OUR REGULATORY STATE

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Washington is in a regulatory growth spurt. Hundreds of rulemaking proceedings are underway or impending under the Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Patient Protection and Affordable Care Act (ObamaCare), both enacted in 2010. The Environmental Protection Agency (EPA) is pursuing many hugely expensive pollution-control initiatives. The Federal Communications Commission (FCC) wants to regulate the Internet. Agencies are tightening highway fuel-economy standards and banning the incandescent light bulb. Federal price controls, out of favor since the wage-price controls of the 1970s, are making a comeback in health insurance and debit cards.

Congressional Republicans are up in arms over these developments. The arrival of the Tea Party class of 2010 produced prompt moderations in the trajectories of taxing, spending, and borrowing, all of which require periodic legislation. But when it comes to regulation, legislators are kibitzers. They can orate and hold hearings on Capitol Hill, but the policy action is downtown, in the bureaucracies and at the White House. Regulatory decisions are based on statutes enacted a year, a decade, or a century ago. Many of those statutes give regulatory agencies expansive authority over broad sectors of the economy.

The Republican charges of overregulation are justified. The Obama administration's confidence in central planning is as manifest in its regulatory policies as in its taxing and spending policies. The administration is comfortable with executive government, as in its dispensation of waivers to the ObamaCare and No Child Left Behind statutes, and its $20 billion compensation program for people affected by the BP oil spill (a program with no statutory basis at all). It uses regulatory authorities to pursue unspoken policies, such as hobbling carbon-based energy production (as in its rejection of the environmentally benign Keystone XL pipeline) and promoting labor unions (as in its campaigns to stop Boeing from building airplanes in South Carolina and to overrule state constitutions that guarantee the secret ballot in union elections).

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Yet the current partisan divide is illusory. The modern regulatory state is a thoroughly bipartisan enterprise. During the half-century before President Obama's election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush. And the Bush administration set the stage for many of the Obama initiatives that Republicans are now attacking. Dodd-Frank's policy of selecting some financial firms as "too big to fail" is a codification of the extemporary Paulson-Bernanke bailout drama of 2008. It was President Bush's Treasury Department that first proposed a consumer financial protection agency, and his EPA that first proposed to regulate greenhouse gasses under the Clean Air Act. The Obama energy rules were authorized—and in some cases, such as the light bulb ban, required—by a 2007 statute that President Bush energetically championed. Only ObamaCare is a distinctively Democratic departure.

Regulatory growth is primarily an institutional phenomenon, and only incidentally an ideological one. The regulatory agency—invented in the Progressive and New Deal eras and upgraded in the 1970s—has proved to be the most potent institutional innovation in American government since the Constitution. The Constitution was designed to make lawmaking cumbersome, representative, and consensual. The regulatory agency was a workaround, designed to make lawmaking efficient, specialized, and purposive. It was a way to accommodate growing demands for government intervention in the face of the constitutional bias for limited government.

SOURCES OF REGULATORY POWER

The power of the regulatory agency, and the persistence of regulatory growth, rest on three foundations—organizational, financial, and political. The organizational foundation is the delegation of lawmaking from Congress to special-purpose agencies in the executive branch. A hierarchy can make decisions with much greater dispatch than a committee can. Congress consists of two huge, interdependent committees, each one divided into many more committees and subcommittees; and its members represent the full spectrum of the nation's diverse and often conflicting interests and values. Regulatory agencies, in contrast, are hierarchies with many fewer internal conflicts and with preordained missions—clean air, safe products, fair financial practices, women's sports, and on and on.

There are cases, such as the light bulb ban and also the minimum wage, where Congress makes specific policies and agencies execute them. But Congress is often unable or unwilling to agree on anything beyond such velleities as "protect the public health." Here is Congress's mandate to the new Consumer Financial Protection Bureau (CFPB) created by Dodd-Frank: "ensure that all consumers have access to markets for consumer financial products and services … [that are] fair, transparent, and competitive." In these cases, it is the agencies that make the hard policy choices: they are the lawmakers. One of the CFPB's first initiatives was to launch a hostile investigation of the practice of banks to charge a fee when customers overdraw their checking accounts. Overdraft fees are customary, well understood, serve an obvious commercial function, and are charged in a highly competitive pricing environment. Although Dodd-Frank's sponsors complained about overdraft fees when the bill was being considered (as did President Obama when he signed the law), it is unlikely that many of the legislators who voted for the 900-page bill seriously considered the pros and cons of federal regulation of overdraft fees, which is where the CFPB's investigation is headed. In time, the Bureau's regulatory docket will be as far afield of legislative contemplation as EPA's current efforts to regulate carbon dioxide and other greenhouse gasses under the decades-old Clean Air Act.

