

H O N O R A B L E M E N T I O N

# REGULATION AND DISTRIBUTION

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**T**his Article tackles a question that has vexed the administrative state for the last half-century: how to seriously take account of the distributional consequences of regulation. The academic literature has largely accepted the view that distributional concerns should be moved out of the regulatory domain and into Congress' tax policy portfolio. In doing so, it has overlooked the fact that tax policy is ill-suited to provide compensation for significant environmental, health, and safety harms. And the congressional gridlock that has bedeviled us for several decades makes this enterprise even more of a non-starter.

The focus on negative distributional consequences has become particularly salient recently, playing a significant role in the 2016 presidential election and threatening important, socially beneficial regulatory measures. For example, on opposite sides of the political spectrum, environmental justice groups and coal miner interests have forcefully opposed the regulation of greenhouse gases through flexible regulatory tools, in California and at the federal level, respectively.

The time has come to make distributional consequences a core concern of the regulatory state; otherwise, future socially beneficial regulations could well encounter significant roadblocks. The success of this enterprise requires significant institutional changes in the way in which distributional issues are handled within the executive branch. Every president from Ronald Reagan to Barack Obama has made cost-benefit analysis a key feature of the regulatory state as a result of the role played by the Office of Information and Regulatory Affairs, and the Donald Trump Administration is keeping that structure in place. In contrast, Executive Orders addressing distributional concerns have languished because of the lack of a similar enforcement structure within the executive branch. This Article provides the blueprint for the establishment of a standing, broadly constituted interagency body charged with addressing serious negative consequences of regulatory measures on particular groups. Poor or minority communities already disproportionately burdened by environmental harms and communities that lose a significant portion of their employment base are paradigmatic candidates for such action.

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