HEALTH IMPACT ASSESSMENT: A NEGATIVE RIGHT TO HEALTH

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It is commonplace to observe that under U.S. law, arguments for a right to health make little headway. Yet curiously the American hostility to health rights does not necessarily reflect hostility to “health” as a value. Instead, the 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. 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. However much we may value health, the argument runs, we would distort or break with our foundational legal system norms 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, and by an
executive order that has proven durable regardless of the President’s party affiliation. Even now, Congress is considering codifying such a requirement. This default requirement of cost benefit analysis (CBA), assumed to apply unless Congress clearly intends a different regulatory standard, has come under criticism from a variety of fronts. Cost-benefit analysis posits a utilitarian world in which values are aggregative and fungible, and thus can be added and traded-off one another. In response, many have argued that the ascendance of cost-benefit analysis misvalues and ultimately displaces non-utilitarian values like rights, distribution, the integrity of human life, and dignity. 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.” Moreover, rights are given against benefits, unless Congress clearly states otherwise. See also, Cass R. Sunstein, Cost-Benefit Default Principles, 99 Mich. L. Rev. 1651 (2001).

5 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 See e.g., Sidney Shapiro and Robert Glicksman, Risk Regulation at Risk: Restoring a Pragmatic Approach 54 (2002).

8 See e.g., Frank Ackerman & Liza Heinzerling, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection, 150 U. Pa. L. Rev. 1553 (2002) (discussing that it may not be possible to limit the effects of cost-benefit analysis to just those areas for which cost-benefit analysis 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 also, Michael Sandel, What Money Can’t Buy: The Moral Limits of Markets (Farrar, Straus and Giroux) (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).

9 Adam Samaha, Death and Paperwork Reduction, 65 Duke L.J. 279, 324 (2015) citing Eric A. Posner, Transfer Regulations and Cost-effectiveness Analysis, 53 Duke L.J. 1067, 1060-9 and 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.
short shrift under CBA’s utilitarian approach insofar as rights bind without regard to individual case-by-case consequences. 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 tradeoff against one another, fails to adequately acknowledge that some values take the form of rights.

What if there were 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 an agency or Congress, if it were to pursue such action burdening human health, to expressly justify the adverse health effects imposed by such action. 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.

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, 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.

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10 Even utilitarians can acknowledge rights as absolute and indefeasible in this sense. John Stuart Mill, Utilitarianism, 1, 61-67, UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (H.B. Acton, ed. 1972) (distinguishing rights from expediency).
11 See infra, Section V. for full description.
12 See e.g., supra note 6.
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 the discourse conventionally regarded as health policy. It is by now widely recognized that policies outside the traditional health-sector affect our health outcomes no less than policies within our so-called health system. An oft-cited early report from the Centers for Disease Control credited medical care with only 10-15% of the reductions in mortality achieved during the 20th century. Our knowledge base has now grown to recognize how “social determinants of health” may have at least as much effect on health outcomes.

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 conditions as well.

Housing and our built environment constitute examples of distal or upstream factors, wrought by collective policy, that affect population health in complex socially-mediated ways. Certainly, lopsided mortgage interest subsidies to the affluent reduce resources for quality affordable housing options, which may expose people to environmental hazards such as lead or mold, among others. Urban sprawl is also associated with health effects. One study found that for every 1 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. These effects are a function of government action, as a vast number of government decisions facilitated development sprawl. Federal housing financing has favored lower-density single-family homes.

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15 Id.
18 See id. See also, Emily Badger, “How the Federal Government Dramatically Skews the U.S. Real Estate Market,” CITYLAB, Jan. 8, 2013 at 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


Government-financed roads literally paved the way for the automobile.\(^{20}\) Single-use zoning laws were established, as well as ordinances on features such as setbacks and parking.\(^{21}\) The effects on human well-being, through physical, mental, and social pathways, are manifold.\(^{22}\) Meanwhile, housing instability among renters gravely harms health, including that of children in the household.\(^{23}\) Yet the U.S. Department of Housing and Urban Development is pursuing new work requirements to encumber housing assistance along with a host of other punitive policies.\(^{24}\)

At the same time, economic and regulatory conditions have allowed the organization and scheduling of work itself to offload ever more contingency onto workers, increasing toxic stress and fatigue.\(^{25}\)

Our transportation policies often create new accident and other risks, as the rise of the railroad,\(^{26}\) and the automobile have made clear.\(^{27}\)

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20 Jackson, supra note 18.

21 Id.


23 Megan Sandel et al., Unstable Housing and Caregiver and Child Health in Renter Families, 141 PEDIATRICS 2017 (2018) DOI: 10.1542/peds.2017-2199


25 See e.g., HUMAN IMPACT PARTNERS, SCHEDULING AWAY OUR HEALTH (July 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 AND KATE BAHN, CENTER FOR AMERICAN PROGRESS, RAISING PAY AND PROVIDING BENEFITS FOR WORKERS IN A DISRUPTIVE ECONOMY https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/.

26 Mark Aldrich, Death Rode the Rails: American Railroad Accidents and Safety 1828-1965 (2006). And 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) (“Most of the cases involving injuries to persons or property after 1840 were brought about by the activity of canals or railroads.” Horwitz then notes the manner in which private law accommodated this type of externalization. He observes that the ascendancy of the negligence principle over the then-prevailing applicability of strict liability with respect to hazards like “railroad locomotives [which] commonly sent sparks onto neighboring land... was intimately associated with the need to reduce the crushing burden of damage judgments that a system of strict liability (or just compensation) entailed.”).

27 See e.g., Jerry L. Mashaw and David L. Harfst, The Struggle for Auto Safety (1991). See e.g., Sandro Galea, “Making the Acceptable Unacceptable” Dean’s
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? Meanwhile the Small Business Administration has poured funding into fast food franchises in low-income neighborhoods in the name of urban revitalization, even as land, zoning and other regulations deterred supermarkets from locating in low-income neighborhoods.

Socioeconomic conditions, including relative social position, are powerful determinants of health. Even when poverty and deprivation recede as health threats, the health problems due to SES factors do not disappear. The level of inequality in a society itself can impose health burdens on the community. Comparing equally wealthy countries, health outcomes are superior in egalitarian societies compared to ones with steeper...
economic gradients. Yet our tax policies are ever more unequal with predictable health impacts. For instance, every ten percent reduction in the Earned Income Tax Credit increases infant mortality by 23.2 per 100,000 births.

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

Our incarceration policies harm prisoner health in lasting ways, in addition to the health of those in communities with “toxic exposure” to mass incarceration.

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36 Peter A. Muenig et al., Cost Effectiveness of the Earned Income Tax Credit as a Health Policy Investment 51 AM. J. PREVENTIVE MED. 874, 874-881 (2016).


38 See Norman Daniels, Just Health 85 (2008).


As yet uncertain—health threats lurk in other non-health sector policies: for instance special immunities granted to social media platforms 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. 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.”

Health Impact Assessment is a way to begin framing some of these arguments in the form of a procedural right. We already in some contexts and in some states, provide that when non-health laws are being deliberated, people are entitled to demand an accounting of that health burden and a justification of the attendant suffering.

When trade agreements, or economic legislation affects 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? After all, nations that impose sanitary and phytosanitary policies must justify them as the least-trade-restrictive. Health should be accommodated in laws granting government monopolies that raise the price of drugs, and indeed there are scattered provisions, albeit underutilized, for public health-based exceptions from government-granted exclusivities for inventions and plant varieties. Health rights could also trim back federal grants of liability relief to gun manufacturers.

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43 See infra.

44 See e.g. BENN McGRADE, TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET (2011).


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 more indirect; 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 too 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. HIAs supply a way of making these arguments so that government action advancing neoliberal interests at the expense of the citizenry can be blocked or mitigated.

B. HIAs 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. This narrower medical autonomy right would disfavor mandatory vaccination, prohibit government interference with the purchase of contraceptives, and possibly invalidate FDA pre-market drug approval requirements. 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. My project aims to show that a negative right to health properly conceived in the form of an HIA would meaningfully address some of the major health challenges we confront today.

A caveat first: the divide between positive and negative rights is

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Texas district court judge held that a man’s constitutional right to bear arms trumps the public safety policy protected by a federal law forbidding domestic violence offenders from owning firearms.); U.S. 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).


49 Id.

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. 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. Our existing economic rights are not negative rights exactly: they are decisions to assure government backing for certain economic holdings. Martha Fineman explains how all rights are positive, all interests subsidized, because “a subsidy is nothing more than the process of allocating collective resources to some persons or endeavors rather than other persons or endeavors because a social judgment is made that they are in some way ‘entitled’.”

However, to the degree that such artificial divisions between positive and negative rights are still used to police the boundaries of U.S. rights discourse, 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?

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.” In short, the HIAs I

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51 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).”) (footnote omitted)); See also, Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. QUARTERLY 470 (1923).