There was, at first, a certain squeamishness about delegated lawmaking. We see this in the Progressive and New Deal agencies, such as the FCC, Federal Trade Commission (FCT), and Securities and Exchange Commission (SEC). These pioneering regulatory commissions were mini-legislatures of five members with proportional representation of the two political parties. Decisions were by majority vote, and members served fixed terms and were supposedly independent of presidential supervision. But by the time of the second wave of regulatory growth, in the 1970s, the initial qualms had been overcome and the legislative mimicry was dropped. Most of the new agencies, such as the EPA, Occupational Safety and Health Administration (OSHA), and National Highway Traffic Safety Administration (NHTSA), were hierarchies reporting to a single decision-maker who served at the president's pleasure. Rules were crafted by subordinates and promulgated by "the administrator." Law-by-regulation became even more efficient, and its output increased.

The second, financial foundation of regulatory power is independence from spending constraint. The costs of agency rules—for instance, the costs of installing safety and pollution-control equipment, testing drugs and medical devices, complying with price controls and disclosure and labeling requirements, and maintaining elaborate records of employment decisions—are realized entirely within the private sector. While these costs are incurred for public purposes, they are free of the institutions of public finance. Government spending programs are subject to a cascade of taxing, borrowing, authorizing, appropriating, and budgeting decisions, which oblige trade-offs and establish priorities among competing public and private purposes. Regulators face none of these constraints (they have their own agency budgets, of course, but these are a tiny sliver of the costs of complying with their rules).

The regulators' financial power, like their organizational power, expanded greatly during the 1970s. Most of the previous regulatory commissions were concerned with prices and services in single industries; they were more like courts than legislatures, adjudicating discrete issues involving one or a few firms through live, trial-like proceedings involving witnesses, cross-examination, and the thrust-and-parry of lawyers' arguments. A case might decide whether to permit a particular trucking firm to transport artichokes from Castroville, California, to Reno, Nevada, and if so at what price. The new 1970s agencies were concerned with economy-wide issues such as environmental quality, product and workplace safety, energy conservation, and group discrimination and representation in employment and education. And they acted more like legislatures: Through "informal rulemaking"—based on written public comments and internal research rather than adjudicated facts—they issued rules covering entire industries or economic sectors. A rule might require that all new automobiles be equipped with airbags designed in a certain manner, or that all packaged foods bear highly specified ingredient and nutrition labels (with certain information required and other information forbidden). A single rule could impose costs and dispense benefits of hundreds of millions of dollars.

With the development of informal rulemaking, which the older commissions soon mastered as well, regulation achieved a fusion of legislative scope, executive alacrity, and financial autonomy that would have been unthinkable even in the New Deal. That fusion produced a political reaction—from the White House, not the Congress. Beginning in the early 1970s, Presidents Nixon, Ford, and Carter authorized White

House officials to review and suggest revisions to selected rulemaking proposals. These initial steps led to a more formal procedure, inaugurated by President Reagan in 1981 and continued by all of his successors. Agencies were required to submit their rules to the Office of Management and Budget (OMB) before publication, along with cost-benefit analyses demonstrating that the rules' benefits exceeded their costs. Disagreements between OMB and the agencies were resolved by senior White House staff or the vice-president, and occasionally by the president himself. Cost-benefit analysis, however, is much more abstract and elastic than a spending budget. And the White House review programs are strictly a matter of internal executive-branch management: They have not countered the migration of lawmaking from Congress to the executive branch, but rather have enhanced the president's control over that lawmaking.

The regulatory state's third, political foundation is relative insulation from public debate and criticism. Regulation is hardly uncontroversial. It is frequently excessive and even outrageous, producing sympathetic victims who have lost their jobs to plant closures, whose backyards have been designated endangered-species preserves, or who have been denied promising drugs for terrible diseases. One might expect Republicans and conservatives—the designated friends of private enterprise and limited government in our system—to advance ambitious agendas for reform. But they do not. Newt Gingrich's 1994 Contract with America, and Paul Ryan's 2008–2010 Roadmap for America's Future, were notably scant on regulatory proposals. Ronald Reagan was an exception, but his presidency coincided with a short-lived, bipartisan deregulation movement (Jimmy Carter and Edward Kennedy had deregulated the airlines before Reagan arrived in Washington). Over the decades, conservative politicians have opposed the growth of regulation polemically while accommodating that growth in practice. Regulatory policies do not reflect the temporal jousting between liberal and conservative visions in the way that tax and health-care policies do.

