(c).

¹⁷¹ *Id.* § 603(c)(1)–(4).

¹⁷² *Id.* § 604(a)(6).

¹⁷³ *Id.* § 610.

¹⁷⁴ *See, e.g.,* Michigan v. Thomas, 805 F.2d 176, 187–88 (6th Cir. 1986).

¹⁷⁵ *See* Shapiro & Moran, *supra* note 145, at 142, 172.

¹⁷⁶ 5 U.S.C. § 611(a)(2) (giving jurisdiction “to review any claims of noncompliance with §§ 601, 604, 605(b), 608(b) and 610”).

¹⁷⁷ *See* Pierce, *supra* note 167, at 547–48.

SBREFA also authorizes small entities to recover attorneys' fees,¹⁷⁸ and stipulates a right of intervention for the Chief Counsel for Advocacy of the Small Business Administration in any such action.¹⁷⁹

The Chief Counsel for Advocacy of the Small Business Administration acts as a representative for small businesses, and is someone the agency promulgating the rule must also reach out to at key points.¹⁸⁰ With respect to three particularly villainized agencies, EPA, OSHA, and now CFPB,¹⁸¹ the advocacy role of the Chief Counsel is enlarged. She must convene a review panel for each EPA, OSHA, or CFPB rule,¹⁸² comprised of governmental officials and tasked with consulting with individual representatives of affected small entities¹⁸³ to review the initial reg-flex and proposed rule.¹⁸⁴ The language stipulates that "where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required."¹⁸⁵ This structure of representative accountability exists alongside the canonically rights-based framework of judicial review.

5. History

The RFA was enacted in 1980, itself a deregulatory moment.¹⁸⁶ Then in 1996, it was, as described, substantially amended to further favor small businesses.¹⁸⁷ The political significance of SBREFA's passage in 1996 extends beyond small business, gesturing toward the entire political agenda of the anti-regulatory Gingrich-led Republican Revolution. A crucial part of the agenda of the new Republican majority in that highly charged time was regulatory reform,¹⁸⁸ including measures that would have codified the

¹⁷⁸ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 § 231, 110 Stat. 857, 862-63 (amending 5 U.S.C. § 504(a)).

¹⁷⁹ 5 U.S.C. § 612.

¹⁸⁰ See, e.g., *id.* § 605(b) (notifying Chief Counsel of any certification of lack of "significant economic impact on a substantial number of small entities"); *id.* § 603(a) (requiring transmittal of initial reg-flex to the Chief Counsel).

¹⁸¹ *Id.* § 609(b) (applying additional requirements for initial reg-flex by "covered agencies"); *id.* § 609(d) (defining covered agency).

¹⁸² *Id.* § 609(b)(2)-(3).

¹⁸³ *Id.* § 609(b)(2).

¹⁸⁴ *Id.* § 609(b)(4).

¹⁸⁵ 5 U.S.C. § 609(b)(6).

¹⁸⁶ See Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213 (1982).

¹⁸⁷ Regulatory Flexibility Act Amendments, Pub. L. No. 104-121, 110 Stat. 864 (1996).

¹⁸⁸ See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 110 (1997).

default requirement of CBA.¹⁸⁹ Indeed, this particular idea, sometimes referred to as “the supermandate,” lingers to the present-day.¹⁹⁰ Despite the significant political energy that the Gingrich Congress expended, their omnibus regulatory reform bills were unable to overcome the opposition of Democrats, including then-President Clinton.¹⁹¹ SBREFA was among the only pieces of the Republican agenda that did ultimately wend its way to completion.

C. National Environmental Policy Act (NEPA)¹⁹²

NEPA is the godparent of all regulatory analysis requirements.¹⁹³ Passed in 1969 and signed by Richard Nixon on January 1, 1970, it requires agencies to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on . . . the environmental impact of the proposed action.”¹⁹⁴ In effect, it made “environmental protection a part of the mandate of every federal agency and department.”¹⁹⁵

1. Scope

The condition of a detailed statement applies to “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”¹⁹⁶

“Significantly affecting” is not defined in the statute, but NEPA regulations contain a device for how to make this threshold determination. Agencies must conduct Environmental Assessments (EAs) which “briefly provide sufficient evidence and analysis for determining whether to prepare

¹⁸⁹ See also, Pierce *supra* note 167, at 546.

¹⁹⁰ See e.g., Portman-Heitkamp Regulatory Accountability Act, S. 951, 115th Cong. § 3(b)(5) (2017).

¹⁹¹ See SINCLAIR, *supra* note 188, at 110–13.

¹⁹² 42 U.S.C. § 4321 *et seq.* (2018).

¹⁹³ See McGarity, *supra* note 127, at 1247 (noting that “[t]he idea that agencies should prepare a separate regulatory analysis document describing the costs and benefits of proposed and final rules and credible rule-making alternatives probably originated with the National Environmental Policy Act of 1969”).

¹⁹⁴ National Environmental Policy Act of 1969 (NEPA) § 102(1)(C)(i), 42 U.S.C. § 4332(1)(C)(i).

¹⁹⁵ CalvertCliff’s Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

¹⁹⁶ 42 U.S.C. § 4332(1)(C). Lookback review might not be available in the sense that previously approved major federal actions do not continue to be subject to this procedural burden for continued effect, even if the environmental circumstances of those prior actions have changed. See Norton v. S. Utah Wilderness All., 542 U.S. 55, 73 (2004).

an environmental impact statement or a finding of no significant impact.”¹⁹⁷ Thus, some minimal environmental assessment is necessary in order to determine whether a full Environmental Impact Statement (EIS) must be conducted. The device of the “finding of no significant impact” (FONSI) is the flip-side of the EIS in the sense that if an EA concludes in a FONSI, then an EIS does not need to be conducted.¹⁹⁸ Sometimes substantive environmental mitigation commitments are made at this stage to obtain what is called a “mitigated FONSI” and thereby avoid the EIS process.¹⁹⁹ EA’s and FONSI’s are also subject to judicial review.²⁰⁰

2. Sufficiency of Purpose

Unlike its RIA progeny, the NEPA statute does not require an analysis of sufficiency of purpose in so many words. The regulations interpreting NEPA do, however. A decision contrary to the most environmentally preferable alternative must be described in terms of the other “economic and technical considerations and agency statutory missions . . . including any essential considerations of national policy” that weighed against the environmentally preferable alternative.²⁰¹ This language requires that the countervailing factors be weighty.

3. Fit

The NEPA statute does specifically demand a showing of fit. The agency must articulate in its detailed statement under § 4332(1)(C) “any adverse environmental effects which cannot be avoided should the proposal be implemented.”²⁰² Moreover, it must describe “alternatives to the proposed action.”²⁰³ This language has been interpreted as a procedural requirement to consider, though not necessarily adopt, less environmentally damaging alternatives.²⁰⁴ The regulations interpreting NEPA, however, do require that the decisionmaker *record* the environmentally preferable alternative, and then describe how the agency decided against this alternative based on the weighty purposes described above.²⁰⁵

¹⁹⁷ 40 C.F.R. § 1508.9 (2019).

¹⁹⁸ *Id.* § 1508.13.

¹⁹⁹ Bradley Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 935 (2002).

²⁰⁰ *See* Save Our Ten Acres (SOTA) v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973).

²⁰¹ 40 C.F.R. § 1505.2.

²⁰² National Environmental Protection Act § 202(1)(C)(ii), 42 U.S.C. § 4332(1)(C)(ii) (2018).

²⁰³ *Id.* § 4332(1)(C)(iii).

²⁰⁴ *See, e.g.,* Vt. Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council, 435 U.S. 519, 558 (1978).

²⁰⁵ 40 C.F.R. § 1505.2 (requiring a “Record of Decision,” or “ROD”).

4. Claiming

While NEPA did not include an express judicial review provision, courts have reviewed for NEPA compliance using APA § 702.²⁰⁶ Courts apply a “hard look” standard to judge an agency’s execution of its obligations under NEPA,²⁰⁷ and a regulation can be enjoined if the agency’s performance of these functions is so inadequate that the regulation is thereby and capricious.²⁰⁸ Moreover, mitigation measures adopted as a condition of the FONSI are judicially enforceable.²⁰⁹

5. History

NEPA does not simply establish an impact assessment requirement. There are important non-obvious purposes hitched to NEPA as well. The measure created the Council on Environmental Quality (CEQ), within the Executive Office of the President (EOP), with duties to assist and advise the President on the quality of the environment across the various “programs and activities of the Federal Government.”²¹⁰ NEPA created a Science Advisory Board which must be consulted on proposed criteria, standards, limitations, or regulations under a range of environmental statutory authorities. These institution-building provisions in NEPA elevate environmental issues within the White House²¹¹ and subject environmental regulation to across-the-board involvement by the Science Advisory Board.

NEPA has proven surprisingly enduring. Congressional amendment has been fairly minor,²¹² although many new laws that Congress passes contain NEPA exemptions.²¹³ CEQ promulgated binding NEPA regulations in the late 1970s, but on the authority of President Carter’s

²⁰⁶ See, e.g., *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1353–54 (9th Cir. 1994) (where the justiciability of compliance with NEPA was conceded precisely on the question of whether the consideration of human health effects—albeit measured by methods other than HIA—were adequate to satisfy NEPA requirements).

²⁰⁷ See, e.g., *Robertson v. Methow Valley Citizen’s Council*, 490 U.S. 332, 338 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

²⁰⁸ See, e.g., *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 106 (1983); *Coeur D’Alene Lake v. Kiebert*, 790 F. Supp. 998, 1010 (D. Idaho 1992); see generally Nicholas C. Yost, *The Background and History of NEPA*, NEPA LITIG. GUIDE (Ferlo et al. eds., 2d ed. 2012).

²⁰⁹ *Tyler v. Cisneros*, 136 F.3d 603 (9th Cir. 1998).

²¹⁰ 42 U.S.C. § 4342 (2018).