52 Id.

53Id. See also, BERNARD HARCOURT, THE ILLUSION OF A FREE MARKET: PUNISHMENT AND THE MYTH OF NATURAL ORDER, Harvard Univ. Press (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 an instrument like a futures contract, when it protects the property interests of wheat wholesalers.")


propose would subject federal government action to a routine accounting of its impact on health and the distribution of health.56

HIAs conventionally involves six stages: screening, scoping, assessment, recommendations, reporting, and finally, monitoring and evaluation.57 Sometimes called the Liverpool approach, the sequence of steps has been delineated in the literature thus:

[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.58

HIA differs from some related tools.59 Risk assessments, for instance, are focused on discrete chemical exposure scenarios rather than comprehensive consideration of a wider array of upstream health determinants.60 Cost-benefit analysis 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.61

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.”).  

56 In this article, I explore a federal Health Impact Assessment, although, HIA requirements at state, transnational and other levels are also important steps forward.
57 See For the Public's Health 7.
61 For the Public’s Health, supra note 57, at 127-128.
1. Link Between Health Impact Assessment and Equity

Built into the conventional way health impact assessment 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.\(^{62}\) First, the identification of affected groups and communities is integral to the methodology, as is evident in the six stages described above.\(^{63}\) Also, HIAs are inseparable from assessments of health disparity. HIAs by nature screen for differential impact, thereby necessarily identify inequity. Moreover, an HIA detects disparities in baseline health in the process of measuring for differential impact. Therefore, health impact assessments entail health disparity impact assessments. Furthermore, the analytical steps described above specifically call for the participation of stakeholders in contributing information or data to be deliberatively considered.\(^{64}\) Some observers have also argued that when non-health policies impose detrimental health burdens, those burdens “disproportionately affect the already disadvantaged”\(^{65}\) such that focusing on health impacts will tend to be equity-focused, rather than neutral to distribution.\(^{66}\)

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

62 See, e.g. Norman Daniels, Just Health 85 (2008) (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 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 supra note 34. For another view of how population health inherently contemplates health equity, see David Kindig and Greg Stoddart, What is Population Health?, 93 AJPH 380 (2003)


64 See supra text accompanying note 58.

65 See O’Keefe supra note 58 at 735.

66 Id. See also, Quigley R. et al., Health Impact Assessment International Best Practice Principles. Special Publication Series Number 5, International Association 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 57, at 94. Another cautionary viewpoint is based on the “inverse equity hypothesis,” whereunder new health interventions are accessible to the well-off, leaving others behind and therefore increasing inequity. See e.g., doi: 10.2105/AJPH.2017.304277.
policies that exacerbate inequality.67

However, as is the case with all rights, this equity-promoting valence of HIAs can be disrupted or reversed.68 The National Research Council report is careful to note that the equity-focus of HIAs is a contingent and possibly temporary feature of HIAs: “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.”69

D. History and Precedent

Some have sourced the HIA tool’s origins in the 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.”70 WHO followed with a Gothenburg Consensus document on HIAs in 1999.71 In 2006, HIAs were recommended as a standard for screening large World Bank projects and are now adopted by the Bank’s private sector counterpart, the


69 For the Public’s Health, supra note 23, at 127-128.


International Finance Corporation. Their use has proliferated globally to date. British Columbia and Quebec require HIAs for all government legislation. HIAs are included in the Thai constitution. The London mayor’s office construed HIAs as part of the office’s statutory remit for a number of years. Finland, Australia, New Zealand, Wales and the European Community have to varying extents adopted HIA practices. WHO has also promoted HIA methods in part through the WHO Healthy Cities European Network.

This practice is already in increasingly extensive, if sporadic, use in U.S. states and localities. In one study, 22 of 36 sampled jurisdictions in the U.S. have made some legal provision for HIAs when environmental and energy policies are considered, while 7 out of the 36 jurisdictions do so for agriculture or transportation policies. HIAs are already part of the environmental impact assessment required by the National Environmental Policy Act (NEPA) which I discuss in greater depth later. NEPA regulations include health among the “direct, indirect, and cumulative effects” of the proposed action and alternatives that must be considered in environmental

73 For the Public’s Health, supra note 23, at 131-135.
impact reporting.\textsuperscript{79} EPA has been employing HIAs within its environmental assessments as part of its Sustainable and Healthy Communities Research Program. It concluded in its April 2014 briefing paper that HIAs “have helped raise awareness and bring health into decisions outside traditional health-related fields.”\textsuperscript{80} 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 and cumulative effects.\textsuperscript{81} However, for various reasons including institutional insularity and gaps in research connecting policies to their ultimate health effects, this HIA mechanism remains underutilized, and health impact is not always identified in the environmental impact assessment process.\textsuperscript{82} Furthermore, NEPA-based health assessments would not capture many policies like tax measures that operate through economically or socially mediated pathways.\textsuperscript{83}

\textit{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 health impact assessments are a form of a right to health. What is my model of rights onto which HIAs can be convincingly mapped? Here, I use an account of rights as weighted or prioritized political norms with three features we would plausibly recognize as characteristic of rights.

\textsuperscript{79} 40 C.F.R. §1502.16, 1508.14.
\textsuperscript{81} Memorandum from Susan E. Bromm & Michael Slimak on Promoting the Use of Health Impact Assessment to Address Human Health in Reviews Conducted Pursuant to the National Environmental Policy Act and Section 309 of the Clean Air Act to the Regional NEPA Directors (Nov. 10, 2015) \texttt{https://www.epa.gov/sites/production/files/2016-03/documents/hia_memo_from_bromm.pdf}.
\textsuperscript{82} \textit{See} Hodge, supra note 26.
Rights are typically (though to varying extents) differentiated from “utilitarian goals” or “policy” values.\(^8^4\) 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.\(^8^5\) He contrasts them with policies, unlike rights, which can be pursued and maximized in the aggregate.\(^8^6\) Thus “policy goals” constitute the category of political norm that can be handled through cost-benefit analysis.\(^8^7\)

1. Individuation/Claiming

By contrast, a right is a value that resists cumulative consideration. First, it requires some sort of individuation to be properly honored.\(^8^8\) “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. However, the impairment of a right in one case (say the deprivation of a right to vote) is not rectified by giving someone two votes next time. In Dworkin’s example, the protection of an individual’s liberty, whether married or unmarried, to purchase contraception does not mean that the next individual’s liberty can be violated because “enough sexual liberty” has been secured. 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 a feature of rights.\(^8^9\)

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.\(^9^0\) This

\(^{84}\) 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., supra note 10.

\(^{85}\) RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

\(^{86}\) Id.

\(^{87}\) See e.g., Ackerman & Heinzerling, supra note 8. See also Sidney Shapiro & Christopher Schroeder, Beyond Cost-Benefit Analysis: A Pragmatic Reorientation, 32 HARV. ENVTL. L. REV. 433 (2008).

\(^{88}\) DWORKIN, supra note 70, at 91(describing rights as an “individuated political aim”).

\(^{89}\) See generally, id. at 81.

\(^{90}\) See e.g., Joel Feinberg, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 143, 155 (1980).
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:

“[T]here 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…”  

Feinberg himself does not require that claimability necessarily include the ability to invoke judicial redress or even a legal rather than moral claim. Moreover, Raz cites examples, such as sovereign immunity, or 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.”

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

91 Donald N. MacCormick, Rights in Legislation, in LAW, MORALITY, AND SOCIETY 189-209 (John Hacker & Joseph Raz eds., 1979), ARGUING ABOUT LAW 321, 330 (Aileen Kavanagh and John Oberdiek, eds. 2009). See also, MacCormick, Dworkin as a Pre-Benthamite, 87 PHILOSOPHICAL REV. 585, 599 (1978) (on the different 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.”).

92 Feinberg, supra note 75.

93 Joseph Raz, Legal Rights, 4 OXFORD J. OF LEGAL STUD. 1, 3-5 (1984).
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.\(^{94}\) One must offer special justification surmounting the presumption in order to harm a value that has the status of a right.\(^{95}\) By one account, rights are prioritized in “rank”\(^{96}\) by means of “heavier weighting for principles concerning rights than for pure policies.”\(^{97}\) While MacCormick uses the term “weighting” to describe even Dworkin’s view of the priority of rights, Dworkin himself might have demurred.\(^{98}\) 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.”\(^{99}\) To the extent one could characterize this view of rights as 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.\(^{100}\) Robert Alexy has formulated a theory that rights are subject to a form of weighted balancing.\(^{101}\) 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

\(^{94}\) DWORKIN, supra note 70 (making clear that his background moral rights are not necessarily justiciable rights). Id. 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.)

\(^{95}\) DWORKIN, supra note 70, at 199-200.

\(^{96}\) Id. at 116-117.

\(^{97}\) See supra, Pre-Benthamite note 91 at 592 (1978).

\(^{98}\) Others have challenged whether Dworkin himself really adhered to this view.


\(^{99}\) DWORKIN, supra note 70, at 199-20

\(^{100}\) Frederick Schauer, A Comment on the Structure of Rights, 27 GA L. REV. 415, 429-31 (1993).

test.” Alison Young explains why:

“[R]ights...rule out some methods of balancing and [give] 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.”

Moshe Eliya-Cohen and Iddo Porat give a historical account of the link between proportionality and rights, given that “proportionality was an instrument by which the idea of rights was introduced into German law [and] consequently, the principle of proportionality stands in Germany for the protection of rights.”

David Beatty also concludes that “proportionality review is the ultimate rule of law for resolving constitutional questions about rights,” and Aharon Barak claims, “Proportionality, 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.”