The explanation for this disparity lies in the chasm between legislation and administration. Regulatory legislation is public and symbolic—characterized by hearings, speeches, and votes where the people's representatives declare themselves for or against safe drinking water, corporate fraud, and discrimination against the handicapped. Regulatory administration is cloistered and quotidian—characterized by piecework rulemaking, interest-group maneuvering, and impenetrable complexity. Even when initial legislation faces strong opposition, the opponents quickly master the program's administration and accommodate themselves to its requirements. The agencies become adept at maintaining coalitions of program "stakeholders" that resist outside threats of reform.

And the outside threats are likely to be feeble in any case. Regulatory policies, directed at the operations of business firms and other intermediate organizations, are largely insensible to the general public. Regulatory costs take the form of higher prices rather than tax payments or scary headlines about deficits and debt. Tedious program details cannot be aggregated with the common metric of money—in the way that dollar figures aggregate the details of taxing and spending programs—for purposes of political argument and mobilization. On the hustings and on television, it is much easier to describe one's plan for Medicare reform than for telecommunications deregulation. Ambitious conservative reformers understandably focus on policies with greater popular salience and political leverage.

CONSEQUENCES OF REGULATORY POWER

The rise of autonomous regulatory power has had profound consequences. It has enabled the federal government of a vast, populous, diverse democracy to partake directly in the everyday affairs of scores of millions of citizens and businesses. The *Code of Federal Regulations* runs to 165,000 pages and contains tens of thousands of rules governing every conceivable aspect of commerce and society. Federal agencies add about a thousand new mandates every year; many are relatively minor and uncontroversial, but in a typical year 50–75 fall into the "major rule" category, with annual costs of $100 million or more. By the agencies' own estimates, the total annual costs of complying with their rules amount to hundreds of billions of dollars, with each year's new rules adding more than $10 billion to the total (private estimates are higher). Many rules—no one knows exactly how many—are subject to criminal sanctions involving punitive fines and imprisonment.

The exercise of regulatory power has yielded important benefits. EPA rules have contributed significantly to reduced air, water, and land pollution, generating large health, aesthetic, and recreational improvements. The Food and Drug Administration (FDA) has kept unsafe drugs off the market. But regulation, like all forms of concentrated power, is prone to excess and abuse. The health, safety, and environmental agencies regularly set standards whose costs exceed any plausible measure of their benefits. The most powerful agencies—the SEC, FDA, and EPA—frequently interpret their statutory mandates very aggressively, and then abuse their enforcement powers to strip firms and individuals of elementary procedural rights. People who are familiar with the operations of these agencies can rattle off numerous examples of innocent parties who become pawns of murky bureaucratic stratagems.

One recent instance attracted rare public notoriety. The EPA notified Michael and Chantell Sackett that it regarded part of their residential lot in Idaho—which measured two-thirds of an acre—to be a "wetland" and ordered them to remove the landfill foundation they had laid for a home. The agency denied the couple any hearing on the order and told them that, if they really did want a hearing, they first had to violate the order and begin to accumulate fines of $75,000 per day. The Sacketts had the gumption (and support from pro bono lawyers) to bring their own suit, leading to a 9-0 victory in the Supreme Court and a rebuke of the EPA's "strong-arming." The case, decided in March 2012, produced many shocked news reports and editorials. But it was exceptional mainly for the Sacketts' temerity in summoning the checking power of the courts. Large firms with continuous business before regulatory agencies rarely challenge such assertions of discretionary power—if a firm does so, and wins, the agency will see to it that the firm is punished in the fullness of time.

Instances of excess and abuse are cause enough for alarm, but regulation is also problematic within its prescribed bounds. In its earnest meliorism and sheer profuseness, the regulatory state harkens to Tocqueville's arresting 1840 prophecy of "democratic despotism" in America: "an immense and tutelary power, … absolute, minute, regular, provident, and mild … [that] every day renders the exercise of the free agency of man less useful and less frequent." But experience has taught us something that Tocqueville did not foresee. Regulation does not suppress the free agency of man so much as it redirects that agency. Even the loftiest regulatory purposes—averting climate change!, reducing systemic financial risk!—come down to humble written rules prescribing detailed, observable features of prices, production, products and services, marketing, and organization. The rule-writers have the larger purposes in mind, but those who are subject to the rules have purposes of their own—which are independent of, and by definition at least somewhat antithetical to, the rule-writers' purposes. Firms and individuals do not go limp: They continue to pursue their private purposes by adapting their prices, products, purchases, and conduct to the public rules. So the government regulates one thing, and myriad other things adjust in response. The upshot for the government's purposes is indeterminate and not infrequently perverse.