²¹¹ See Yost, *supra* note 108, at 1.

²¹² Bradley Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 336 n.14 (2004).

²¹³ See, e.g., Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205 n.9 (1998) (counting the number of exceptions to NEPA authorized by Congress by the year 1997, and finding 28); see also William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 496 (1990).

Executive Order 11,991, rather than on the basis of statutorily delegated rulemaking authority.²¹⁴ These regulations have operated through the decades, despite being based on what one observer describes as “such a shaky legal foundation.”²¹⁵ NEPA, which declares a Congressional policy of “recogniz[ing] that each person should enjoy a healthful environment,”²¹⁶ has achieved a degree of entrenchment. Indeed, one commentator notes, “If environmental law has a superstatute, it is the procedural NEPA,”²¹⁷ referencing the notion that certain laws attain a status of popular acceptance and entrenchment such that they become durable normative fixtures exerting influence beyond ordinary legislation.²¹⁸ Indeed, this capsule history of NEPA supports the argument that RIAs are instruments of popular struggle to inscribe conceptions of rights in extra-constitutional space.

D. *Unfunded Mandates Reform Act (UMRA)*²¹⁹

The Unfunded Mandates Reform Act (UMRA) was passed in 1995 and imposes heightened scrutiny on the uncompensated economic burdens that subnational governments shoulder because of federal mandates. A “federal intergovernmental mandate,” the target of UMRA, is defined as “any provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local or tribal governments . . . or would reduce or eliminate the amount of authorization of appropriations for . . . the purpose of complying with any such previously imposed duty.”²²⁰ What is notable about UMRA is that it applies to legislation.²²¹ Title I of

²¹⁴ Exec. Order No. 11,991 (“EO”), 40 C.F.R. § 1500 (2018). The EO directs agencies to “comply with the regulations issued by [CEQ] except where such compliance would be inconsistent with statutory requirements.” *Id.* § 2(g).

²¹⁵ See Karkkainen, *supra* note 212, at 336.

²¹⁶ National Environmental Protection Act § 101(c), 42 U.S.C. § 4331(c) (2018).

²¹⁷ See, e.g., Jedidiah Purdy, *Coming into the Anthropocene*, 129 HARV. L. REV. 1619, 1619 (2016); see also Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963, 963 (1972) (describing NEPA as an “environmentalist Magna Carta”).

²¹⁸ See generally ESKRIDGE & FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2013).

²¹⁹ Unfunded Mandate Reform Act of 1995 (UMRA) § 2, 2 U.S.C. § 1501 (2018) and scattered sections.

²²⁰ *Id.* § 658(5). This definition is simplified for exposition purposes here. The definition features certain economic thresholds as well, and a number of exclusions, including a complex partial exclusion of conditions on spending, which are differentiated from conditional provisions attached to entitlement programs. Statutes imposing federal intergovernmental mandates trigger reporting requirements, but these are only enforceable above a certain economic threshold. *Id.* Also, in the process of bill passage, an amendment was added such that federal mandates upon the *private sector* (rather than just upon subnational governments) would also trigger scrutiny. *Id.* § 658(6)–(7); see *infra* note 269.

²²¹ See Unfunded Mandate Reform Act § 202, 2 U.S.C. § 1532.

the Act addresses legislative action, and Title II concerns regulatory action. I discuss Title II first, and then return to Title I.

1. Regulatory Sufficiency of Purpose

Title II applies to proposed rulemaking “likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or the private sector, of \$100 million or more (adjusted annually for inflation) in any one year.”²²²

Such actions must be accompanied by a § 202 written statement of “anticipated . . . benefits . . . as well as the effect of the Federal mandate on health, safety, and the natural environment,” or in other words, a statement of sufficient purpose.²²³ Health is anticipated to be a governmental purpose that can compete with and burden the favored value of state and local economic freedom.

2. Regulatory Fit

UMRA § 205 clearly states that “the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the . . . least burdensome alternative that achieves the objective of the rule.”²²⁴ This fit requirement permits the presumption against intergovernmental burden to be overcome only in two circumstances: first, with an explanation by the head of the relevant agency, or second, if these “provisions are inconsistent with law.”²²⁵

3. Regulatory Claiming

The agency must engage in “consultation with elected representatives of the affected State, local, and tribal governments”²²⁶ and the § 202 written statement must describe this consultation when the rule is promulgated.²²⁷ Such written statement must also include a summary of comments with the agency’s responses.²²⁸ Again, this type of provision provides affected entities with some protected expectation of participation.

In fact, this expectation turns out to be enforceable under UMRA § 401(a). According to that section, “compliance or noncompliance . . . with the [written statement] provisions of . . . [§] 202” are subject to judicial

²²² *Id.* § 1532(a).

²²³ *Id.* § 1532(a)(2).

²²⁴ *Id.* § 1535(a).

²²⁵ *Id.* § 1535(b).

²²⁶ *Id.* § 1532.

²²⁷ Unfunded Mandate Reform Act § 202, 2 U.S.C. § 1532(b).

²²⁸ *Id.* §§ 1532(a)(5)(A)–(C).

review within 180 days of promulgation. Though the “sufficiency of purpose” requirement is subject to judicial review, the fit requirements of § 205 do not seem to be within the scope of this provision, since they are contained in § 205, rather than § 202.²²⁹ The review that is provided under this section is described as APA § 706(1) review, namely, review to “compel agency action unlawfully withheld or unreasonably delayed.”²³⁰ Because any enforcement action would concern whether the agency complied with the statement requirement, the remedy could consist merely of judicial order that the agency prepare the statement. By the terms of the judicial review provision itself, “inadequacy or failure to prepare such [a] statement . . . shall not be used as a basis for staying, enjoining, invalidating, or otherwise affecting such agency rule.”²³¹ Moreover, a rule of construction tacked on at the end of the section disingenuously disclaims the creation of “any right or benefit, substantive or procedural,”²³² presumably weakening the strength of judicial enforcement available under the regulatory accountability provisions of UMRA.

4. Legislative Sufficiency of Purpose

I now return to the portion of UMRA that applies to legislative action. Under Title I, when a Congressional committee reports out legislation that includes “any Federal mandates,” the legislation must be accompanied by a reporting of not only costs anticipated in the first five fiscal years, but also the “benefits anticipated from the Federal mandates (including the effects on health and safety and the protection of the natural environment).”²³³ Such a declaration of benefit could be understood as a requirement to state a sufficient purpose for the imposition of the federal mandate.

What leaps out about this § 423(c) committee reporting duty is that no point of order is available to enforce this requirement.²³⁴ UMRA amended

²²⁹ *Id.* §§ 1571(a)(1)–(2), (5).

²³⁰ *Id.*

²³¹ *Id.* § 1571(a)(3).

²³² *Id.* § 1571(b)(2).

²³³ Congressional Budget and Impoundment Control Act of 1974 (Congressional Budget Act) §§ 423(c)(1)–(2), (as amended by Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 658d(c)(1)–(2) (2018)). Congressional Budget Act § 423(c), 2 U.S.C. § 658c, assigns a duty to the Congressional Budget Office (CBO) to estimate the cost of federal mandates in proposed legislation.

²³⁴ Congressional Budget Act § 423(f) requirement for a CBO estimate to accompany the committee reported bill is protected by point of order. Budget Act § 425(a)(1) says that “[i]t shall not be in order in the Senate or the House of Representatives to consider (1) any bill or joint resolution that is reported by a committee unless the committee has published a statement of the Director on the direct costs of Federal mandates in accordance with [section 423(f)] before such consideration.” 2 U.S.C. § 658d(A)(1). But this section does not mention the need to accord with § 423(c), which contains the other committee reporting requirements.

a two-decade old law, the Congressional Budget and Impoundment Control Act of 1974, often referred to as the “Congressional Budget Act of 1974.” UMRA inserted many of its requirements directly into the framework of the Congressional Budget Act.²³⁵ Indeed the section number used to signify this obligation, § 423, refers to the section of the Congressional Budget Act added by UMRA containing this committee reporting duty in subsection (c).

As a general matter, Congress’ overall budgeting framework is enforced by an elaborate system of points of order.²³⁶ After all, for Congress’ budget to have meaning, it must impose consequences for the passage of laws that exceed the budget.²³⁷ The Congressional Budget Act thus subjects such budget non-conforming legislation to a point of order that any member of Congress can raise.²³⁸ To proceed with the legislation once such an objection has been raised, the relevant house must waive the implicated rule,²³⁹ a step which according to the Congressional Budget Act framework, requires a supermajority vote.²⁴⁰

The UMRA committee reporting requirement under § 423, however, is not subject to a point of order.²⁴¹ Even if it were, the regular committee process is increasingly a relic of the past as many bills in our hyper-polarized political context are steered by leadership directly to the floor.²⁴²

These circumstances do not mean that UMRA is unenforceable as applied to legislation. UMRA contains a second tier of requirements apart from § 423. Section 425 of the UMRA-amended Congressional Budget Act imposes an even stronger condition upon significant mandates exceeding an economic threshold (roughly \$50 million in direct costs) and

²³⁵ Congressional Budget and Impoundment and Control Act of 1974 is often referred to as the “Congressional Budget Act of 1974,” 2 U.S.C. §§ 601–88.

²³⁶ Christina S. Ho, *Budgeting on Autopilot: Do Sequestration and the Independent Payment Advisory Board Lock-In Status Quo Majority Advantage?*, 50 TULSA L. REV. 695, 716 (2015).

²³⁷ *Id.* at 716–17.

²³⁸ Congressional Budget Act §§ 302(f)(1)–(2); 2 U.S.C. §§ 633(f)(1)–(2).

²³⁹ Bill Heniff, Jr., *Overview of the Authorization-Appropriations Process*, CONG. RES. SERV. 1, 2 (2012), <https://www.senate.gov/CRSPubs/d2b1dc6f-4ed2-46ae-83ae-1e13b3e24150.pdf>.