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. Our constitutional rights doctrine often requires

102 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).
104 DAVID M. BEATTY, THE ULTIMATE RULE OF LAW.
105 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.” Id.

(1) a showing of sufficiency of purpose, (2) means-ends rationality and (3) least-restrictive means. I will for now 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. Many of these accounts of proportionality also add an explicit “balancing” prong, which I exclude here because it is implicit to the notion that the privileged value can be overcome by the decision-makers in this context.

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. However these elements, if present, signal that a value is being treated as a right, particularly against the background of flat cost-benefit analysis by default, which predominates in the policy realm. We can be alerted to rights-reasoning at work whenever we see an interest whose tradeoff 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.

II. RIGHTS IN REGULATORY AND LEGISLATIVE IMPACT ASSESSMENT

Fundamental rights under U.S. substantive due process doctrine receive strict scrutiny, as do certain First Amendment rights. Vicki Jackson has pointed out other areas of U.S. constitutional law, like Takings doctrine,

107 ALEXY, supra note 86 (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.)

108 See Jackson, supra note 91 at 3118-3119, 3140-3141 and at n. 222 (describing how in the U.S. we assimilate the balancing 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.”). Id. at 3118-9

109 See Jackson, supra note 91 (discussing other methods in the U.S. constitutional tradition, like categorical rules). See also AHARON BARAK, ALTERNATIVES TO PROPORTIONALITY 493-527 (2012) (discussing methods like categorization, absolute rights, particularly as applied to a right’s “core”).

110 See supra note 4-6.

111 Richard Fallon, Strict Judicial Scrutiny, supra note 106.
where proportionality is used. 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 amidst an overall acceptance of policy-tradeoffs (which the current vogue for CBA represents as well).

However, few proceed to note that regulatory impact analysis (RIA) requirements are also littered 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. 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, I catalog a number of less-canonical provisions that are similar in structure. The Family Impact Assessment, which applied for a few years in the late 1990’s, qualifies even though it was passed as a rider to an appropriations bill, and may not have featured robust enforcement provisions. I would argue that some Executive Orders (EO’s) resemble these rights-like RIAs, despite the lack of judicial enforcement of available for EO’s. For instance, the Reagan-era EO 12630 (1988) required assessment for regulatory burdens on private property even when such 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

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112 See Jackson, *supra* note 91 at 3104-3105.
113 Richard Fallon, *Strict Judicial Scrutiny, supra* note 106
114 See *supra* note 8.
115 MAEVE P. CAREY, *CONGRESSIONAL RESEARCH SERVICE, CROSS-CUTTING REGULATORY ANALYSIS REQUIREMENTS* 4 (December 9, 2014) (including these four in the discussion).
between RFRA and the classic RIAs is that such showings can be enforced--called to be produced--by a different mechanism, that of judicial review. However, we shall see that in the Regulatory Flexibility Act, NEPA, Title II of UMRA, and the Endangered Species Act, judicial review is available as well.\footnote{117 See infra, Section III.F and III.G.}

I argue that in each of the 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 to the extent that they may be plausibly considered rights-holders as distinct from incidental beneficiaries.

In the following section I demonstrate that each of these elements is present (in varying degrees) in each of these RIAs.

\textbf{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 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 OMB. This entity, which serves as a clearinghouse for regulations and certain other administrative actions, has roots in a deregulatory agenda.\footnote{118 See, e.g., Nestor M. Davidson and Ethan J. Lieb, \textit{Regulatory Prudence- at OIRA and Beyond}, 103 Geo. L. J. 259, 280, n. 95 and n.76 (2015) (describing Nixon’s deregulatory agenda as crucial in the history of regulatory review). See also, Jim Tozzi, \textit{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, \textit{Regulatory Analysis and Regulatory Reform}, 65 Tex. L. Rev. 1234, 1249 (1987) (recounting the origins of regulatory analysis in the Nixon, then Ford, Carter and Reagan administrations. He states flatly, from a contemporaneous perspective “Regulatory analysis is to be used to implement the Reagan administration’s philosophy of limited government.”).} Whether it
retains this cast today is in some dispute, but the creation of 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 “the 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 “includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.” 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.

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


120 5 CFR §1320.3 (c).

121 See infra text accompanying notes 145-152 (describing the E-Government Act of 2002 to amend and supplement the PRA).

122 Carey, supra note 115 at 14 (saying that “independent agencies, as well as independent regulatory agencies” are included in the PRA’s coverage, in contrast to Executive Orders, including those that impose default cost-benefit analysis requirements,
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.  

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.”  

§3506(2)(A) 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. 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 “reduction to the extent practicable and appropriate,” such as different compliance standards, timetables, or exemptions.

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

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which do not always reach independent or independent regulatory agencies.).

123 See supra Section I. E. 3.
be apparent from the outward framing of the RIA measure.\textsuperscript{128}

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.\textsuperscript{129} The Director’s zeal in performing this review function is undoubtedly spurred further by § 3514, whereby the Director must report to Congress each year on the information collection burdens on the public.\textsuperscript{130}

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 with power, 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 or for an agency to determine, if, under this subchapter, a person shall maintain,”

\textsuperscript{128} 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 362.

\textsuperscript{129} 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 372-380.

\textsuperscript{130} Some have argued that this approach has failed since the number of information collections has continued to increase, although one does not know if the collections would have increased even more had the PRA not been operative during that time. See Stuart Shapiro and Deanna Moran, The Checkered History of Regulatory Reform Since the APA, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 141 (2015).
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.”

Moreover, persons can claim individualized immunities under §3512, the “Public Protection” provision of the PRA. The section stipulates that “No 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), “The 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: “[T]he 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.”

Under §3506(c)(2)(A)(i) the agency is also required to solicit comments for 60 days as to whether it has met the justification requirement for the paperwork burden. Apart from the normal administrative law requirement to take comments into account, 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.”

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. Paperwork had originally been recognized as a concern in the Federal Reports Act of 1942, but this legislation came under criticism in the 1970’s as ineffectual, and was finally

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131 44 U.S.C. §3517 (b)(1) and (2). 5 CFR §1320.14(c) (emphasis added).
132 5 CFR 1320.6(c).
133 44 U.S.C. §3506(c)(2)(A)(i)
superseded by the PRA in 1980. Stuart Shapiro and Deanna Moran observe that the interest groups supporting the PRA were principally businesses and state and local governments. Meanwhile, the diffuse nature of the benefits from paperwork meant that no interest group came forward and supported its collection.


This history suggests that many of the RIAs that are not now easily classifiable as a form of subconstitutional “right” may still be a “right-in-the-making” should there be opportunity for several more rounds of revisitation by Congress.

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. This note imposed so-called “Privacy Impact Assessments” as an auxiliary to the PRA requirements, and indeed they are often completed together as one process related to information collection requests.  §208(b)(1)(A) of the E-
Government Act\textsuperscript{147} requires that before “initiating a new collection of information that will be collected, maintained or disseminated using information technology; and includes information in an identifiable form permitting … contacting of a specific individual…each agency shall conduct a privacy impact assessment.”\textsuperscript{148}

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.”\textsuperscript{149} 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.”\textsuperscript{150}

Also, to the extent that the electronic information collection results in the maintenance of a “system of records” with individually identifiable information,\textsuperscript{151} that system of records is then governed by another regime, the Privacy Act of 1974, that imposes its own requirements, including standards of fit: “Each 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.”\textsuperscript{152}

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

\subsection*{B. Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBERFA)\textsuperscript{153}}
RFA, like the PRA, was modified by Congress, most notably by SBERFA in 1996. RFA enshrines a different favored value, namely small business freedom from economic burden. Agencies imposing such a burden must make a special showing of heightened justification, and this justification is expressly subject to judicial review.

1. Scope

The RFA, like the PRA, applies to all agencies, even independent regulatory agencies.\(^{154}\) 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.”\(^{155}\) Because these terms are malleable, an agency head must certify, accompanied by factual basis for certification, if she finds that a rule does not meet those standards, and is therefore not subject to the analysis requirements.\(^{156}\) As discussed infra, this certification is subject to judicial review.\(^{157}\)

Small entities are defined to include small businesses, “small organizations,” i.e. not-for-profits, and “small government jurisdictions.”\(^{158}\)

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.”\(^{159}\) We again see an intertwining of the concerns of the PRA and the RFA, suggesting that many of these RIAs are part of an interconnected agenda.

2. Sufficiency of Purpose

In the initial regulatory analysis that must accompany the proposed rule, called the initial “reg-flex,” an agency must describe “reasons why action by the agency is being considered.”\(^{160}\) The agency must also supply “a succinct statement of the need for, and the objectives of the proposed rule.”\(^{161}\)

\(^{154}\) Carey, supra note 115 at 13.
\(^{155}\) 5 U.S.C. §605(b).
\(^{156}\) 5 USC § 605 (b).
\(^{157}\) 5 U.S.C. §611(a)(2)
\(^{158}\) 5 U.S.C. §601(3) to (6).
\(^{159}\) 5 U.S.C. §603(a).
\(^{160}\) See also, Thomas O. Sargentich, The Small Business Regulatory Enforcement Fairness Act, 49 ADMIN L. REV. 123, 128 (1997).
\(^{162}\) 5 U.S.C. §603(b)(1) and (2).
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 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 entities.” The statute then lists particular alternatives that “shall 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.” 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 consistent with the stated objectives of applicable statutes, including a statement on the…reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule…was rejected.