Compensating adjustments to narrow rules are the source of the "unintended consequences" of regulation that fill the editorial pages and social science journals. An example currently in the news is the regulation of fees and conditions of credit and debit cards. Intended to benefit consumers and merchants at the expense of card issuers, the controls have led issuers to adjust other, unregulated fees and terms of service and to jettison riskier (and therefore costlier) customer groups. Just about everybody has been left worse off. Similarly, if the CFPB should ban or unduly restrict checking overdraft fees, banks may simply stop honoring even small charges for which there are insufficient funds. The examples of unintended consequences are legion: Price controls cause queues; pharmaceutical controls retard drug innovation and marketing; fuel-economy controls promote more driving.

A separate, equally important problem is the one imperfectly expressed in the term "agency capture." Regulatory agencies may or may not be captured by the groups and industries they regulate, but they certainly inhabit the same culture and come to share its perspectives and enthusiasms. Many of the old-line commissions were and are zealous protectors of incumbent firms against new competition. The FDA, although adversarial toward the pharmaceutical industry in many respects, is institutionally biased in favor of large, established firms that can mount the considerable expenses of the agency's pre-marketing testing protocols. The SEC was blind to the Bernard Madoff financial fraud in part because Madoff was a respected industry leader with an impressive résumé. Most dramatically, the financial regulators and housing agencies not only failed to avert, but were deeply complicit in, the financial collapse of 2008, through their aggressive promotion of low-income homeownership by means of absurdly leveraged "subprime" mortgage loans and derivative securities. These problems are not the result of syndicalist conspiracies; they are intrinsic to the delegation of lawmaking power to specialized agencies.

Our regulatory state is the product of more than a century of institutional evolution; it is resilient and adaptable and will not easily be tamed. But its essence, as we have seen, is autonomous executive power, and this tells us where we must start: with the checking and balancing powers of the other two constitutional branches, Congress and the judiciary. Congress, however, has been a willing collaborator in regulatory growth, and it is seldom nimble enough to check individual cases of excess. Its difficulties have been dramatically on display in the current Congress. Republicans (and some Democrats) have mounted repeated challenges to controversial rulemaking proceedings such as the EPA's effort to regulate greenhouse gasses. Many of these efforts have employed streamlined legislative procedures designed to give Congress a greater say over regulatory decisions. Every one of them has failed, with the exception of a pathetic nine-month delay in enforcing the light bulb ban (and that was a legislative enactment in the first place).

The judiciary is designed for the individual case, and under the Administrative Procedure Act of 1946 courts may set aside regulatory decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In practice, however, the courts are usually highly deferential. Some of the older agencies such as the FCC—whose rules mainly dispense economic favors to industry groups in the name of "the public interest"—are often struck down on appeal. But those such as the EPA—whose rules set health and safety standards based upon reams of technical data, amidst the tactical positioning of myriad interest groups—are usually affirmed. (The Sacketts' complaint was decided under the APA, but it was an enforcement case, not a rulemaking.)

In the wake of its failures to affect individual rulemaking proceedings, Congress has turned to reforming the regulatory process. Two proposals are sensible enough but skirt the problem of executive autonomy; we will review these two briefly to illustrate the dilemmas of regulatory reform and to introduce two other, much more robust proposals.

A Regulatory Moratorium. Congress is considering legislation to defer all new "major" regulations (those costing $100 million or more annually) until the unemployment rate has fallen to some level such as 6 or 7 percent, with exemptions for security and safety emergencies. It is sensible to defer expensive new regulatory projects during bad economic times, and the Obama administration has itself deferred some costly EPA rules for this reason. But a general moratorium is at once too sweeping and too piddling. Consider that it would amount to a suspension of the ObamaCare and Dodd-Frank acts, both of which depend on timelines of regulatory decisions. In these and many other cases, the emergency exemptions, determined by the president, would come into play (most major regulations are already advertised as addressing a crisis of some sort). And, when the moratorium was over, what would it have accomplished? The regulatory state would remain in place and poised for action—now with a backlog of major rules just as the economy was starting to improve. A moratorium would be, at best, transient and easily recouped. It is the regulatory equivalent of a wage-and-price freeze as a cure for inflation.

A Regulatory Budget. A regulatory budget, operating by analogy to the conventional spending budget, would address the financial foundation of regulatory power. Each regulatory agency would receive an annual budget of the expenditures that its new rules could impose. That sum, plus savings from established rules the agency relaxed or eliminated, would be the limit on the costs of new rules for the budget year.