²⁴⁰ While usually only a majority vote is required to override the ruling of a chair when such ruling is appealed to the whole Senate, some points of order under the budget process require 60 votes to waive. 2 U.S.C. § 621 note; see Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113, 1174 (1997).

²⁴¹ See UMRA § 425(a)(1), 2 U.S.C. § 658d(a)(1) (by contrast subjecting the CBO reporting requirement, as opposed to the committee reporting requirement, to a point of order).

²⁴² Garrett, *supra* note 240, at 1142.

this condition, if not met, is vulnerable to a point of order.²⁴³ The point of order, unlike some others within the Congressional Budget Act, requires a mere majority to overcome.²⁴⁴ Various aspects of the § 425 condition are discussed below, but it requires, roughly speaking, some indication that the mandate's burdens will be mitigated.²⁴⁵ While this point of order does not apply expressly to the absence of sufficient purpose for the mandate, one could view a vote to overcome the point of order as a legislative determination that the purpose of legislation containing the unfunded mandate *is* sufficient to overcome the presumption.²⁴⁶ Forcing a separate vote on this issue alone can be viewed as a requirement of extra clarity on the sufficiency of purpose to infringe on the favored value of states' economic freedom.²⁴⁷

5. Legislative Fit

As we mentioned in discussing Title II of UMRA earlier, before promulgating a rule for which a written statement is required, "the agency shall . . . consider . . . [and] select the . . . least burdensome alternative."²⁴⁸

At first glance, the articulation of a similar fit requirement is not a condition for a legislative intergovernmental mandate, especially one protected by the less enforceable § 423(c) committee reporting obligation. This initial impression, however, gives way on closer inspection, as we describe later.²⁴⁹ Oddly, for a legislative *private* mandate, the committee report must include "a description of the actions, if any, taken by the committee to avoid any adverse impact on the private sector."²⁵⁰ But this requirement does not apply to a legislative *intergovernmental* mandate. Like RFA, UMRA establishes a private protectorate whose economic interests are procedurally differentiated.

Yet, the real enforcement cudgel, the point-of-order under § 425 of the Congressional Budget Act, applies only to *intergovernmental*

²⁴³ Congressional Budget Act § 425(a)(2) (as amended by UMRA), 2 U.S.C. § 658d(a)(2).

²⁴⁴ Garrett, *supra* note 240, at 1161 (explaining that a majority vote is needed to sustain a ruling of the chair to overrule the point of order, or to appeal a ruling of the chair sustaining the point of order, or voting on the point of order even if the Chair has declined to rule). Garrett, *supra* note 240, at 1162.

²⁴⁵ See Congressional Budget Act § 425(a), (B)(iii)(bb), 2 U.S.C. §§ 658d(a)(2), (B)(iii)(bb).

²⁴⁶ See Garrett, *supra* note 240, at 1165–66.

²⁴⁷ See generally William Eskridge & Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

²⁴⁸ 2 U.S.C. § 1535(a) (2018).

²⁴⁹ See Congressional Budget Act §§ 425(a)(2)(A), (B)(iii)(I)(bb), 2 U.S.C. §§ 658d(a)(2)(A), (B)(iii)(I)(bb).

²⁵⁰ See Congressional Budget Act §§ 423(c)(3); 2 U.S.C. §§ 658b(3).

mandates.²⁵¹ Despite a lack of specific language in Title I, close consideration reveals that fit requirements do apply to these \$50 million-plus intergovernmental mandates.

The requirement is apparent once one realizes that by default the “less burdensome alternative,” or the means by which the mandate burden is to be minimized, is through federal funding. UMRA certainly requires declaration of either funding or mandate mitigation for legislation to constitute a “funded” rather than “unfunded” mandate and thereby escape the point of order. For instance, § 425(a)(2)(A) and (B) lists conditions exempting legislation from the point of order. Subparagraph (A) exempts legislation if it provides new budget authority, entitlement, or spending authority to cover the mandate.²⁵² Subparagraph (B) stipulates that the conditions necessary to avoid a point of order are satisfied if the bill authorizes sufficient appropriations, and provides some assurance that the amount will be appropriated.²⁵³ To meet this requirement, legislation could include a circuit-breaker that kicks in whenever appropriations fall short to “implement a less costly mandate or mak[e] such mandate ineffective for the fiscal year.”²⁵⁴

Even when federal intergovernmental mandates miss the \$50 million direct-costs threshold and are therefore not subject to § 425 and its accompanying point of order, the § 423 committee report must contain “a statement of whether the committee intends that the Federal intergovernmental mandates be partly or entirely unfunded, and if so, the reasons for that intention.”²⁵⁵

Lookback review is built into UMRA. If within ten years, the implementing agency re-estimates the mandate’s costs and they prove to be higher, the agency must notify Congress with recommendations for mitigation or lapse of the mandate’s burden.²⁵⁶ Garrett also notes, “Congress has the authority under the Act to request CBO to perform follow-up studies.”²⁵⁷

6. Legislative Claiming

The point of order provides accountability for the heightened legislative criteria of § 425, which can be understood as requirements for

²⁵¹ See Congressional Budget Act § 425(a)(2), 2 U.S.C. § 658d(a)(2).

²⁵² Congressional Budget Act §§ 425(a)(2)(A), (B)(iii)(I)(bb), 2 U.S.C. §§ 658d(a)(2)(A), (B)(iii)(I)(bb).

²⁵³ Congressional Budget Act § 425(a)(2)(B), 2 U.S.C. § 658d(a)(2)(B).

²⁵⁴ Congressional Budget Act § 425(a)(2)(B)(iii)(I)(bb), 2 U.S.C. § 658d(a)(2)(B)(iii)(I)(bb).

²⁵⁵ Congressional Budget Act § 423(d)(1)(B), 2 U.S.C. § 658b(d)(1)(B).

²⁵⁶ Congressional Budget Act § 425(a)(2)(B)(iii), 2 U.S.C. §§ 658d(a)(2)(B)(i), (iii).

²⁵⁷ Garrett, *supra* note 240, at 1160.

extra clarity by Congress with respect to sufficiency of purpose and fit. If there is no funding or no funding mitigation *expressly* indicated for a federal mandate above the threshold,²⁵⁸ a point of order can be raised, thus requiring the *clarity* of a vote on the sufficiency of the mandate's purpose to overcome the unfunded mandate objection.²⁵⁹

Any state can thus have its representative delegation make a "claim" on its behalf, if one subscribes to the "political safeguards of federalism" view of how elected Senators relate to their states.²⁶⁰ The point of order can only be overcome by majority vote, which remains politically consequential insofar as it forces a separate roll call vote requiring Members of Congress to take a visible stance on that particular issue.²⁶¹ Furthermore, the Senate has on occasion voted to raise that threshold to sixty votes.²⁶² While that threshold reverted back to simple majority in subsequent fiscal years, the threat of elevation in any given year remains.²⁶³

Another feature of UMRA that suggests that the enforcement mechanism treats subnational governments as rights-holders rather than mere beneficiaries of an otherwise structural public duty, is that those enforcement provisions can be "waived" or at least go voluntarily unclaimed by states and localities, consistent with H.L.A. Hart's account of choice-rights.²⁶⁴ Section 425(b) contains the following rule of construction:

²⁵⁸ Congressional Budget Act § 424(a)(1), 2 U.S.C. § 658c(a)(1) (imposing a \$50 million per fiscal year threshold for intergovernmental mandates). Congressional Budget Act § 424(b), 2 U.S.C. § 658c(b)(1) (setting the threshold at \$100 million for private mandates).

²⁵⁹ Garrett, *supra* note 240, at 1161–68 (detailed description of the mechanics and incentive structure behind points of order generally and UMRA points of order in particular).

²⁶⁰ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 184 (1980).

²⁶¹ Garrett, *supra* note 240, at 1161, 1163–64; see also Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1496, 1503–04 (2008).

²⁶² H. Con. Res. 95, 109th Cong. (2005) (enacted) [https://www.congress.gov/bill/109th-congress/house-concurrent-resolution/95_\(the_fiscal_year_2006_budget_resolution\)](https://www.congress.gov/bill/109th-congress/house-concurrent-resolution/95_(the_fiscal_year_2006_budget_resolution)). The Senate also included a supermajority threshold in an early version of the fiscal year 2010 budget resolution, S. Amdt. 819 (Enzi) to S. Con. Res. 13, 111th Cong. (2009) <https://www.congress.gov/amendment/111th-congress/senate-amendment/819?s=a&r=162>. This change, however, dropped out before the budget resolution was finalized.

²⁶³ See *id.*; see also Robert Jay Dilger, *Unfunded Mandates Reform Act: History, Impact, and Issues*, CONG. RES. SERV. 1, 17 (Aug. 28, 2019), https://www.everycrsreport.com/files/20190828_R40957_03df232a05ad57fb108a129a6c0c8d50e45ad445.pdf.

²⁶⁴ Congressional Budget Act § 425(b), 2 U.S.C. § 658d(b) (2018). For a view that a rights-holder is one who can waive the right, see H.L.A. Hart, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162, 186 (1982).

The provisions [of this subsection] shall not be construed to prohibit or otherwise restrict a State, local, or tribal government from voluntarily electing to remain subject to the original Federal intergovernmental mandate, complying with the programmatic or financial responsibilities of the original Federal intergovernmental mandate and providing the funding necessary.²⁶⁵

7. History

In the floor debates over UMRA, Democratic politicians voiced “concerns that the legislation would impede the federal government’s ability to protect public health,”²⁶⁶ while the allies of the so-called intergovernmental lobby were vocal in support.²⁶⁷ But business groups were also strong UMRA proponents, condemning environmental laws such as the Clean Air Act as examples of unfunded federal mandates.²⁶⁸ The constituency favoring UMRA (states and small business, supported by big business) was quite similar to the constituency backing the RFA.²⁶⁹ It is perhaps not so surprising then that non-federalism-related purposes burrowed their way into UMRA by amendment, imposing “private-sector cost impact statements when the economic burdens [exceed] 100 million USD.”²⁷⁰ UMRA thus elevates *private* economic freedom as well.