The measure also imposes a lookback tailoring 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.”

4. Claiming

Small businesses must be notified so they have an opportunity to comment, and the comment opportunity exceeds APA notice-and-comment. Section 609 lists the special “techniques” that can be used to “assure that small entities have been given an opportunity to participate.” These include direct notification, publication in targeted publications, public hearings or other methods. Section 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’

\[\text{163}\ 5\ U.S.C. \text{ §603(c).}\]
\[\text{164}\ 5\ U.S.C. \text{ §603(c) } (1) -(4).\]
\[\text{165}\ 5\ U.S.C. \text{ §604(a)(5).}\]
\[\text{166}\ 5\ U.S.C. \text{ §610.}\]
\[\text{167}\ \text{United States v. Nova Scotia Food Products, 568 F.2d 240 (1977).}\]
actions. However courts would consider the contents of the reg-flex analysis in determining whether the rule was “arbitrary and capricious” under the APA.\textsuperscript{168} SBERFA, passed by the Gingrich Congress in 1996,\textsuperscript{169} added a judicial review provision. Small entities can now go to court to challenge an agency’s actual analysis for final rules, an agency’s threshold certification of no significant impact, and the agency’s ten-year lookback review outcomes.\textsuperscript{170} Relief can include a deferment of enforcement against small entities, which is considerably more favorable than the usual remand \textit{nonvacatur} which leaves the contested rule in place while the agency reconsiders the rule on remand.\textsuperscript{171} SBERFA also contains a provision authorizing small entities to recover attorneys’ fees.\textsuperscript{172} The statute stipulates a right of intervention for the Chief Counsel for Advocacy of the Small Business Administration in any such action.\textsuperscript{173}

The Chief Counsel for Advocacy of the Small Business Administration acts as a representative for small businesses, whom the agency promulgating the rule must also reach out to at key points.\textsuperscript{174} With respect to two particularly villainized agencies, EPA and OSHA,\textsuperscript{175} the advocacy role of the Chief Counsel is enlarged. She must convene a review panel for each EPA or OSHA rule,\textsuperscript{176} identifying individual representatives of affected small entities\textsuperscript{177} to review the initial reg-flex and proposed rule.\textsuperscript{178} 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.”\textsuperscript{179} This structure of representative accountability exists alongside the canonically rights-based framework of judicial review.

\textsuperscript{168} See \textit{e.g.}, Michigan v. Thomas, 805 F.2d 176, 187-8 (6th Cir. 1986).
\textsuperscript{169} See Shapiro and Moran, \textit{supra} note 130.
\textsuperscript{170} 5 U.S.C. §611(a)(2) (giving jurisdiction “to review any claims of noncompliance with §§601, 604, 605(b), 608(b) and 610.”).
\textsuperscript{171} See Pierce \textit{supra} note 160 at 547-8.
\textsuperscript{172} 110 Stat. at 862-3 (amending 5 U.S.C. §504(a)).
\textsuperscript{173} 5 U.S.C. §612.
\textsuperscript{174} See \textit{e.g.}, 5 U.S.C. §606(b) (notifying Chief Counsel of any certification of “lack of significant economic impact on a substantial number of small entities.”); §603(a) (requiring transmittal of initial reg-flex to the Chief Counsel).
\textsuperscript{175} 5 U.S.C. §609(b) (applying additional requirements for initial reg-flex by “covered agencies” and §609(d) defining covered agency).
\textsuperscript{176} 5 U.S.C. §609(b) (2) (and (3)
\textsuperscript{177} 5 U.S.C. §609(b)(2)
\textsuperscript{178} 5 U.S.C. §609(b)(4).
\textsuperscript{179} 5 U.S.C. §609(b)(6).
5. History

The Regulatory Flexibility Act was enacted in 1980, itself a deregulatory moment. Then in 1996, it was, as described, substantially amended to further favor small businesses. 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, including measures that would have imposed a supermandate for cost-benefit analysis. That particular idea lingers to the present-day. 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. SBREFA was among the only pieces of the Republican agenda that did ultimately wend its way to completion.

C. National Environmental Policy Act (NEPA)

In some ways, NEPA is the godparent of all regulatory analysis requirements. 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.” In effect, it made “environmental protection a part of the mandate of every federal agency and department.”

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182 See supra note 110 (1997).
183 See also Pierce supra note 121 at 546.
184 See e.g., supra note 126.
185 See Sinclair, supra note 122 at 110-113.
186 42 U.S.C. §4321 et seq.
187 See McGarity supra note 118 at 1247 (“The 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”).
188 NEPA §202(1)(C), 42 U.S.C. §4332(1)(C).
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.”

“Significantly affecting” is not defined in the statute, but NEPA regulations have devised a methodology for how to make this threshold determination. Agencies must conduct Environmental Assessments (EA’s) which “briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” Thus, some minimal environmental assessment is necessary in order to determine whether a full Environmental Impact Statement (EIS) must be conducted under 42 U.S.C. §4332(1)(C). 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. Sometimes substantive environmental mitigation commitments are made at this stage to obtain what is called a “mitigated FONSI“ and thereby avoid the EIS process. EA’s and FONSI’s are also subject to judicial review.

2. Sufficiency of Purpose

Unlike its RIA progeny, the NEPA statute does not require an analysis of sufficiency of purpose in so many words. However, the regulations interpreting NEPA do. 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. This language requires that the countervailing factors be weighty.

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190 42 U.S.C. §4332(1)(C) (2000). 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. Southern Utah Wilderness Alliance 542 U.S. 55 (2004).
191 40 C.F.R. §1508.9. This case-by-case elaboration of the threshold has been
192 40 C.F.R. §1508.13.
194 Save Our Ten Acres (SOTA) v. Kreger, 472 F.2d 463 (5th Cir. 1973).
195 See 40 CFR §1505.2
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.”\(^{196}\) Moreover, it must describe “alternatives to the proposed action.”\(^{197}\) This language has been interpreted as a procedural requirement to consider, though not necessarily adopt, less environmentally damaging alternatives.\(^{198}\) However, the regulations interpreting NEPA 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.\(^{199}\)

4. Claiming

While NEPA did not include an express judicial review provision, courts have reviewed for NEPA compliance using APA §702.\(^ {200}\) Courts apply “hard look” analysis to judge an agency’s execution of its obligations under NEPA,\(^ {201}\) and a regulation can be enjoined if the agency’s performance of its NEPA functions is so inadequate that the regulation is arbitrary and capricious.\(^ {202}\) Moreover, mitigation measures adopted as a condition of the FONSI are judicially enforced.\(^ {203}\)

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

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\(^{196}\) NEPA §202(1)(C)(ii)

\(^{197}\) NEPA §202(1)(C)(iii)

\(^{198}\) See e.g., Vermont Yankee v. NRDC, 435 U.S. 519 (1978).

\(^{199}\) 40 CFR §1505.2 (requiring a “Record of Decision,” or ROD).

\(^{200}\) See e.g., Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1353-4, (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.).


\(^{203}\) Tyler v. Cisneros, 136 F. 3d 603 (9th Cir. 1998).
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.”

42 U.S.C. §4365 also created a Science Advisory Board which must be consulted with on proposed criteria, standards, limitations or regulations under a range of environmental statutory authorities. These institution-building provisions in NEPA accomplish several things. They institutionalize a certain elevation of environmental issues within the White House by the creation of a dedicated council.

The provisions also subject environmental regulation to across-the-board involvement by the new institution of the Science Advisory Board.

NEPA has proven surprisingly enduring. Congressional amendment has been fairly minor, although many new laws that Congress passes contain NEPA exemptions. CEQ promulgated binding NEPA regulations in the late 1970’s, but on the authority of President Carter’s Executive Order 11514, rather than on the basis of statutorily delegated rulemaking authority.

These regulations have operated through the decades, despite “such a shaky legal foundation.” NEPA, which declares a Congressional policy of “recognize[ing] that each person should enjoy a healthful environment,” has achieved a degree of entrenchment such that one observer notes, “If environmental law has a superstatute, it is the procedural NEPA,” referencing the “superstatute” notion that certain laws attain a status of popular acceptance such that they are difficult to repeal. Indeed, this capsule history of NEPA aligns with the argument that RIAs are vehicles for popular struggles to inscribe conceptions of rights in extra-constitutional

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204 42 U.S.C. §4342
205 See Yost supra note 206
207 See e.g. Lynton K Caldwell, Beyond NEPA: Future Significance of the National Environmental Policy Act, 22 HARV. ENVT'L. L. REV. 203, 205 n. 9 (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).
208 3 CFR §531 (1971). The EO directs agencies to “comply with the regulations issued by [CEQ] except where such compliance would be inconsistent with statutory requirements.”
209 See Karkkainen supra note 206 at 335.
210 NEPA 101(c).
D. Unfunded Mandates Reform Act (UMRA)\textsuperscript{213}

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.”\textsuperscript{214} What is notable about UMRA is that it applies to legislation.\textsuperscript{215} Title I of 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.”\textsuperscript{216} 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.\textsuperscript{217} Health is anticipated to be a governmental purpose that can compete with and burden the favored value of state and local economic freedom.