The regulatory budget is a fine idea in theory that would be a monstrosity in practice. While spending budgets deal in hard dollars, a regulatory budget would deal in estimates of private expenditures that were subject to legitimate disagreement as well as deliberate gaming. If agencies had the final say on expenditure estimates for individual rules, the budget would accomplish nothing; if OMB had the final say, it would gain control over agency decisions far beyond anything in its controls on spending budgets. And there would be no external reference for annual budget numbers in the first place: they would be derived, perforce, from the agencies' own regulatory wish lists.

The regulatory budget idea has been kicking around for decades, always stumbling on the administrative dilemmas just mentioned. Recently, Senator Mark Warner of Virginia has proposed an ingenious alternative that he calls "regulatory pay-go." Under his proposal, agencies could issue new rules only by rescinding existing rules of equivalent cost or some fraction of the cost of new ones. (Thus, if the annual pay-go rate was 50 percent, an agency could issue new rules costing $100 million only by rescinding old rules costing $50 million.)

That would be much more practicable than a full regulatory budget. New regulatory expenditures would be capped at some multiple of savings from rescinded older rules (2x in our numerical example), so there would be no need for annual budget allocations. Even if OMB had the final say on the costs of new and rescinded rules, the choice of rules would be up to the agencies.

Although regulatory pay-go has many attractive properties, it suffers from some of the deficiencies of a regulatory moratorium. Trading off new rules against unrelated old rules may seem arbitrary, especially as compared to the cost-benefit standard at the heart of the current White House review program, where all of the trade-offs concern the intrinsic merits of each individual rule. Most seriously, regulatory pay-go would be an internal executive branch exercise, with none of the congressional involvement of spending budgets, and with easy opportunities for exemptions and number-fudging to suit the purposes of the administration in office. Suggestions for involving the legislative branch—such as by giving the Congressional Budget Office a role alongside OMB in overseeing rulemaking and agency cost estimates—have foundered on the separation of powers. When Congress acts, it must do so by statute.

But two current reform proposals do have constitutional teeth. In contrast to the moratorium and regulatory pay-go, they aim directly at the problem of executive unilateralism. One would summon the courts, and the other the Congress, to exercise much more vigorous oversight of executive rulemaking than either branch has ever done before. These are, therefore, the most serious and far-reaching of the current reform initiatives, and worthy of careful evaluation.

COSTS, BENEFITS, AND COURTS

The first proposal is the Regulatory Accountability Act, sponsored by House Judiciary Committee chairman Lamar Smith of Texas. The House passed it in December 2011 by a vote of 253 to 167, and a similar bill is pending in the Senate. The legislation would amend the Administrative Procedure Act to make the cost-benefit standard, as applied by the White House review programs since 1981, a matter of statutory law and subject to judicial review (it would also make major rulemakings more formal, with live hearings and cross-examination). When a rule was challenged in court, judges would ask not only whether the rule was "arbitrary, capricious, [or] an abuse of discretion," but also whether the agency had made a reasonable demonstration that the rule met the cost-benefit standard. In effect, Congress would be saying that it is arbitrary for an agency to issue a rule without good grounds for thinking that its benefits are worth its costs.*

As a regulatory analogue to budgets on spending programs, the cost-benefit standard is more natural and practicable than a regulatory budget or a pay-go procedure. The costs of regulations are constrained by their own benefits, not by the costs of other regulations. The standard is also an appealing rule of statutory construction. In every case where Congress has punted wide policy discretion to an agency, some legislators will favor an expansive construction of the statutory mandate, others a narrow construction. But if one tries to imagine a single rule for all such mandates that could win the consent of most legislators, it is hard to do better than that every agency should pursue its mission as cost-effectively as possible. Since 1981, five presidents of both parties, including one strong conservative and one strong liberal, have chosen the cost-benefit standard (sometimes following strenuous internal debate) as the best means of countering agency parochialism—an impressive display of cross-partisan policy consistency.

Many people think of cost-benefit analysis as an arcane, technocratic procedure. This is only half right: the procedure does have its technical aspects, but its purpose is to transcend arcanery. Its immediate purpose is to summarize a complex decision for high-level review. The cost-benefit standard did not emerge in the executive branch because economists seized control of the West Wing. Rather, White House political officials needed to know about a pending decision at the EPA, or the Agriculture Department or the Federal Aviation Administration, which had attracted public attention or congressional complaint. Working in a hectic, high-pressure environment, they needed an efficient, informative briefing. Why, in a nutshell, was this a good idea? How much would it cost? What are the alternatives?