III. OTHER EXAMPLES OF SIMILAR LEGISLATIVE AND REGULATORY HEIGHTENED JUSTIFICATION REQUIREMENTS

Here I wish to argue for the similarity of a few additional measures imposing heightened justification requirements. By now I hope it is evident that these heightened justification requirements exist on some kind of quasi-rights continuum, and I make the case here for these other examples as points on the same spectrum.

A. *Endangered Species Act (ESA)*

Although the Endangered Species Act (ESA) is not primarily considered an impact assessment requirement, it shares features of the subconstitutional rights we have examined. It constitutes an RIA insofar as

²⁶⁵ 2 U.S.C. § 425(b).

²⁶⁶ Shapiro & Moran, *supra* note 145, at 167 (citing Dilger, *supra* note 263). Senator Frank Lautenberg protested that OSHA and EPA would be hampered in their ability to set minimum standards to address the collective action problems of a patchwork regime. *Id.*

²⁶⁷ Garrett, *supra* note 240, at 1136.

²⁶⁸ Shapiro & Moran, *supra* note 145, at 168.

²⁶⁹ *Id.* at 169.

²⁷⁰ See S. Amdt. 19 (Kempthorne) to S. 1, 104th Cong. (1995) (enacted) <https://www.congress.gov/amendment/104th-congress/senate-amendment/19/all-info>.

an assessment of an agency's potential impact on endangered species is necessary in order to determine whether the ESA's strictly conditioned bans on federal action apply. Accordingly, ESA obligations include required biological assessments under § 7(c), as well as opinions specifying impact as part of the § 7(a)(4) written statements issued by the Secretary of Interior or Secretary of Commerce incident to required consultation by the acting agency.²⁷¹

ESA § 7(a)(2) commands:

"Each Federal agency shall, in consultation with . . . the Secretary, insure that any action . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical."²⁷²

Any agency action that burdens these values in this way can only proceed if it has been granted an exemption, which in turn depends on sufficiency of purpose and fit.

1. Scope

The ESA actually features two thresholds of burden to species preservation. Section 7(a)(3) requires consultation with the Secretary over "prospective agency action . . . if the applicant has *reason to believe* that an endangered species or a threatened species *may be present in the area affected* by his project and that implementation of such action *will likely affect such species*."²⁷³

By contrast, the previously mentioned § 7(a)(2) has a higher threshold; namely, agency action that is "*likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species*."²⁷⁴ But this paragraph also places a correspondingly heavier requirement, beyond mere consultation, upon agency actions that reach the higher threshold of impingement upon the favored value. Such impingement forces an agency to obtain an "exemption" from the § 7(a)(2) prohibition through prescribed procedures. An exemption involves formal hearings and votes of the multi-member committee,²⁷⁵ colloquially called the "God Squad,"²⁷⁶ hinging

²⁷¹ Endangered Species Act (ESA) § 7(a), 16 U.S.C. §§ 1536(a)–(d) (2018).

²⁷² ESA § 7(a), 16 U.S.C. § 1536(a)(4)

²⁷³ ESA § 7(a)(3), 16 U.S.C. § 1536(a)(3) (emphasis added).

²⁷⁴ ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (emphasis added).

²⁷⁵ ESA § 7(e), 16 U.S.C. § 1536(e) (listing in subparagraph (3) the seven members of the "God Squad"); ESA § 7(h), 16 U.S.C. § 1536(h); ESA § 7(h) (listing the requirement that "the Committee shall make a final determination whether or not to grant an exemption . . . by a vote of not less than five of its members," and then articulating the

upon certain substantive showings such as sufficiency of purpose and fit.²⁷⁷

2. Sufficiency of Purpose

Section 7(h)(1)(A) provides that voting committee members may grant exemptions on the basis of determinations that “the action is of regional or national significance,”²⁷⁸ that “such agency action is in the public interest,” and that “the benefits of such action clearly outweigh the benefits of alternative courses of action.”²⁷⁹

These formulations all amount to a finding that the purpose of the action is sufficient to justify an exemption.

3. Fit

Section 7(h)(1)(A)(i) also lists a fit requirement as one of the determinations required for the committee member to vote in favor of an exemption. Specifically, the impingement upon endangered species by the agency must be justified by a Committee determination that “there are no reasonable and prudent alternatives to the agency action.”²⁸⁰ Section 7(h)(1)(B) goes on to require that the Committee granting the exemption must:

*[E]stabilis[h] such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.*²⁸¹

4. Claiming

Section 7(n) grants judicial review under the APA, of any decision of the Endangered Species Committee under subsection (h),²⁸² though with notorious standing limitations.²⁸³ The statute also provides for attorney’s fees.²⁸⁴

determinations that must be made to justify such a vote).

²⁷⁶ See Jared des Rosiers, *Exemption Process Under the Endangered Species Act: How the God Squad Works and Why*, 66 NOTRE DAME L. REV. 825, 833 n.55 (1991).

²⁷⁷ ESA § 7(h)(1)(A)–(B), 16 U.S.C. § 1536(h)(1)(A)–(B).

²⁷⁸ ESA § 7(h)(1)(A)(iii), 16 U.S.C. § 1536(h)(1)(A)(iii).

²⁷⁹ ESA § 7(h)(1)(A)(ii), 16 U.S.C. § 1536(h)(1)(A)(ii).

²⁸⁰ ESA § 7(h)(1)(A)(i), 16 U.S.C. § 1536(h)(1)(A)(i).

²⁸¹ ESA § 7(h)(1)(B), 16 U.S.C. § 1536(h)(1)(B).

²⁸² ESA § 7(n), 16 U.S.C. § 1536(n).

²⁸³ See *Lujan v. Defenders of the Wildlife*, 504 U.S. 555 (1992).

²⁸⁴ See ESA § 11(g)(2)(C)(3)(B)(4), 16 U.S.C. § 1540(g)(2)(C)(3)(B)(4).

5. History

Indeed, the court has intervened to enforce these species-preservation norms, with *TVA v. Hill* serving as a vivid reminder.²⁸⁵ The Court held that the statute forbade cost-benefit balancing in a way that prompted Sunstein to muse that “perhaps the [ESA] is best taken to be rooted in a theory of rights, one that rebuts the presumption in favor of cost-benefit balancing.”²⁸⁶ The God Squad has rarely found occasion to overcome the ESA’s protections,²⁸⁷ though occasionally agencies engage in negotiations over discretionary decisions such as whether to designate or list a relevant species or habitat, or whether “jeopardy” to the relevant species is found.²⁸⁸

But this anomalously stringent subconstitutional provision was, like other quasi-rights on this list, the result of a decades-long struggle to entrench biodiversity as a favored value. The Endangered Species Preservation Act enacted in 1966 merely provided a means of listing native species with limited protections.²⁸⁹ It was amended in 1969, and only assumed its current form in 1973. The provisions were then weakened five years later with the allowance of exemptions from the ESA’s protections through the “God Squad” process described above.²⁹⁰ Major amendments have since passed and Congress has periodically intruded to grant relief for those who sought to overcome this presumptive protection of endangered species without prevailing in the God Squad process.²⁹¹

B. Religious Freedom Restoration Act of 1993 (RFRA)²⁹²

1. History

RFRA arose in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v.*

²⁸⁵ See 437 U.S. 153, 194–95 (1978) (applying the ESA strictly according to its own terms to enjoin a 100 million USD project for the sake of protecting a critical habitat for a snail darter).

²⁸⁶ CASS SUNSTEIN, *THE COST-BENEFIT STATE* 68 (2002); see also Amy Sinden, *In Defense of Absolutism, Combating the Power of Politics in Environmental Law*, 90 IOWA L. REV. 1405, 1410–11 (2005) (also characterizing the absolutism of the ESA as a rights-approach).

²⁸⁷ See Sinden, *supra* note 286, at 1504 (observing that the committee has “convened on only a handful of occasions in the quarter century since its creation, and even in those rare instances, it has never granted a wholesale exemption from the ESA’s protections”).

²⁸⁸ *Id.* at 1504–05.

²⁸⁹ *Endangered Species Act: A History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV. (Dec. 11, 2018), <https://www.fws.gov/endangered/laws-policies/esa-history.html>.

²⁹⁰ Sinden, *supra* note 286, at 1504–05.

²⁹¹ *Id.* at 1506–07.

²⁹² 42 U.S.C. § 2000bb (2018).

Smith.²⁹³ Prior to *Smith*, the Supreme Court under the Free Exercise Clause of the Constitution applied strict scrutiny²⁹⁴ not only to laws that target religion but also to laws that are “neutral toward”²⁹⁵ and only incidentally burden religion.²⁹⁶ By analogy, I argue in this article that generally applicable laws not targeted at health per se, but which burden health nonetheless, should receive HIA scrutiny.

The *Smith* decision in 1990 was a pivot for the Supreme Court.²⁹⁷ Two individuals were fired for ceremonially ingesting peyote thereby violating employer and state-imposed drug restrictions.²⁹⁸ Because *Smith* and *Black* were fired for misconduct, just as *Sherbert* was fired for refusal to work on Saturdays, they did not qualify for unemployment benefits.²⁹⁹ The general criminal prohibition on drug use and possession was plainly neutral to religion and applied to all individuals regardless of religion.³⁰⁰ Therefore, according to Justice Scalia writing for a 6–3 majority, the compelling interest and least restrictive means test was not triggered.³⁰¹ Religious minority interests could seek protection in the general horse-trading of the political process and would not otherwise be singled out for special justification of any incidental burden.³⁰²

Congress, in RFRA, re-imposed strict scrutiny, requiring a showing of compelling governmental interest and least restrictive means for generally applicable laws that substantially burdened “a person’s exercise of religion.”³⁰³ Here, we examine RFRA insofar as the heightened justification for federal actions parallels other regulatory analysis requirements.