\textsuperscript{213} 2 U.S.C. § 1501 and scattered sections.

\textsuperscript{214} 2 USC § 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 certain conditional provisions attached to entitlement programs. Statutes imposing federal intergovernmental mandates trigger certain reporting requirements, but are only enforceable above a certain economic threshold. \textit{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. 2 U.S.C. §658(6) and (7). \textit{See} Stuart Shapiro and Deanna Moran, \textit{supra} note 130.

\textsuperscript{215} UMRA §202 et seq (Title I).

\textsuperscript{216} UMRA §202(a); 2 USC §1532(a).

\textsuperscript{217} UMRA §202(a)(2); 2 USC §1532(a)(2).
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 costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule.” This fit requirement applies to both intergovernmental and private sector mandates, and permits the presumption in favor of the least-burdensome alternative 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.

3. Regulatory Claiming

The agency must engage in “consultation with elected representatives of the affected State, local, and tribal governments” and the §202 written statement must describe this consultation when the rule is promulgated. Such written statement must also include a summary of comments with the agency’s responses. 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 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. 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.” 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.”

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218 2 U.S.C. §1535(a).
219 2 U.S.C. §1535(b).
220 UMRA §204; 2 U.S.C. §1534
221 UMRA §202.
222 UMRA § 202(a) (5) (A-C); 2 U.S.C. §1532(a) (5) (A-C)
223 UMRA § 401(a) (1-2) and (5); 5 U.S.C. §1571(a) (1-2) and (5).
224 Id.
225 UMRA §401(a)(3); 5 U.S.C. §1571(a)(3)
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,” 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 mandate,” the legislation must be accompanied by a reporting of not only costs anticipated in the first five fiscal years, but also the “benefit anticipated from the Federal mandates (including the effects on health and safety and the protection of the natural environment).” Such declaration of benefit could be understood as 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. UMRA amended a two-decade old law, the Congressional Budget and Impoundment Control Act of 1974, often referred to as the Congressional Budget Act or just the “Budget Act.” UMRA inserted many of its requirements directly into the framework of the Budget Act. Indeed the section number used to signify this obligation, §423, refers to the section of the 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. After all, for Congress’ budget to have meaning, it must entail consequences for the passage of laws that exceed the budget. The Budget Act thus subjects such budget non-
conforming legislation to a point of order that any member of Congress can raise.\textsuperscript{232} To proceed with the legislation once such an objection has been raised, the relevant house must waive the implicated rule,\textsuperscript{233} a step which according to the Budget Act framework, requires a supermajority vote.\textsuperscript{234}

However, the UMRA committee reporting requirement under §423 is not subject to a point of order.\textsuperscript{235} 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.\textsuperscript{236}

These circumstances do not, however, mean that UMRA is unenforceable as applied to legislation. UMRA contains a second tier of requirements apart from §423. §425 of the UMRA-amended Budget Act imposes an even stronger condition upon significant mandates exceeding an economic threshold (roughly $50 million in direct costs) and this condition, if not met, is vulnerable to a point of order.\textsuperscript{237} This point of order, unlike certain others within the Budget Act, requires a mere majority to overcome.\textsuperscript{238} Various aspects of the §425 condition are discussed below, but it requires, roughly speaking, some indication that the mandate’s burdens will be mitigated.\textsuperscript{239} While this point of order does not apply expressly to 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.\textsuperscript{240} 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.

\textsuperscript{232} 2 U.S.C. § 633 (f)(1) and (2)
\textsuperscript{233} BILL HENIFF, JR., CONG. RES. SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS (2012) http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0DP%2BPLW%3C%22%40%20%20%0A.
\textsuperscript{234} 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, Pub. L. No. 93-344 §904(c) and (d). See Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 KANSAS L. REV. 1113, 1161-1168 (1997).
\textsuperscript{235} UMRA §425(a)(1) (subjecting the CBO reporting requirement to a point of order, though.).
\textsuperscript{236} Garrett supra note 234 at 1142.
\textsuperscript{237} Budget Act § 425(a)(2) (as amended by UMRA); 2 U.S.C. § 658d(a)(2)
\textsuperscript{238} Garrett supra note 234 at 1161-1168 (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. Id. at 1161-2.
\textsuperscript{239} See supra text accompanying notes 243-245.
\textsuperscript{240} Garrett, supra note 234 at 1165-6, 1172-3.
5. Legislative Fit

As we said when discussing UMRA Title II, before promulgating a rule for which a written statement is required, “the agency shall consider…. [and] select the…least burdensome alternative…” [241]

At first glance, the articulation of a similar fit requirement is not a condition for a legislative intergovernmental mandate, especially one protected by only the less enforceable §423(c) committee reporting obligation. However, this initial impression gives way on closer inspection as we describe later. [242] 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…” But this requirement does not apply to a legislative intergovernmental mandate. Again, as with RFA, UMRA establishes a private protectorate whose economic interests are procedurally differentiated.

However, the real enforcement cudgel, the point-of-order under §425 of the Budget Act, only applies to intergovernmental mandates. [243] Despite a lack of specific language in Title I, demanding that Congress describe its consideration of “less restrictive” means or “efforts to reduce or minimize” burdens, 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) list conditions under which legislation would not be subject to the point of order. Subparagraph (A) exempts the legislation if it provides new budget authority, entitlement, or spending authority to cover the mandate. [244] 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. To satisfy this requirement, legislation could include a circuit-breaker which, upon shortfalls in appropriations, then kicks in to “implement a less costly mandate or mak[e] such mandate ineffective

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[242] See supra text accompanying note 246.
[244] Budget Act §425(a)(2)(A) and (B)(iii) (bb); 2 USC §658d(a)(2)(A) and (B)(iii) (bb).
for the fiscal year.”

Even for those federal intergovernmental mandates that fall short of 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.”

Lookback review is also a feature of 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. Garrett also notes, “Congress has the authority under the Act to request CBO to perform follow-up studies.”

6. Legislative Claiming

The point of order provides accountability for the heightened legislative criteria of §425, which can be understood as requirements of extra clarity by Congress with respect to sufficiency of purpose and fit. If there is no funding or no funding mitigation clearly indicated for a federal mandate above the threshold, 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.

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. The point of order can only be overcome by majority vote, which Garrett contends remains politically consequential insofar as it forces a separate roll call vote requiring Members

245 Budget Act §425(a) (2) (B) (iii) (bb); 2 USC §658d(a)(2) (B)(iii) (bb).
246 Budget Act §423; 2 USC §658b.
248 Garrett supra note 234 at 1160.
249 Budget Act §424(a)(1), 2 USC §658(a)(1) (imposing a $50 million per fiscal year threshold for intergovernmental mandates). §424(b), 2 USC §658c(b) (setting the threshold at $100 million for private mandates).
250 Garrett, supra note 234 at 1161-1168 (detailed description of the mechanics and incentive structure behind points of order generally and UMRA points of order in particular).
of Congress to take a visible stance on that particular issue.\textsuperscript{252} Furthermore, the Senate has on occasion voted to raise that threshold to sixty votes.\textsuperscript{253} While that threshold reverted back to simple majority in subsequent fiscal years, the threat of elevating enforcement in any given year remains.\textsuperscript{254}

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 by states and localities, consistent with H.L.A. Hart’s account of choice-rights.\textsuperscript{255} §425(b) contains the following rule of construction: “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.”\textsuperscript{256}

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”\textsuperscript{257} while the allies of the so-called intergovernmental lobby were vocal in support.\textsuperscript{258} But business groups were also strong UMRA proponents in committee hearings, citing environmental laws such as the Clean Air Act as examples of unfunded federal mandates.\textsuperscript{259} The


\textsuperscript{253} FY2006 Budget Resolution (March 2005) https://www.congress.gov/bill/109th-congress/house-concurrent-resolution/95. The Senate also included a supermajority threshold in an early version of the FY2010 budget resolution, (S. Amdt. 819) to S. Con. Res. 13, but this change dropped out before the budget resolution was finalized.


\textsuperscript{255} For a view that a rights-holder is one who can waive the right, see H.L.A. Hart’s account of choice-rights in \textit{Legal Rights, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY} 162, 186.

\textsuperscript{256} Budget Act §425(b).

\textsuperscript{257} Shapiro and Moran, \textit{supra} note 130 at 167 citing Dilger & Beth, \textit{supra} note 254. 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.

\textsuperscript{258} Garrett, \textit{supra} note 234 at 1136.

\textsuperscript{259} Shapiro and Moran \textit{supra} note 130 at 168
constituency favoring UMRA (states and small business, supported by big business) was very similar to the constituency that supported RFA.\textsuperscript{260}

Furthermore, certain non-federalism-related purposes burrowed their way into UMRA. The bill originally concerned only burdens on states and localities, but an amendment introduced required “private-sector cost impact statements when the economic burdens were over 100 million USD.”\textsuperscript{261} UMRA thus elevates private economic freedom as well.

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

Here I wish to argue for the similarity of a few additional measures that impose 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

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 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 within the §7(a)(4) written statements issued by the Secretary of Interior or Secretary of Commerce incident to required consultation by the acting agency.\textsuperscript{262}

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….”

Any agency action that burdens these values in this way can only proceed if it has been granted an exemption.