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* The White House review programs have been based on a "maximum net benefit" standard: agencies must (a) demonstrate that the benefits of their rules outweigh the costs and (b) chose, from among alternative approaches to a problem, the one with the greatest margin of benefits over costs. The Regulatory Accountability Act employs a somewhat different formulation, and other pending reform bills use further variations. The differences are unimportant to the discussion of this essay; I will refer simply to the cost-benefit standard.

As cost-benefit analysis took hold as an internal review procedure, it acquired important public purposes as well. In any contentious rulemaking proceeding, opponents want to focus only on the costs and proponents only on the benefits, and everyone wants to emphasize politically salient facets such as employment effects ("job killing regulations" versus "green energy jobs"). The regulatory agencies, for their part, want to keep the debates amorphous and incommensurable, in order to preserve their leeway to justify final rules in ways that sound expert and authoritative and are difficult to gainsay when they land in court. Cost-benefit analysis, conscientiously applied, disciplines the arguments on all sides, requiring everyone to confront those issues they would rather downplay. In this manner, it replicates in informal rulemaking some of the productive tension of the live adversarial proceeding. It also promotes political transparency—giving outsiders a sense of what the shouting is all about and (as in the case of dollar sums in debates over taxing and spending programs) of the economic magnitude of the issue.

Cost-benefit analysis is not a deus ex machina. As critics of the procedure like to point out, benefits and costs can involve large ranges of uncertainty and inescapable questions of subjective valuation and political judgment. And the procedure involves many arguable issues—such as how to discount future costs and benefits for comparison (often, regulatory expenditures are incurred immediately while their benefits are realized in future years) and how to value longer lives, better health, and non-market benefits such as improved amenity. But these are strengths, not weaknesses. Cost-benefit analysis clarifies debate by separating the easy questions from the difficult ones. In some cases the easy questions are decisive, so we needn't fuss over the difficult ones (one could argue that averting one accidental death is worth $5 million or $50 million, but where a rule would cost a billion dollars per life saved, or a million dollars, we don't need to have that argument). In other cases the difficult questions of valuation and timing are decisive—and are, therefore, precisely the questions that serious policy debate should focus on.

The cost-benefit standard, coupled with White House review, has wrought many improvements in individual regulations. In administrations of both parties, OMB's regulatory overseers take a broader, more disinterested, more empirical view of rulemaking proposals than their agency counterparts. White House review has, with little ado, culled many clearly bad agency proposals and fortified many clearly good ones. Closer cases are typically the subject of vigorous internal disagreement; sometimes OMB prevails, sometimes the agencies prevail, sometimes OMB and the agencies compromise.

But these improvements, while real, have been marginal. In every administration, OMB has approved numerous dubious rules. While some cost-benefit analyses are sophisticated and illuminating, others are offhand guestimates or rationalizations of decisions made on other grounds, and sometimes they are omitted altogether. Because of the wide variation in analyses approved by OMB, the cost-benefit standard is only a weak discipline on the conduct of agencies and rulemaking participants when rules are being developed and are acquiring political momentum. These deficiencies are the result of the standard's being a matter of internal executive-branch management, to be applied or disregarded according to the political contingencies of the moment. Everyone involved is working for the president. Once a decision is reached—either by OMB-agency compromise or by superiors at the White House—everyone is going to lock arms, proclaim the integrity of the decision, and present a united front to the administration's political opponents and to those opposed to the particular decision. The process is capable of countering individual instances of agency parochialism, but not the larger problem of autonomous executive power.

The magnitude of the problem is illustrated by the Obama administration's egregious exaggeration of the benefits of its new air pollution rules. It has touted benefits of many hundreds of billions of dollars per year, vastly exceeding the rules' estimated costs. But almost all of the benefits come from a single source: the EPA's calculations of fabulous health benefits from reducing airborne particulate matter from already low levels to still lower levels. For instance, a recent rule limiting mercury emissions from power plants was accompanied by a cost-benefit analysis showing benefits in the range of $37–90 billion per year, far exceeding the costs of $10 billion per year. Buried in the analysis, and obscured in EPA's promotional materials, was the fact that the estimated benefits of the mercury reductions themselves were minuscule—in the range of $460,000 to $6 million for the entire United States. Essentially all of the benefits came instead from coincident reductions in particulate emissions.

And these estimates, in the mercury rule and several others, are artifactual. They are not based on observations of health effects; rather, they are mathematical extrapolations that assume that reductions from today's very low levels of airborne particulates will yield benefits equivalent to those of reductions from far higher levels many years ago. The EPA methods have been shredded by several private studies and criticized by the National Research Council. A careful reader of OMB reports could surmise that its regulatory analysts are equally skeptical—but the internal pressures to let the matter pass must be irresistible, given that the estimates are essential to justifying many of EPA's most expensive new regulatory initiatives.