²⁹³ 494 U.S. 872 (1990) (refusing to apply strict scrutiny to neutral, generally applicable laws that impose a substantial burden on the practice of religion); *see also* 42 U.S.C. §§ 2000bb(a)(2)–(4); §2000bb–1(a).

²⁹⁴ *See e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁹⁵ This phrase is used in the Congressional findings for RFRA, 42 U.S.C. § 2000bb(a)(2); § 2000bb(a)(4).

²⁹⁶ *Sherbert*, 374 U.S. at 398; *see also* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁹⁷ The decision was presaged by *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

²⁹⁸ 494 U.S. 872, 874 (1990).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 878.

³⁰¹ *See Smith*, 494 U.S. at 879.

³⁰² *Id.* at 902.

³⁰³ 42 U.S.C. §§ 2000bb–1(a), (b) (2018). Though *City of Boerne v. Flores*, 521 U.S. 507 (1997), partially invalidated RFRA insofar as Congress’ Fourteenth Amendment power was deemed insufficient to authorize the imposition of RFRA upon the states, Congress restored some state applications of RFRA in the form of the Religious Land Use and Institutionalized Persons Act (RLUIPA), relying on Congress’ Commerce and Spending Powers instead. *See* 42 U.S.C. § 2000cc.

2. Scope

RFRA, like UMRA, covers both legislative and regulatory activity, declaring that “[t]his chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”³⁰⁴ RFRA evidently contemplates lookback application as well.³⁰⁵

But not every regulation or statute is captured insofar as the law must still qualify as one that “substantially burdens a person’s exercise of religion.” This parameter mirrors other RIA threshold requirements. NEPA kicks in only when a “major federal action significantly affects the quality of the human environment,” and the RFA is triggered if a rule will have “a significant economic effect on a substantial number of small entities.”³⁰⁶

The threshold term, “exercise of religion” is defined in the statute as “any exercise of religion, whether or not compelled by or central to, a system of religious belief.”³⁰⁷ The threshold term “substantial burden,” however, is not further specified in the statute and has been contested in court.³⁰⁸

3. Sufficiency of Purpose

The “sufficiency of purpose” that a law must display in order to justify substantial burden on religious exercise is manifestly required. The statute prevents such burden unless “that application of the burden to the person . . . is in furtherance of a compelling government interest.”³⁰⁹

4. Fit

RFRA’s demand for fit in the event of government action countervailing religious liberty is also readily apparent. The government must demonstrate that the burdening measure is “the least restrictive means

³⁰⁴ *Id.* § 2000bb–3(a).

³⁰⁵ Some would argue that the “lookback” application is the only portion of RFRA on sound constitutional footing. *See, e.g.*, Branden Lewiston, *RFRA as Legislative Entrenchment*, 44 PEPP. L. REV. 26, 26 (2017).

³⁰⁶ *See supra* text accompanying note 160.

³⁰⁷ 42 U.S.C. § 2000bb–2(4) (referencing § 2000cc–5).

³⁰⁸ *See, e.g.*, *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (concluding that the condition that for-profit employers who offer health insurance include mere coverage of certain contraception options, whose use is within the election of the employees themselves, in order to enjoy a tax benefit for offering health benefits voluntarily was not so attenuated as to fail the “substantial burden” threshold). Observers have noted that the substantial burden test was thereby defined down to virtually nothing. *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1497 (2015) (stating the substantial burden test merely required “plaintiffs’ assertions that a law imposes a substantial burden”).

³⁰⁹ 42 U.S.C. § 2000bb–1(b)(1).

of furthering that compelling governmental interest.”³¹⁰

5. Claiming

The government can be called to account for nonconformance with RFRA by a putative individual rights-bearer. The statute allows an aggrieved person to assert a “violation of this section . . . as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”³¹¹

In 2006, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,³¹² a unanimous Supreme Court blocked the government from enforcing the Controlled Substances Act in such a way as to burden a religious group’s use of hallucinogenic tea. Following the implementation of the Affordable Care Act in 2013, Hobby Lobby, a for-profit corporation closely held by family members with certain religious beliefs, successfully challenged the regulation stipulating that non-grandfathered employer health plans cover contraceptives.³¹³

6. Isomorphism

Through this discussion it should be apparent that RFRA contains the same structural elements as the other regulatory analysis statutes: (1) a trans-substantive law passed by Congress; (2) imposing requirements upon federal action across jurisdictional bounds; (3) triggered by a threshold impact upon a favored value; (4) when that value is not otherwise protected by the Constitution; (5) imposing a condition of heightened justification for that burden; and (6) consisting of a showing of sufficiency of purpose and fit. “Impact assessment,” in terms of a showing of “substantial burden,” is required in order to make the threshold showing for the heightened scrutiny to apply. The only conceivable differences between RFRA and the other impact assessments we have examined lie in, first, the mechanism of enforcement and second, the timing of when the justification must be produced, a matter which is related to the mode of enforcement. According to UMRA, any member of Congress can raise a point of order to prevent the statute from going forward for failure to fulfill the heightened justification requirement. Under RFRA, the power of the courts can be harnessed to strike the rule or statute for failure to fulfill the heightened justification requirement. Of course, because of the nature of judicial review as opposed to points of order, the justification need not be tendered *ex ante* before the measure is issued as the court action will usually occur

³¹⁰ *Id.* § 2000bb–1(b)(2).

³¹¹ *Id.* § 2000bb–1(c).

³¹² 546 U.S. 418 (2006).

³¹³ *Hobby Lobby*, 134 S. Ct. at 2751.

post hoc.

C. Assessment of Federal Regulations and Policies on Families

The Fiscal Year 1999 Treasury Appropriations bill required that any agency rule include an assessment of the rule's impact on family well-being.³¹⁴ This interest, however, was specifically defined in a way that reveals an agenda of hidden purposes not apparent from the labeling of the interest at issue. The provision demanded the following:

Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether . . .

(2) [agency actions] strengthen or erode the stability or safety of the family and, particularly, the marital commitment; [or]

(3) [they affect] authority and rights of the parents in the education, nurture and supervision of their children;

(3) [the agency action] helps the family perform its functions, or substitutes governmental activity for the function; [. . .]

(8) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.³¹⁵

These specifications of family well-being are neither politically neutral nor inevitable. Setting aside this politically contestable framing of "family well-being" as personal responsibility, autonomy from government, and the sanctity of marriage, what is notable about this statutory text is the *qualitative* rather than *quantitative* identification of burden. The qualitative definition of burdens suggest that fungibility or tradeoff against other values is not assumed, and therefore sets this impact assessment apart from the default CBA that would apply to any other type of implicated interest lacking a special RIA privilege.

1. Sufficiency of Purpose and Fit

The family impact assessment lacks specificity in requiring purpose or fit. It does demand, however, that the regulation be assessed for whether the proposed benefits of the action justify the impact on the family.

Under § 654(d) of the appropriations language, a rule that is determined to have a negative effect on families must be supported with an "adequate rationale." "Adequacy of rationale" could be understood to require a sufficiently important purpose or reason for the "family burdens"

³¹⁴ Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. 105-277 § 654, 112 Stat. 2681; 5 U.S.C. § 301 note (1999) (containing language establishing a family impact assessment).

³¹⁵ Pub. L. 105-277 § 654(c).

inflicted. The adequacy of the rationale could also imply an associated fit requirement such that no portion of the burden is unnecessary and unjustifiable.

2. Claiming

The provision specifically states: “This section is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.”³¹⁶ Members of Congress may demand compliance, however. According to § 654(e), “Upon request by a Member of Congress relating to a proposed policy or regulation, an agency shall conduct an assessment . . . and shall provide a certification and rationale.” Presumably failure to comply could result in practical consequences such as oversight hearings or appropriations riders.

Though the rights-like features characterizing other impact assessments are lacking somewhat in clarity, the Family Impact Assessment may yet prove a forerunner of a more robust future regulatory analysis requirement.³¹⁷ Indeed, the Family Impact Assessment itself was preceded by EO 12606.³¹⁸

D. *Private Property/Takings Executive Order*

In the late 1980’s, Reagan signed EO 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights.”³¹⁹ It has not since been revoked. Under this EO, before any agency undertakes regulation of private property to protect public health or safety, it must show sufficiency of purpose and fit.³²⁰

1. Scope

This heightened justification requirement clearly extends to regulatory burdens on private property that do not rise to the level of takings. Even without examining the case law on regulatory takings, this point is evident from the language of the EO. Part of the statement of heightened justification required before the agency takes action is an “[e]stimate, to the

³¹⁶ *Id.* § 654(f).

³¹⁷ Some groups continue to advocate in this vein. *See, e.g., Family Impact Institute, History*, PURDUE UNIV., <https://purdue.edu/hhs/hdfs/fii/about/history> (last visited Feb. 2, 2019).

³¹⁸ Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 2, 1987).

³¹⁹ Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 18, 1988). *See* 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 14,332 (Mar. 20, 2017) (to be codified at 42 C.F.R. pt. 10), for an example of recent regulation complying with its requirements.

³²⁰ 53 Fed. Reg. 8859.

extent possible, [of] the potential cost to the government in the event that a court later determines that the action constituted a taking.”³²¹ Thus, the set of actions to which the EO is expected to apply exceeds the actions that will later be found a taking. Meanwhile, the Congressional Research Service reported at the time that “the majority of taking principles stated or implied in the Executive Order 12630 overestimated the likelihood of a taking.”³²²

2. Sufficiency of Purpose

The agency must first, “[i]dentify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action.”³²³ Thus, the purpose of the regulatory action must be specifically articulated.

3. Fit

The EO next requires agencies to “[e]stablish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk.”³²⁴ The agency must show what Alexy might call “suitability,”³²⁵ namely, that the means do advance the important justifying end or purpose identified above.

Also, the agency must “[e]stablish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk.”³²⁶ This provision requires another aspect of fit, namely, no excess burden that is somehow not sufficiently linked with, and therefore cannot draw sufficient justification from, the important purpose.