\textsuperscript{260} Id. at 169.
\textsuperscript{261} See Kempthorne S. Amdt. 19 to S. 1 in 104th Congress.
\textsuperscript{262} ESA §7(a); 16 U.S.C. § 1536(a)-(d).
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.”

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 [or threatened] species...or result in the destruction or adverse modification of habitat of such species.” 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. Exemption involves formal hearing and vote of the multi-member committee, colloquially called the “God Squad,” hinging upon certain substantive showings such as sufficiency of purpose and fit.

2. Sufficiency of Purpose

Section 7(h)(A) provides that voting committee members may grant exemptions on the basis of determinations that “the action is of regional or national significance,” 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....”

These formulations all necessitate a finding that the purpose of the action must be sufficient to justify an exemption.

3. Fit

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264 16 U.S.C. § 1536(a)(2); ESA §7(a)(2) (emphasis added).
265 16 U.S.C. § 1536(e); ESA §7(e)( listing in subparagraph (3) the seven members of the “God Squad”); 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 5 of its members...” and then articulating the determinations that must be made to justify such a vote).
267 ESA §7(h)(A) and (B); 16 U.S.C. § 1536(h)(A) and (B).
Section 7(h)(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.”\textsuperscript{270} §7(h)(B) goes on to require that the Committee granting the exemption must:

“establish 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.”\textsuperscript{271}

4. Claiming

§7(n) grants that “[a]ny person...may obtain judicial review under [the APA], of any decision of the Endangered Species Committee under subsection (h),”\textsuperscript{272} though with notorious standing limitations.\textsuperscript{273} The statute also provides for attorney’s fees.\textsuperscript{274}

5. History

Indeed, the court has intervened to enforce these species preservation norms, with \textit{TVA v. Hill} serving as a vivid reminder.\textsuperscript{275} The Court held that the statute forbade cost-benefit balancing in a way that prompts 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.”\textsuperscript{276} The God Squad has rarely found occasion to overcome the ESA’s protections,\textsuperscript{277} though occasionally agencies engage in negotiation over discretionary decisions such as whether to designate or list a relevant species or habitat, or whether “jeopardy” to the relevant species is found.\textsuperscript{278}

But this anomalously stringent subconstitutional provision was, like other quasi-rights on this list, the result of a decades-long struggle to establish and shape biodiversity as a favored value. The Endangered Species Preservation Act enacted in 1966 merely provided a means of listing native species with

\textsuperscript{270} \textit{Id.} (italics added).
\textsuperscript{271} ESA §7(h); 16 U.S.C. § 1536(h).
\textsuperscript{272} ESA §7(n); 16 U.S.C. § 1536(n).
\textsuperscript{274} ESA §11(g); 16 U.S.C. § 1540(g).
\textsuperscript{275} 437 U.S. 153, 194-95 (1978).
\textsuperscript{277} See Sinden, \textit{id.} at 1504.
\textsuperscript{278} \textit{Id.}
limited protections.\textsuperscript{279} It was amended in 1969, and only assumed its current form in 1973. The provisions were then slightly weakened five years later with the allowance of exemptions from the ESA’s protections through the “God Squad” process described above.\textsuperscript{280} Major amendments have since passed and Congress has periodically intruded to grant relief for those who sought to overcome the presumptive protection of endangered species, yet did not prevail in the God Squad process.\textsuperscript{281}

\section*{B. Religious Freedom Restoration Act of 1993 (RFRA)\textsuperscript{282}}

1. History

RFRA arose in response to the Supreme Court’s decision in \textit{Employment Div., Dept. of Human Resources of Ore. v. Smith}.\textsuperscript{283} Prior to Smith,\textsuperscript{284} the Supreme Court, under the Free Exercise Clause of the Constitution,\textsuperscript{285} applied strict scrutiny not only to laws that target religion but also to laws that are “neutral toward”\textsuperscript{286} and only incidentally burden religion.\textsuperscript{287} By analogy, I argue in this article that generally applicable laws not targeted at health \textit{per se}, but which burden health nonetheless, should still receive HIA scrutiny.

With the Smith decision in 1990 the Supreme Court changed course.\textsuperscript{288} Native American persons had been fired for ceremonially ingesting peyote thereby violating state-imposed and employer restrictions on drug-use. Because Smith was fired for misconduct, just as Sherbert was fired for refusal to work on Saturday, he did not qualify for unemployment benefits. The general criminal prohibition on drug use and possession was plainly neutral to religion and applied to all individuals regardless of religion. Therefore,

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\textsuperscript{280} Sinden, \textit{supra} note 276 at 1505.
\textsuperscript{281} Id.
\textsuperscript{282} 42 U.S.C. §2000bb \textit{et seq.}
\textsuperscript{283} 494 U.S. 872 (1990) (departing from the balancing test applying strict scrutiny to neutral generally applicable laws that impose a substantial burden on the practice of religion.). That it was enacted in response is evident in the findings. 42 U.S.C. §§ 2000bb(a) (2)-(4) and 2000bb-1(a).
\textsuperscript{284} 485 U.S. 439 (1988).
\textsuperscript{285} Sinden, \textit{supra} note 276.
\textsuperscript{286} This phrase is used in the Congressional findings for RFRA, 42 U.S.C. §2000bb(a)(2) and (4).
\end{flushright}
according to Scalia writing for a 6-3 majority, the compelling interest and least restrictive means test were not triggered.289 Religious minority interests would have to seek protection in the general horse-trading of the political process and would not otherwise be singled out for special justification as a condition of infringement.290

Congress in RFRA re-imposed the application of strict scrutiny, requiring a showing of compelling governmental interest and least restrictive means for generally applicable laws imposing a substantial burden on “a person’s exercise of religion.”291 Here, we examine RFRA insofar as the heightened justification for federal action parallels other regulatory analysis requirements.

RFRA impedes the federal government from “substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability,”292 unless it makes a showing satisfying strict purpose and fit standards.

2. Scope

RFRA, like UMRA, covers both legislative and regulatory activity, declaring, “This 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.”293 RFRA evidently contemplates lookback application as well.294

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.”

The threshold term, “exercise of religion” is defined by reference in the

289 499 U.S. 872, at 879.
290 Id. at 980.
293 42 U.S.C. § 2000bb-3(a)
294 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, 2017 PEPPERDINE L. REV. 26 (2017).
statute as “any exercise of religion, whether or not compelled by or central to, a system of religious belief.”295 However, the threshold term “substantial burden” is not further specified in statute, and has been contested in court.296

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.” 297

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 of furthering that compelling governmental interest.” 298

5. Claiming
The government can be called to account for nonconformance with RFRA by the putative individual rights-holders. The statute allows an aggrieved person to assert “violation of this section….as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”299

In 2006, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,300 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 preventive services that non-grandfathered employer health plans were expected to cover include

296 Burwell v. Hobby Lobby 573 U.S. ___ (2014); 134 S. Ct. 2751 (concluding that the condition that for-profit employers who offer health insurance include coverage but not hands-on provision of certain contraception options if they wish to enjoy tax exemption while using the offer of health benefits to compete for skilled employees was not so attenuated as to fail the “substantial burden” threshold.). Observers have noted that he substantial burden test was defined down to virtually nothing by this case. See e.g., Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM L. REV. 1453, 1497 (2015) (the substantial burden test required merely that “plaintiff’s assert… that a law imposes a substantial burden.”).
297 42 U.S.C § 2000bb-1(b)(1).
contraceptives.  

6. Isomorphism

RFRA is not usually referred to as an RIA requirement. But through this discussion it should be apparent that RFRA contains all 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, and 5) imposing a condition of heightened justification for that burden 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 differences 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 as an accountability mechanism, the justification need not be tendered ex ante, before the measure is issued, as the court action will usually occur post hoc.

C. Assessment of Federal Regulations and Policies on Families

The Fiscal Year 1999 Treasury Appropriations bill 302 required that any agency rule include an assessment of the impact of the rule on family well-being. However, this interest 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 that “[b]efore implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether” inter alia…

2. “[agency actions] “strengthen or erode the stability or safety of the family and, particularly, the marital commitment;
3. “[they affect] “authority and rights of the parents in the education, nurture and supervision of their children;
4. “[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.”

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. These are burdens where the fungibility and tradeoff against other values is not assumed, which clearly sets this impact assessment apart from the default cost-benefit analysis 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. However, it does demand that the regulation be assessed as to whether “the proposed benefits of the action justify the financial 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” 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. Claimability

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.” However, Members of Congress could demand compliance. 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 imposed by Congress such as oversight hearings, appropriations riders and adverse authorizing or appropriations action.

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303 Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 §654(c).
304 Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 §654(f).
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.\textsuperscript{305} Indeed, the Family Impact Assessment itself was preceded by EO 12606.\textsuperscript{306}

\textbf{D. Private Property/Takings Executive Order}

In the late 1980’s, Reagan signed EO 12630 “Governmental Actions and Interference with Constitutionally Protected Property Rights.” It has not since been revoked.\textsuperscript{307}

1. Scope

Under this EO, before any non-independent agency undertakes regulation of private property to protect public health or safety, it must show sufficiency of purpose and fit.