Similarly, the EPA, NHTSA, and Department of Energy claim hundreds of billions of dollars of benefits from energy-efficiency standards for motor vehicles, dishwashers, stoves, light bulbs, and other appliances. But here, too, almost all of the stated benefits—about 90 percent—are from a single, synthetic, highly debatable source. They are not public benefits at all, such as reduced air pollution or decreased dependence on foreign oil. Rather they are the private savings to consumers from purchasing costlier products that are less expensive to operate because they use less energy. The assumption is that consumers care too much about actual prices today and too little about estimated future prices: if they did a proper calculation, they would conclude that more expensive, energy-efficient products save more in energy bills over the products' projected lifetimes than the additional up-front costs. As Secretary of Energy Steven Chu has explained, "We are taking away a choice that continues to let people waste their own money."

Secretary Chu's confidence in his paternalistic benevolence is misplaced. Future energy prices are subject to wide ranges of uncertainty (as suggested by today's plummeting prices of natural gas), and it is easy to show that betting on higher prices over the lifetime of a major appliance or automobile is often a losing proposition. In any event, cost-benefit analysis is supposed to be a tool for correcting market failures, not the personal failings of individual citizens. If it is simply a tool for announcing the government's judgment that it can make better personal decisions than individuals, then the possibilities for economic regimentation are endless. The National Weather Service might as well order everyone to buy galoshes.

Making the cost-benefit standard a legal standard, subject to judicial review, could go a long way toward remedying the shortcomings of today's White House review procedure. The end point of internal deliberations would not be a press release, but instead an analysis that could survive scrutiny in an adversarial proceeding before judges who are obliged to explain their decisions in terms of law and precedent. The prospect of independent external review would transform relations between OMB and the agencies, between program officials and analytical staffs within agencies, and between agencies and rulemaking participants. The reasonableness of claiming immense social benefits from energy-efficient appliances and slight reductions in ambient particulates could no longer be settled at a staff meeting. Over time, questions such as these would be addressed by a variety of judges in a variety of policy contexts. The result would be a body of regulatory law and a critical academic literature in law, economics, public health, and other disciplines. With regulatory discretion defined by cost-benefit precedent available to everyone, policymaking would become less declarative, more professional, and more economically literate.

This has already happened in antitrust law. Before the 1980s, policies toward mergers, pricing, and marketing were populist and unpredictable. Since then, the antitrust statutes have been reinterpreted to require that enforcement actions promote economic efficiency and consumer welfare. Many disagreements remain, and much room for executive discretion. But the embrace of economics has made antitrust more precise and predictable, its enforcement agencies more professional, and its results more beneficial. Had it continued unreformed, pre-1980s antitrust would have throttled the revolution in computer and information technology of the 1990s and 2000s.

A preview of how this might unfold in regulatory policy appears in a 2011 Court of Appeals decision in *Business Roundtable v. SEC*. The SEC had issued a rule requiring that, when corporations send shareholders materials for electing new members to the board of directors, they include materials for certain independent nominees opposed by current directors. (The rule was an effort to promote representation of unions and state pension funds on corporate boards.) The authorizing statutes required the Commission to consider the "economic consequences" of its rules and their effect upon "efficiency, competition, and capital formation." Those provisions—amounting to a cost-benefit standard tailored for financial regulation—did not empower the court to substitute its policy judgments for those of the SEC, but only to review the plausibility of the Commission's economic assessments. On that score, the court found that "the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters"—and provided pointed examples of each failing. So the court vacated the rule, but in so doing provided the SEC with a guidebook for performing a competent economic analysis and issuing a lawful rule—provided that the rule's economic benefits can be reasonably estimated and explained.

The case was the most recent in a succession of rulemakings where the SEC had tried to elide the "economic consequences" test through rhetorical legerdemain and invocations of expertise, only to be easily exposed by generalist judges. It may be the last. The Commission has since issued preliminary internal directions for analyzing the economic effects of its rules, and it will be hiring economists to work alongside its lawyers in developing future rules. In time, the SEC will learn that it must take economics seriously, just as the antitrust agencies learned decades ago. That will require assessing benefits and costs not as a procedural hurdle but rather as an active guide to policy—one that channels executive discretion in a manner comprehensible to an independent, co-equal branch of government.

The Regulatory Accountability Act would impose the same discipline throughout the regulatory establishment—including the older, supposedly "independent" commissions such as the FCC and the SEC itself, which have been exempted from the White House review programs. The source of discipline would not be the cost-benefit standard alone; it would be the application and continuous refinement of that standard in the course of vigorous judicial oversight.