4. No Claiming under Executive Orders

Though these measures lack claiming mechanisms,³²⁷ they should be seen for their significance within a dynamic arc. They are present at one moment in the ongoing struggle over popular conceptions of rights in the

³²¹ Exec. Order No. 12,630 § 4, 53 Fed. Reg. 8859 (Mar. 18, 1988).

³²² ROBERT MELTZ, CONG. RES. SERV., COMPARISON OF TAKING PRINCIPLES IN EXECUTIVE ORDER NO. 12630 WITH SUPREME COURT JURISPRUDENCE AND RELATED QUESTIONS (1988) (cited in *GAO's Recent Report on the Implementation of Exec. Order 12630 and the State of Federal Agency Protections of Private Property Rights: Hearing before the H. Subcomm. on the Judiciary*, 108th Cong. 3 (2003) (statement of John D. Echeverria, Exec. Dir., Georgetown Environmental Law & Policy Inst., Geo. U.L. Center)).

³²³ Exec. Order No. 12,630 § 4(d)(1), 53 Fed. Reg. 8859, 8861 (Mar. 18, 1988).

³²⁴ *Id.* § 4(d)(2).

³²⁵ See ALEXY, *supra* note 107, at 396–98.

³²⁶ Exec. Order No. 12,630, *supra* note 318, at § (d)(3).

³²⁷ Erica Newland, *Executive Orders in Court*, 124 Yale L.J. 2026, 2075–2082 (2015).

U.S. and may well evolve into a more robust right in the future.

Many of the other measures that feature mature claiming provisions started out in precursor form. The Assessment of Impact on Families was an opportunistic statutory expansion built upon an idea first encountered in another executive order from the Reagan years.³²⁸ The Paperwork Reduction Act was preceded by the Federal Reports Act.³²⁹ UMRA succeeded the State and Local Government Cost Estimates Act of 1981 which had been in place for thirteen years but lacked the accountability provided by points of order.³³⁰ Similarly, the extra-constitutional protection of private property from regulatory burden may now take the form of a mere executive order, but bills have been introduced since to codify it.³³¹ In 1995, H.R. 925 passed the House, though it later died in the Senate.³³² This bill would have triggered agencies to compensate property owners for the regulatory burdens on their private property use if that federal agency action reduced the property's fair market value by a certain threshold percentage (eventually set at twenty percent).³³³ Meanwhile, the EO itself has enjoyed significant longevity,³³⁴ continuing to elevate the protection of private property rights above the constitutional baseline, just as RFRA does for the protection of free exercise, and as UMRA does for the protection of federalism-related values.

E. Other Impact Assessments Established by the Executive Branch

Other EO's on the continuum may or may not yet merit the label "rights." Some constitute duties to the public at large, rather than duties with corresponding rights. For instance, President Clinton signed EO 13,175 for "Consultation and Coordination with Indian Tribal Governments,"³³⁵ which bears some similarities to UMRA. No agency

³²⁸ See *supra* text accompanying note 318.

³²⁹ Shapiro & Moran, *supra* note 145, at 17–18.

³³⁰ State and Local Government Cost Estimates Act of 1981, Pub. L. No. 97-108, 95 Stat. 1510 *repealed by* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 104, 109 Stat. 48, 62; *see also* Garrett, *supra* note 240, at 1153, 1160–63.

³³¹ Private Property Rights Act of 1991, S. 50, 102nd Cong. (1991) (introduced by Senator Steven Symms).

³³² Private Property Protection Act of 1995, H.R. 925, 104th Cong. (1995). This provision was also included in the Job Creation and Wage Enhancement Act of 1995, H.R. 9 §§ 201–210, 104th Cong. (1995) as a component of the Republican's Contract with America. *See* SINCLAIR, *supra* note 188, at 113–33; *see also* THOMAS O. MCGARITY, FREEDOM TO HARM 78 (2013) (explaining that Senate Republicans failed to overcome filibusters on various omnibus regulatory reform efforts.).

³³³ SINCLAIR, *supra* note 188, at 122–25.

³³⁴ *See* U.S. GEN. ACCT. OFF., GAO-03-1015, REGULATORY TAKINGS: IMPLEMENTATION OF EXECUTIVE ORDER ON GOVERNMENT ACTIONS AFFECTING PRIVATE PROPERTY USE 4 (2003).

³³⁵ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

should promulgate a regulation that has “tribal implications” or preempts tribal laws without consultation with tribal officials or without providing OMB with the summary impact statement.³³⁶ This “tribal summary impact statement” need, however, only describe the agency’s consultation and state the extent to which the tribal concerns have been met. No particular countervailing purpose or minimization of burden is required.

President Clinton’s EO 12,988, “Civil Justice Reform,”³³⁷ directed agencies to review all new and old regulations to ensure that they are “written to minimize litigation.”³³⁸ Again, this deviates from the canonical requirement of requiring a sufficient countervailing purpose and certainly lacks any vision of particular claimant whose rights correspond to this duty.

President George W. Bush issued EO 13211, “Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use,” which required federal agencies to prepare a “Statement of Energy Effect” (SEE).³³⁹ This SEE is triggered only when federal actions may have “significant adverse effect” on “supply, distribution, and use of energy.”³⁴⁰ OMB issued a memorandum in 2001 listing circumstances that would constitute “a significant adverse effect,” including reductions in crude oil supply in an amount over 10,000 barrels per day, reductions in coal or natural gas production of a certain amount, and increases in the cost of energy production and distribution in excess of one percent.³⁴¹ Some environmental advocates warned this EO could “curtail critical habitat designation or other environmental protection”³⁴² and therefore urged Obama to repeal it in his first hundred days.³⁴³ He declined to do so, and this EO remains in effect today.³⁴⁴

And oddly, the National Historic Preservation Act (NHPA) itself fell short of the specificity of the impact assessments we have looked at thus far, merely requiring agencies to “take into account the effects of the

³³⁶ *Id.*

³³⁷ Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 7, 1996).

³³⁸ *Id.* § 3(a)(2).

³³⁹ Exec. Order No. 13,211, 66 Fed. Reg. 28355 (May 22, 2001).

³⁴⁰ *Id.*

³⁴¹ OFF. MGMT. & BUDGET, EXEC. OFF. PRESIDENT, OMB MEMORANDUM M-01-27, GUIDANCE FOR IMPLEMENTING EXEC. ORDER 13211 (2001).

³⁴² Elizabeth Glass Geltman et al., *Inquiry into the Implementation of Bush’s Executive Order 13211 and the Impact on Environmental and Public Health Regulation*, 27 FORDHAM ENVTL. L. REV. 225, 228 (2016).

³⁴³ REBECCA BRATSPIES ET AL., CENTER FOR PROGRESSIVE REFORM, PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT BY THE STROKE OF A PRESIDENTIAL PEN: SEVEN EXECUTIVE ORDERS FOR THE PRESIDENT’S FIRST 100 DAYS 33 (2008).

³⁴⁴ Elizabeth Glass Geltman et al., *Impact of Executive Order 13211 on Environmental Regulation: An Empirical Study*, 89 ENERGY POL’Y 302, 302 (2016).

undertaking” on historical properties.³⁴⁵ The implementing regulation, however, contemplates a process that at least partly tracks NEPA.³⁴⁶ NHPA-compliance is even accorded judicial review as an adjunct to judicial review for NEPA-compliance.³⁴⁷

Examples abound.³⁴⁸ But many of these impact assessment requirements depart from the structured, individuated analysis that characterizes rights. For instance, whom does the energy order protect? Certainly, energy sector interests are protected. In addition, the provision seems to contemplate the interests of the general public who pay energy bills and depend on energy supplies. Though these examples impose certain assessment duties upon agencies, they can be fairly characterized as duties to the public-at-large.

F. Regulatory Right to Know

The misleadingly named “Regulatory Right-to-Know Act” falls short of a right. Passed in the 2001 Treasury and General Government Appropriations Act,³⁴⁹ it is understood as a legislative rider imposing a *permanent* reporting obligation upon OMB.³⁵⁰ Its precursors include similar reporting requirements that took the form of one-year riders.³⁵¹ The Regulatory-Right-to-Know report is due only once a year rather than triggered with each agency action. It is submitted to Congress along with the President’s budget and requires reporting in the aggregate, totaling the costs and benefits of all major rules, and stratifying by agency and major rule. The agency must produce not just an estimate of total costs and benefits, but impacts on other favored values: “state, local, and tribal

³⁴⁵ 16 U.S.C. § 470 (2018) (current version of Act in scattered sections of 54 U.S.C.); 36 C.F.R. § 800 (2019).

³⁴⁶ See *Tyler v. Cisneros*, 136 F. 3d 603, 608–09 (9th Cir. 1998). See also *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1024 (finding that despite an implied right of action under the APA for judicial review associated with NHPA, the district court lacked jurisdiction for other reasons.).

³⁴⁷ See *Cisneros*, 136 F. 3d 603, 608–09.

³⁴⁸ See e.g., Exec. Order No. 11,821, 3 C.F.R. § 203 (1974), amended by Executive Order No. 11,949, 3 C.F.R. § 161 (1977) (requiring statements of inflationary impact.).

³⁴⁹ 31 U.S.C. § 1105 (2018). Similar provisions were previously passed as fiscal year riders in § 625 of the Treasury and General Government Appropriations Act for Fiscal Year 1999, Pub. L. No. 105–61 (1998); see also Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, § 638(a), 112 Stat 2681, 2681–525 (1998).

³⁵⁰ See CAREY, *supra* note 120, at 7 n.31 (stating that this note “put in place a permanent requirement for an OMB report on regulatory costs and benefits”).

³⁵¹ Angela Antonelli, *Regulatory Right to Know: Tracking the Costs and Benefits of Federal Regulation*, HERITAGE FOUND. (April 20, 1999), <https://www.heritage.org/government-regulation/report/regulatory-right-know-tracking-the-costs-and-benefits-federal>.

governments, small businesses, wages, and economic growth.”³⁵² The generality of this requirement renders this RIA more of a duty to the public-at-large.