This heightened justification requirement clearly extends to regulatory burdens on private property that do not rise to the level of takings. Even without discussing 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 “estimate, to the extent possible, [of] the potential cost to the government in the event that a court later determines that the action constituted a taking.”\textsuperscript{308} 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, in a report conducted at the time, concluded that “the majority of takings principles stated or implied in the Executive Order 12630 overestimated the likelihood of a taking.”\textsuperscript{309}

\textsuperscript{305} Some groups are engaged in this policy advocacy, including the Family Impact Institute, now headquartered at the Center for Families at Purdue University. https://purdue.edu/hhs/hdfs/fii/about/history.


\textsuperscript{308} Exec. Order No. 12630 § 4.

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.” Thus, the purpose of the regulatory action must be clearly and 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.” The agency must show what Alexy might call “suitability,” namely, that the means does 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.” This provision requires another aspect of fit, namely, no excess of burden that is somehow not sufficiently linked with, and therefore cannot draw sufficient justification from, the important purpose.

4. No Claiming under Executive Orders

These measures with no claiming mechanism should be seen for their significance within a dynamic arc. They are being described at one moment in the ongoing struggle over popular conceptions of rights in the 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. The Paperwork Reduction Act was preceded by the Federal Reports Act. The Unfunded Mandates Reform Act 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. Similarly, the extra-constitutional protection of private property from regulatory burden may begin in the form of a mere executive order, but bills have been introduced

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311 Id.
312 See supra note 107
313 Supra text accompanying note 306.
314 Shapiro and Moran, supra note 130.
since to codify it.\textsuperscript{316} In 1995, legislation to extend this EO was introduced as H.R. 925 and passed the House, though it later died in the Senate.\textsuperscript{317} 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 20%).\textsuperscript{318} Meanwhile, the executive order itself has enjoyed significant longevity,\textsuperscript{319} 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.

\textit{E. Federalism Executive Order 13132 and other Clinton RIAs by Executive Order}

President Clinton signed a number of executive orders along these lines. For instance, EO 13045 for the “Protection of Children from Environmental Health Risks and Safety Risks”\textsuperscript{320} contained an RIA requirement in §5. Any rulemaking action falls within the scope of §5 if it is “likely to result in an economically significant rule” and involved “an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children.”\textsuperscript{321} Should an agency take an action covered by those parameters, it must provide the following information: 1) an evaluation of the environmental health and safety effects of the planned regulation on children,” and “an explanation of why the planned regulation is preferable to other potentially and reasonably feasible alternatives considered by the agency.”\textsuperscript{322} Thus, some alternatives and their degree of burden on this privileged interest must be considered and a justification offered for why they were not selected. Some fit is demanded even if the failure to require sufficiency of purpose, and the general unsuitability of EO’s to ground any individuated claim might place these examples slightly further on the

\textsuperscript{317} Also included in H.R. 9 The Job Creation and Wage Enhancement Act of 1995, a component of the Republicans Contract with America. \textit{See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 113-133 (1997). See also, THOMAS O. MCGARITY, FREEDOM TO HARM 78 (2013) (explaining that Senate Republicans failed to overcome filibusters on various omnibus regulatory reform efforts.).}
\textsuperscript{318} Sinclair, \textit{id}. at 122-5.
\textsuperscript{319} GAO Report “Regulatory Takings: Implementation of EO 12630.”
\textsuperscript{321} \textit{Id}. §5.
\textsuperscript{322} \textit{Id}. 
continuum away from the model of an RIA as a quasi-right.323

F. 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 Obama signed EO 13175 for “Consultation and Coordination with Indian Tribal Governments,”324 which is related to UMRA in certain respects. No agency 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. However, this “tribal summary impact statement” need only describe the agency’s consultation, and a statement of the extent to which the tribal concerns have been met. No particular countervailing purpose or minimization of burden is required.

President Clinton’s EO 12988 “Civil Justice Reform”325 directed agencies to review all new and old regulations to ensure that they are “written to minimize litigation.”326 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).327 This SEE is triggered only when federal actions may have “significant adverse effect” on “supply, distribution, and use of energy.” OMB issued a memorandum in 2001 listing circumstances that would constitute “a significant adverse effect,” including reductions in crude oil supply in an amount of 10,000 barrels per day or more, reductions in coal or natural gas production of a certain amount, increases in the cost of energy production and distribution in excess of 1 percent.328

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323 See e.g., In re Surface Mining Regulation Litigation, 627 F. 2d 1346 (D.C. Cir. 1980) (illustrating that executive orders for impact assessments could not be enforced in court).
325 Exec. Order No. 12988 Civil Justice Reform (February 5, 1996).
326 Exec. Order No. 12988 “Civil Justice Reform” (February 5, 1996) §3(a)(2).
328 Memorandum M01-27, OMB, Guidance for Implementing E.O. 13211 (July 13, 2001) available at https://www.whitehouse.gov/omb/memoranda_m01-27
advocates feared the use of this EO to “curtail critical habitat designation or other environmental protection,” and therefore urged Obama to repeal this executive order in the first hundred days. He declined to do so, and this EO remains in effect today.

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 effect of the undertaking” on historical properties. However, the implementing regulation contemplates a process that at least partly tracks NEPA. NHPA even accorded judicial review for compliance along with NEPA.

The examples abound. 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 interests, but also the general public who pay energy bills and depend on energy supplies. Though these examples impose certain assessment duties upon agencies, they might be fairly characterized as duties to the public at large.

G. Regulatory Right to Know

The so-called “Regulatory Right-to-Know Act,” despite its name, falls short of a right. Passed in 2001 in the Treasury and General Government Appropriations Act, it is understood as a legislative rider imposing

333 36 CFR §800.
334 See supra Tyler v. Cisneros, 136 F. 3d 603 (9th Cir. 1998).
permanent reporting obligation for OMB.337 Its precursors include similar reporting requirements inserted previously as one-year appropriations riders.338 Unlike the other RIA requirements discussed thus far, 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 while also 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 governments, small businesses, wages, and economic growth.”339 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 12866. However, because EO’s are generally not applicable 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.

H. Agency-Specific RIAs

There are many other RIA provisions that I neglect here because they are not trans-substantive, and may apply to only one or a few related agencies. As such, they may be nearly indistinguishable from statutorily mandated factors that an agency must consider when regulating.340

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.

Similarly, §106 of the National Securities Market Improvement Act of 1996 requires the SEC, in all its actions, to consider, “in addition to the protection of investors, whether [an] action will promote efficiency, competition, and capital formation.”341

337 See Carey, supra note 115 at 7, note 31 (stating that this note “put in place a permanent requirement for an OMB report on regulatory costs and benefits.”)
340 See Carey, supra note 115 for this insight.
USDA has issued a departmental policy requiring a civil rights impact analysis for all loans or “conditional commitments.” I leave these RIAs aside for now.

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 legislative and administrative domains.

And 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. States have protected interests against economically burdensome federal mandates, property owners assert freedom from subconstitutional regulatory takings, and “traditional” families enjoy certainautonomies. But are we free from government action that burdens people’s health? In some politically motivated instances, we virtually ban health impact assessment, as seen in the case of guns and their effect on health. We have only partial claim, in the form of an interest 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.

342 7 C.F.R. § 4279.60
344 Language from the so-called Dickey Amendment has been inserted into appropriations bills each year since 1996, “prevent[ing] funds from being used to advocate for or promote gun control.” This language, while not strictly forbidding research or gathering of data on the health effects of gun policies, has chilled such conduct and remains in the FY2018 Appropriations bill. See H.R. 1625 Consolidated Appropriations Act, 2018 available at https://www.congress.gov/bill/115th-congress/house-bill/1625/text.

For other examples of statutory language that, although not yet enacted, seeks to prohibit other types of impact assessments, see H.R. 482 Local Zoning Decisions Protection Act of 2017 available at http://gosar.house.gov/sites/gosar.house.gov/files/Local%20Zoning%20Decisions%20Protection%20Act%202017.pdf. Section 3 reads, “Notwithstanding 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.”
The selective imposition of accounting and justification requirements provides a familiar procedural means of framing substantive norms. Selectively procedural, and therefore “semi-substantive” means of protecting background rights have been observed in other contexts.345

V. THE PROPOSAL

What should this HIA measure look like? The following sketches an HIA requirement that I believe should be passed by Congress. I offer these features merely to supply a starting point for a policy debate that we urgently need.

A. Scope

The requirement should apply to both legislative action and agency action, just as UMRA and RFRA do. The HIA should apply with equal strength to both regulatory and deregulatory government action, as this symmetry characterizes other RIAs as well as judicial scrutiny of administrative action.346 Because this HIA would be instituted by statute, not executive order, it would also cover independent regulatory agencies.

The determination of whether a policy would affect health, and the type of effect necessary to trigger the HIA must be specified. This threshold question is a crucial one for many of the other RIA measures we have examined.347 One option might consist of the assignment of a duty to either

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347 See Shapiro and Moran, supra note 130 at 171-172 (observing, “Much 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 larger left open to interpretation by individual agencies. Critics of the Act noted that the vague definition allows agencies to evade assessments and benefit-cost analysis 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.”)
an agency head or a designated health official to make a determination of when an HIA is triggered. 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.” Such determination of no substantial impact on health would be subject to judicial review, just as a certification of insignificant impact is under RFA and FONSI would be under NEPA.