The measure may seem duplicative insofar as costs and benefits must already be considered for each major rule under EO 12,866. Because EOs do not, however, apply to independent regulatory agencies, which include such major actors as the Securities and Exchange Commission, the Consumer Product Safety Commission, the Federal Reserve, and the Office of the Comptroller of the Currency, this Congressional “Right-to-Know” provision does at least ensure agency coverage.

G. Agency-Specific RIAs

There are many other RIA provisions that I neglect here because they are not trans-substantive, applying to a narrow segment of agencies. As such, they may be indistinguishable from statutorily-mandated factors that the agency must consider when regulating.³⁵³

For instance, according to § 1102 of the Social Security Act, regulations implementing the Medicare and Medicaid titles are not to be advanced without consideration of their effects on rural hospitals.³⁵⁴

Similarly, § 106 of the National Securities Market Improvement Act of 1996 requires the SEC to always consider, “in addition to the protection of investors, whether [an] action will promote efficiency, competition, and capital formation.”³⁵⁵

The Department of Agriculture (USDA) has issued a departmental policy requiring a civil rights impact analysis for all loans or “conditional commitments.”³⁵⁶ I leave these RIAs aside for now.³⁵⁷

IV. THE GLARING OMISSION OF HEALTH

A. Health is Not on Equal Footing

Thus far, our discussion reveals a field of contest over conceptions of rights. A picture emerges of ongoing struggle to elevate certain protected interests to rights status. Moreover, this struggle is happening in the

³⁵² 31 U.S.C. § 1105 (2018); Act of Dec. 21, 2000, Pub. L. No. 106–554, § 624, 114 Stat. 2763, 2763A–161(a)(2).

³⁵³ See CAREY, *supra* note 120, at 11.

³⁵⁴ Social Security Act § 1102(b); 42 U.S.C. § 1302(b) (2018).

³⁵⁵ 15 U.S.C. § 77b (2018); Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 1987 (2013).

³⁵⁶ 7 C.F.R. § 4279.60 (2019).

³⁵⁷ See 22 U.S.C. § 2576 (2018) (requiring disarmament impact statements for all new weapons systems); Department of Transportation Act § 4(f), 49 U.S.C. § 303 (2018).

legislative and administrative domains.

How would we characterize the state of play? By this snapshot, we enjoy a panoply of negative rights, namely, freedom from government-imposed paperwork, freedom for small businesses from economic burdens, and religious freedom beyond constitutional levels of protection. State interests are shielded from economically burdensome federal mandates, property owners assert freedom from subconstitutional regulatory takings, and “traditional” families enjoy certain autonomies. *But are we free from government action that burdens people’s health?* In some politically motivated instances, we virtually ban HIA, as seen in the case of guns and their effect on health.³⁵⁸ We have indirect claims under NEPA and the ESA, in the form of protected interests in environmental protection. Environmental entitlements are urgent, but classic environmental exposure is not the only threat to health. There is a glaring gap for the protection of basic human well-being. Therefore, I propose we institute an HIA requirement.

The selective imposition of accounting and justification requirements provides a familiar procedural means of institutionalizing substantive norms. Selectively procedural and therefore “semi-substantive” means of protecting background rights have been noted in other contexts.³⁵⁹

V. THE PROPOSAL

Here I present options to consider for an HIA requirement that I believe should be enacted by Congress. I offer these features as a starting point for policy debate.

Because this HIA would be imposed by statute, not executive order, it would also cover independent regulatory agencies. The bill would have to specify an HIA triggering condition based on the nature of a policy’s effect on health. This threshold question has been crucial in each of the RIA

³⁵⁸ Language from the so-called Dickey Amendment has been inserted into appropriations bills each year since 1996, preventing funds from being used “to advocate [for] or promote gun control.” This language, while not strictly forbidding research or data-gathering on the health effects of gun policies, has chilled such conduct and remains in the FY2018 Appropriations bill. *See* Consolidated Appropriations Act, Pub. L. No. 115–141, § 210, 132 Stat. 348, 736 (2018). For another example of statutory language that, although not yet enacted, seeks to prohibit impact assessment, *see* Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. § 3 (2017), which declares, “[n]otwithstanding any other provision of law, no Federal Funds may be used to design, build, maintain, utilize, or provide access to a Federal database of geospatial information on community racial disparities or disparities in access to affordable housing.”

³⁵⁹ *See, e.g.,* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 6, 39 (2008).

measures we have examined.³⁶⁰ One could assign the duty to either an agency head or a designated health official. This approach draws from the example set by RFA, whereby the agency head must decide and certify whenever government action avoids a threshold impact on “a substantial number of small entities.”³⁶¹ A determination of “no substantial impact on health” would be subject to judicial review, just as a certification of insignificant impact is under RFA, or FONSI is under NEPA.³⁶²

Alternatively, we could adapt the NEPA mechanism, whereby the impact analysis and detailed statement condition would apply to “major Federal actions significantly affecting” human health, and the agency would have to perform some kind of preliminary HIA to see if this threshold is met. This two-step process parallels the mechanism of the preliminary “EA” under NEPA, which concludes in either a FONSI or proceeds to a full EIS. This example illustrates how a trigger mechanism could be designed such that an early, smaller HIA might be required for *all* government action. Meanwhile, the desire to avoid full HIAs might encourage health commitments across sectors as various government organs seek the HIA equivalent of “mitigated FONSI.”³⁶³ I discuss below what form those mitigating actions might take.³⁶⁴ NEPA’s implementation also proves that a trigger threshold need not be specified in advance and can be elaborated case-by-case.

For HIAs to empower beneficiaries *as rights-holders*, we should consider adding a mechanism for individuals or their representatives to initiate or call for the HIA heightened justification procedure. The availability of judicial review for the determination of “no trigger” under RFA or FONSI under NEPA, would represent one avenue. One could also establish a Chief Counsel for Health Advocacy along the lines of the Chief Counsel for Advocacy of the Small Business Administration, which would institutionalize representation of community health interests.³⁶⁵

UMRA requires CBO to judge a bill’s projected costs to subnational governments against the triggering threshold to determine whether a point

³⁶⁰ See Shapiro & Moran, *supra* 145, at 170–71 (observing, “[m]uch as the vague definition of ‘significant impact’ in the [Regulatory Flexibility Act] was a source of agency discretion, the term ‘economically significant’ in the UMRA was largely left open to interpretation by individual agencies. Critics of the Act noted that the vague definition allows agencies to evade assessments and benefit-cost analyses by determining that rules do not qualify as economically significant. The GAO supported this criticism, stating that the Act gave agencies too much discretion in complying with the requirements.”).

³⁶¹ See *supra* text accompanying notes 162–165.

³⁶² *Id.* See also text accompanying note 200, at 466–67.

³⁶³ See *supra* text accompanying note 199, at 932–33.

³⁶⁴ See *infra* text accompanying notes 388–389.

³⁶⁵ See *supra* text accompanying notes 180–185. I thank Alan Morrison for this insight.

of order would lie against it.³⁶⁶ Similarly, GAO or some other entity designated by Congress could be tasked with calculating whether a bill “significantly affects human health.”³⁶⁷ Because health impacts are hard to quantify, we could use qualitative thresholds like those under the Family Impact Assessment.³⁶⁸ Alternatively, we could piggyback on existing RIA thresholds such that any action meeting the UMRA threshold as calculated by CBO would also be subject to full HIA. For instance, the National Historic Preservation Act has piggybacked on NEPA such that any “major federal action” under NEPA also garners some process under NHPA.³⁶⁹

Alternatively, “significantly affecting human health” could also be construed as adversely affecting key health indicators for a numerical threshold of persons by a certain magnitude. I do not believe this approach requires an optimal set of thresholds. Some initial proxies could be set, just as in Bush’s EO 13211, the effect on energy supply was established as adversely affecting energy prices by more than one percent, or a drop in crude oil production by 10,000 barrels a day or more.³⁷⁰ Similarly, the Gingrich Congress’ attempt to legislate regulatory takings identified a trigger of twenty percent reduction in the property’s fair market value.³⁷¹ The difficulty of setting a perfect threshold should not block the development of a provisional mechanism, just as those difficulties did not impede the establishment of RIAs protecting other values.

A. Participatory

HIAs should follow NEPA in promoting participation.³⁷² This commitment would enhance an emerging feature of HIAs whereby they are taken up by disadvantaged communities and their supporting coalitions. For instance, HIAs have been wielded by Native Alaskan tribal groups to assert their interests in health and well-being through the state HIA process as well as NEPA.³⁷³ In Los Angeles, communities at risk of being

³⁶⁶ See *supra* note 233.

³⁶⁷ This idea takes inspiration from NEPA’s creation of CEQ and the Science Advisory Board, and PRA’s authorization of OIRA. The HIA proposal, however, would authorize a Congressional agency like CBO rather than an executive entity.

³⁶⁸ See *supra* text accompanying note 314.

³⁶⁹ See *Tyler v. Cisneros*, 136 F.3d 603 (9th Cir. 1998).

³⁷⁰ See *supra* note 333–334 and accompanying text.

³⁷¹ See SINCLAIR, *supra* note 333.

³⁷² See FERLO ET AL., NEPA LITIG. GUIDE, *supra* note 208, at 24–25.

³⁷³ See generally *Integrated Activity Plan / Environmental Impact Statement, National Petroleum Reserve—Alaska*, U.S. DEP’T INTERIOR (Nov. 2012), https://eplanning.blm.gov/epl-front-office/projects/nepa/5251/41004/43154/Vol2_NPR-A_Final_IAP_FEIS.pdf (constituting an EIS process where the Alaskan Inter-Tribal Council participated heavily).

dislocated by stadium development used HIAs to block the proposal.³⁷⁴ Causa Justa's community organizers recruited the Alameda County public health department to survey the health harms of foreclosure.³⁷⁵ In San Francisco, HIAs contributed to the successful campaign for a living wage.³⁷⁶

Any member of Congress could call for an HIA for legislative measures through a point of order. Arguably, this mechanism allows democratic participation through lobbying, though this approach also renders the tool more accessible to powerful interests.