Another option would be to adapt the mechanism devised for NEPA, 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 a full-fledged HIA should be conducted. 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 incentive of avoiding full HIA’s might foster health commitments across sectors as various government organs sought the HIA equivalent of “mitigated FONSI’s.” I discuss below what some of those mitigating actions might be. Second, NEPA’s implementation shows how a trigger threshold need not be specified in advance and can be elaborated case-by-case over the decades.

Perhaps for HIAs to empower individual beneficiaries as rights-holders, we should consider adding a mechanism for individuals 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, as proposed above, would be one avenue. One could also enable individuals to submit citizen petitions for examination of whether regulatory policies have direct or indirect effects on health. Perhaps decisions on those petitions could be subject to procedural and substantive judicial review for conformance with standards including assurance against “arbitrary and capricious” decision-making.

For legislative action, UMRA requires CBO to estimate the economic effects on subnational governments to determine whether the bill imposed costs above the threshold such that a point of order would lie against it. Alternatively, GAO or some other entity designated by Congress could be

348 See supra text accompanying footnotes 155-158.
349 Id. See also text accompanying note 194.
350 See supra text accompanying footnote 193.
351 See infra text accompanying notes 374-375.
352 See e.g., 21 C.F.R. § 10.30 (FDA rule on citizen petitions).
353 See supra note 227.
tasked with calculating whether a bill “significantly affected human health,”354 Because health impacts are hard to quantify, we could develop a list of multiple threshold proxies and some could be qualitative just as the thresholds are under the Family Impact Assessment.355 We could also piggyback on existing impact analysis thresholds such that any action meeting the UMRA point of order threshold as calculated by CBO would 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.356

Alternatively, “significantly affecting human health” could be construed as adversely affecting key health indicators for a set numerical threshold of persons by a certain magnitude. I do not believe this approach necessarily requires an optimal set of thresholds, but simply observe that some initial thresholds could be set, just as in the case of Bush’s EO 13211, the effect on energy supply was established to mean adversely affecting energy prices by more than 1%, or a drop in crude oil production by 10,000 barrels a day or more. Similarly, the Gingrich Congress’ attempt to legislate regulatory takings thresholds identified a trigger of 20 percent reduction in the property’s fair market value.357 The difficulty of setting a perfect threshold measure should not prevent some mechanism from being instituted, just as those difficulties did not impede the establishment of RIAs protecting other values.

B. Participatory

Just as NEPA was designed to be deeply participatory,358 HIAs should be similarly structured. 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 in strategic ways by Native Alaskan tribal groups to assert their interests in health and well-being. They have done so through the state HIA process as well as NEPA.359 In Los Angeles, communities at risk of being dislocated because

354 This idea draws from the creation of the CEQ and the Science Advisory Boards by NEPA, OIRA by the PRA, and the RFA’s designation of the Chief Counsel for Advocacy of the Small Business Administration. However, the HIA would be creating a Congressional rather than an executive entity.
355 See supra text accompanying notes 302-303.
356 See supra note 333.
357 See supra note 318.
358 See NEPA Litigation Guide, supra note Error! Bookmark not defined. at 25.
of a stadium development plan successfully used HIAs to block the development plan. In San Francisco, HIAs were part of the successful campaign for a living wage.

Regarding legislative measures, the call for an HIA could originate with any Member of either house of Congress through a point of order. Arguably, this mechanism provides an entry-point for democratic participation through the lobbying of individual members of Congress, though this approach also renders the tool more favorable to powerful interests.

C. 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.

The United Kingdom issued a landmark report on health disparities in the 1998 which declared that “[a]ll 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.” Such language, declaring that “all policies likely to have a direct or indirect effect on health should be evaluated in terms of their impact on health inequalities” could certainly be included in the impact assessment requirement.

Under the “fit” requirements which I discuss below, the HIA measure could require that “all policies should be formulated in such a way that by favoring the less well-off they will, wherever possible, reduce such inequalities.” As in NEPA regulations which require the agency decision-maker to “record” the environmentally preferable alternative, and then describe how the agency decided against this alternative based on other considerations, the agency or legislature could be required to “record” the most health equity-promoting alternative. If the agency decided against this alternative, then it would have to describe the reasons and cite the specific

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360 See RWJF supra note 75.
361 Id.
363 For a recent proposal along these Rawlsian lines, see Alicia Ely Yamin and Ole Frithjof Norheim, Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health, 36 HUM. RTS. Q. 296 (2014).
364 40 C.F.R. § 1505.2.
“economic and technical considerations and agency statutory missions...including any essential considerations of national policy,” mirroring NEPA implementing language.365

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.366 Furthermore, social and economic inequality are major determinants of population health, with effects independent of those caused by poverty.367 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 just for burdens on States and localities, but burdens on private entities too. The Paperwork Reduction Act includes extra protection for privacy and small businesses.

D. Impact Analysis

The legislative and regulatory proposals that fall within the HIA measure’s scope of application must report on the burdens they place on health and its distribution. Again, some of this 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.368

E. Sufficiency of Purpose

These health-affecting policies must also be accompanied by declaration of the purpose and need for that action. Borrowing language from the PRA, an agency must describe the “need” for the action being considered.369 Borrowing from NEPA regulations, it must do so in terms of the “economic and technical considerations and agency statutory missions...including any essential considerations of national policy.”370

As with UMRA, any legislative action would be subject to a sufficiency

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365 Id.
366 See supra text accompanying notes 63-69.
367 See supra text accompanying notes 31-34.
368 See supra notes 191-192.
369 44 U.S.C. § 3506(c).
370 40 C.F.R. § 1505.2
of purpose showing insofar as a separate vote to overcome the 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.

F. Fit

Just as earlier we discussed the incorporation of equity considerations by requiring a recording of the alternative that favors the least well-off, we could also apply that same recording requirement for the least health-restrictive alternative. Agencies and legislatures would identify the alternative that would minimize the burden on health. We mentioned the precedent for such a requirement in NEPA. UMRA also demands that “before promulgating a rule for which a written statement is required…. the agency shall consider…. [and] select the…least burdensome alternative.…” The agency would have to justify a rejection of this alternative based on other considerations that could be held to exacting standards of importance.

A Congressional point of order could be required for any health-affecting policy that, as we mentioned above, reduced major health indicators of a population by a certain threshold magnitude. Just as unfunded mandates could avoid the point of order if they were “funded,” HIA points of order could be avoided if the health-burdening legislation included some 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 specifically cites certain mitigation strategies (such as different compliance timetables and exemptions) that must be considered when small businesses are burdened. ESA does the same for endangered species. A list of must-consider health mitigation and improvement strategies could be developed, including investment in early childhood education and other social determinants of health, or some other action that would reduce the Gini coefficient.

371 Supra text accompanying notes 362-367.
372 Supra note 241.
373 See supra text accompanying note 127.
374 See supra text accompanying note 271.
375 See e.g., DAVID BUCK AND SARAH GREGORY, IMPROVING THE PUBLIC’S HEALTH: A RESOURCE FOR LOCAL AUTHORITIES (2013) (for nine key areas that can improve public health and reduce inequalities).
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G. Enforcement/Claiming

I have proposed a point of order as a means of enforcing the HIA requirement in the legislative context. In addition, as with RFA and RFRA, compliance with regulatory as well as legislative HIA requirements could be subject to judicial review. Even if this were not specifically authorized, courts might still, as they have with NEPA and NHPA, construe judicial review to be available for whether agency action is arbitrary and capricious in light of inadequacies in health impact assessment. Indeed some courts have in the past found an implied right of action for NHPA compliance.

H. Lookback Review of Existing Federal Laws

A true Ungerian destabilization right would affect existing policies, not just new policies. Thus, any existing 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.

A recent example of lookback scrutiny is President Obama’s EO 13563, Improving Regulations and Regulatory Review, § 6 of which requires agencies to have plans to periodically review existing “significant” rules. A five-year sunset was proposed by the Gingrich Congress for all regulations subject to other types of RIA.

Any already-approved legislation could be subject to judicial review, just

376 See supra note 201.
377 See Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991); Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 875 F.2d 453 (5th Cir. 1989). But see San Carlos Apache Tribe v. United States, 417 F.3d 1091 (9th Cir. 2005).
378 How do we unwind states of the world that are damaging? How do we combat the inertia and power of incumbents against those 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 “destabilization 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.”) Thanks to Scott Burris for the insight that my proposal for HIAs resembles a call for a destabilization right.
379 See supra notes 129, 166, 247, and 293.
381 See also Stuart Shapiro and Deanna Moran, supra note 130 at 172.
as any measure is now subject to RFRA.\textsuperscript{382} Prior legislation would also be vulnerable to a point-of-order certainly upon re-authorization or amendment, but could be made subject to the point of order at other designated re-evaluation times, including appropriations, as well.


\textbf{CONCLUSION}

I argue that we should move from sporadic to general use of HIAs as part of the process of constructing 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.”\textsuperscript{383} Health Impact Assessments would seed a right that pushes back on that view.\textsuperscript{384}

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, pervasive social media and algorithmic use of 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.

\textsuperscript{382} See supra text accompanying notes 293294294.

\textsuperscript{383} See O’Keefe, supra note 58 at 736.

\textsuperscript{384} See also West, supra note 47 at 91-102 (arguing that we should revitalize rights in forms that recognize relational aspects of human nature).