B. Equity

The measure I propose would embed a preference for health equity even more deeply into the HIA methodology. HIA should impose justificatory burdens not just on actions with direct and indirect effects on human health, but also on actions exacerbating health inequality.

A landmark British report on health disparities in 1998 declared that "all policies likely to have a direct or indirect effect on health should be evaluated in terms of their impact on health inequalities, and should be formulated in such a way that by favouring the less well off they will, wherever possible, reduce such inequalities."³⁷⁷ The HIA could require that "all policies likely to have a direct or indirect effect on health must report their impact on health inequalities."

The "fit" requirements, which I discuss below, could then proceed to encourage policies to be formulated to favor the less well-off and reduce such inequalities.³⁷⁸ Mimicking the NEPA regulations which require the agency decision-maker to "record" the environmentally preferable alternative and justify how the agency rejected this alternative,³⁷⁹ the decision-maker could be required to "record" the most health equity-promoting alternative. If the agency chose otherwise, then it would have to describe the reasons and cite the specific "economic and technical

³⁷⁴ See HUMAN IMPACT PARTNERS, FINDINGS AND RECOMMENDATIONS OF THE RAPID HEALTH IMPACT ASSESSMENT OF THE PROPOSED FARMERS FIELD DEVELOPMENT (July 6, 2012), https://playfairfarmersfield.files.wordpress.com/2012/07/ff-hia_final_full.pdf.

³⁷⁵ Victoria Colliver, *Foreclosures Can Make You Sick, Report Says*, SFGATE (Sept. 2, 2010, 4:00 AM), <https://www.sfgate.com/health/article/Foreclosures-can-make-you-sick-report-says-3254499.php>.

³⁷⁶ See Gottlieb et al., *supra* note 79, at 9.

³⁷⁷ DONALD ACHESON ET AL., INDEPENDENT INQUIRY INTO INEQUALITIES IN HEALTH (1998).

³⁷⁸ For a recent proposal along these Rawlsian lines, see generally, Alicia Ely Yamin & Ole Frithjof Norheim, *Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health*, 36 HUM. RTS. Q. 296, 308, 324 (2014).

³⁷⁹ See 40 C.F.R. § 1505.2 (2019).

considerations and agency statutory missions . . . including any essential considerations of national policy,” mirroring NEPA implementing language.³⁸⁰

For those who believe that attention to equity represents an interjection of additional favored values into the HIA mechanism apart from health, there are a few responses. One is that identification of health impacts necessarily includes identification of the *distribution* of health impacts as discussed earlier.³⁸¹ Furthermore, social and economic inequality are major determinants of population health, with effects independent of those caused by poverty.³⁸² Because the health gradient is steeper at lower SES levels, SES distribution must flow downward to have salutary effects on population health. Promoting equity is closely congruent with the protection of health.

Second, we can argue that other RIAs also include ideologically clustered secondary values. UMRA sneaks in concern not only for burdens on States and localities, but also costs to private entities. The PRA includes extra protection for privacy and small business.

C. Impact Analysis

The legislative and regulatory proposals that fall within the HIA measure’s scope of application must include reporting on the burdens they place on health and its distribution. Again, some impact analysis and reporting would already exist from the threshold determination of the HIA measure’s applicability, just as some environmental impact analysis is done in the form of an EA to determine whether there is sufficient effect on the quality of the human environment to warrant a full EIS.³⁸³

D. Sufficiency of Purpose

These health-affecting measures must also clearly declare the purpose and need for that action. As with the PRA, an agency must describe the “need” for the action being considered.³⁸⁴ Borrowing again from NEPA, need must be framed in terms of “economic and technical considerations and agency statutory missions . . . including any essential considerations of national policy. . . .”³⁸⁵

As with UMRA, any legislative action would be subject to a sufficiency of purpose showing insofar as a separate vote to overcome the

³⁸⁰ *Id.*

³⁸¹ See *supra* Part I.C.1, and text accompanying notes 66–72.

³⁸² See *supra* text accompanying notes 36 at 323.

³⁸³ See 40 C.F.R. §§ 1508.9, 1508.13.

³⁸⁴ See 44 U.S.C. § 3506(c) (2018).

³⁸⁵ 40 C.F.R. § 1505.2.

point of order would be required, implicitly demonstrating congressional conclusion that the non-health-sector policy furthers a sufficiently important purpose to justify the burden on health.

E. *Fit*

Just as earlier we discussed the incorporation of equity considerations by requiring a recording of the alternative that favors the least well-off,³⁸⁶ that same recording requirement would apply to the least health-restrictive alternative.

A point of order could be available for any health-affecting policy that, as we mention above, reduced major health indicators of a population by a certain threshold magnitude. Just as unfunded mandates could avoid points of order if “funded,” HIA points of order could be avoided if the health-burdening legislation included listed health-promoting measures. We could deliberate over and devise what those might be, and I assume our judgments on the appropriate mitigation policies would change with changing circumstances. For instance, PRA specifies certain mitigation strategies such as different compliance timetables and exemptions that must be considered when small businesses are burdened.³⁸⁷ ESA does the same for endangered species.³⁸⁸ The domain of must-consider health mitigation and improvement strategies could be developed, including investment in early childhood education, housing and other social determinants of health, or some other action that would reduce the Gini coefficient.³⁸⁹

F. *Enforcement/Claiming*

Beyond a point of order, compliance with regulatory as well as legislative HIA requirements could be subject to judicial review. Even if not specifically authorized, courts might still, as they have with NEPA, construe judicial review to be available for whether agency action is arbitrary and capricious in light of inadequacies in HIA.³⁹⁰

³⁸⁶ See *supra* text accompanying notes 377–382.

³⁸⁷ See *supra* text accompanying note 136.

³⁸⁸ See *supra* text accompanying note 281.

³⁸⁹ See generally DAVID BUCK & SARAH GREGORY, IMPROVING THE PUBLIC’S HEALTH: A RESOURCE FOR LOCAL AUTHORITIES (2013) (for nine recommendations to improve public health and reduce inequalities).

³⁹⁰ See *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); see also *Robertson v. Methow Valley Citizen’s Council*, 490 U.S. 332 (1989) (demonstrating a court’s ability to review NEPA decisions).

G. Lookback Review of Existing Federal Laws

A true Ungerian destabilization³⁹¹ right would affect existing policies as well as new policies. Thus, any policy might be analyzed and challenged for its adverse effects on health and health equity. While this notion may sound extreme, many of the examples I describe contain precisely such lookback and ongoing tailoring requirements affecting existing rather than new policies.³⁹²

A recent example of lookback scrutiny is President Obama's EO 13563, Improving Regulations and Regulatory Review. Section 6 requires agencies' plans for periodic review of existing "significant" rules.³⁹³ A five-year sunset was proposed by the Gingrich Congress for all regulations subject to other types of RIAs.³⁹⁴

Any already-approved legislation would be subject to judicial review, just as any measure is now subject to RFRA challenge.³⁹⁵ Prior legislation would also be vulnerable to a point of order certainly upon re-authorization or amendment, but could also draw a point of order at designated re-evaluation points, including appropriations, as well.

VI. CONCLUSION

I argue that we should move from sporadic to general use of HIAs to foster a rights-based approach to health. My paper demonstrates that a negative procedural right to health could be enunciated in the form of an HIA requirement and thereby circumvent the difficulty of recognizing positive social and economic rights in the U.S. legal tradition. Neoliberal rights "deflect consideration of how we are systemically connected to one another globally, irrespective of our choices."³⁹⁶ HIAs would seed a right that pushes back on that view.³⁹⁷

³⁹¹ How do we unwind states of the world that are damaging? How do we combat the inertia and the power of incumbents as they affect future humanity? For these goals we need destabilization rights. ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530 (1987) (explaining that "[d]estabilization rights protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage"). Scott Burris provided the insight that my proposal for HIAs resembles a call for destabilization rights.

³⁹² See *supra* notes 173, 256, and 304; see 5 U.S.C. § 610 (2018); Congressional Budget Act § 425(a)(2)(B)(iii), 2 U.S.C. § 658d(a)(2)(B)(iii) (2018).

³⁹³ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

³⁹⁴ See Shapiro & Moran, *supra* note 145, at 172.

³⁹⁵ See *supra* text accompanying notes 304–305.

³⁹⁶ See O'Keefe, *supra* note 61, at 736.

³⁹⁷ See generally West, *supra* note 50, at 91–102 (arguing that we should revitalize rights in forms that recognize relational aspects of human nature).

Meanwhile the illusion of a distinction between positive and negative rights is ever more difficult to maintain. The entitlements of the “haves” are so blatantly non-neutral and involve choices to affirmatively allocate state resources in their favor. The increasing circumstances of scarcity also emphasize choice. We are so interconnected with one another and these interconnections are now hypertrophic, as evidenced by climate change, 360-degree surveillance,³⁹⁸ pervasive social media and algorithmic use of big data. Coercion (or unconsented for harms or appropriations at the hands of others) occur routinely yet our traditional lines and bulwarks of liberty rights cannot contain the spillover. We need a complementary right to insulate people from systemic harm as well.

Our freedom is not the only thing we can claim against one another. Kantian rights of liberal autonomy protect a person in the abstract, stripped of all specific character. A right to health, by attending to our embodied selves, could serve as a useful corrective. Our liberal tradition sharply divides the right from the good, while a right to health presupposes continuity between rights and human flourishing. At least we may start with a negative right to health as a baseline integrity from harm, supplementing traditional liberty and property rights by marking another place to toe the line, an additional index of justice.

³⁹⁸ See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).