CONGRESSIONAL ACCOUNTABILITY

The second serious reform proposal is the REINS Act ("Regulations from the Executive In Need of Scrutiny"), conceived by Congressman Geoff Davis of Kentucky. Along with the Regulatory Accountability Act, it passed the House in December 2011 and is pending in the Senate with little immediate prospect of passage. REINS would require that major new rules be approved by a joint resolution of Congress and signed by the president—that is, approved by statute—before taking effect. Thus, if the EPA issued a costly new air pollution rule or the SEC a costly new corporate reporting rule, the rules would be, in effect, legislative proposals. Expedited procedures would guarantee prompt up-or-down floor votes (without amendment) in the House and Senate.

While the Regulatory Accountability Act accepts the trend of unilateral executive lawmaking and disciplines it with much-enhanced judicial oversight, REINS goes against the trend with an audacious reassertion of Congress's lawmaking prerogatives. It has won the endorsement of many conservative thinkers, activists, and politicians. Mitt Romney has even said that, as president, he would submit major rules for congressional approval regardless of whether REINS is enacted. And the proposal has a simple, commonsense appeal: should not members of Congress stand and be counted on federal policies costing $100 million or more, even if that means spending less time naming post offices after one another and proclaiming National Orange Juice Week?

But liberal academics and interest groups are heatedly opposed, charging that direct congressional involvement would eviscerate health, safety, and environmental protections. And many disinterested observers find the proposal troublesome. Anyone who has worked at an agency with a big budget and demanding mission, such as the Defense Department or the National Institutes of Health, has seen the absurd consequences of congressional micromanagement of program administration. Some notable policy successes, such as trade-liberalization treaties and military base-closings, have been achieved by keeping Congress at arms length from politically fraught decisions.

The fears of REINS opponents are overwrought. New York Law School’s David Schoenbrod—a devoted environmentalist and learned opponent of regulatory delegation—has noted that some of the most effective environmental policies, such as automobile tail-pipe emissions standards, have been statutory standards. The light bulb ban and minimum wage—which liberals love and conservatives loath—are also legislated regulations. Much of the anti-REINS liberal angst probably arises from imagining Obama administration rules being subject to the approval of today’s Republican House. But with a Republican administration and Democratic House, the shoe would be on the other foot.

And often there would be shoes on both feet. Although the EPA's greenhouse gas rules would surely fail to pass the current, half-Republican Congress under a REINS procedure, they would have failed in the previous, all-Democratic Congress as well—where the Obama administration's proposal for a statutory "cap and trade" program foundered on opposition within the president's party. Congressional majorities often decline to embrace the causes of passionate advocacy groups, but they sometimes do embrace them, and when that happens the policies tend to stick—reflecting the demonstration of a political consensus. Environmental protection is one such consensus issue, as Republican legislators would quickly acknowledge if they had to vote on EPA rules rather than carping from the sidelines. And EPA rules are often opposed by labor unions, as Democratic legislators would quickly acknowledge if they had to vote on the rules rather than standing passively by. REINS would end the conspiracy of acquiescence.

The big question presented by REINS is a different one: What is the feasible role of Congress in modern government? The migration of policymaking from representative legislatures to executive authorities is one of the most pronounced trends not only in America but throughout the advanced democracies (witness the sovereign-debt bailout drama in Europe, where national legislators have been reduced to reluctant handmaidens to a few national leaders and the European Central Bank). The trend has many deep causes, including the limitless demands for government intervention that modern society generates; the growth and specialization of knowledge, which makes many important controversies difficult for generalist legislators to penetrate; the plethora of highly organized interest groups, which makes legislative compromise increasingly difficult; and the lightening speed of communications, which plays strongly to the advantage of executive action. The difficulty of legislating away these legislative debilities is captured in a practical question: Is Congress really prepared to add 50 or more pieces of complex, controversial legislation to its annual docket, each one guaranteed to move promptly to a floor vote ahead of whatever else may be in the works—a Supreme Court nomination, a debt-ceiling imbroglio—whenever it arrives on Capitol Hill?

Maybe Congress should give it a try. REINS would not repeal regulatory delegation, but rather would allow Congress to re-learn the art of lawmaking without robbing if of the executive props is has come to rely on. Under a full revival of "originalist," 18th-century separation of powers, Congress would be required to take the initiative—designing every important regulatory standard on its own, with executive agencies administering those standards with only routine enforcement discretion. That would be a true revolution, setting the federal government on a glide path back to a much smaller size dictated by the capacities of legislative process. But under REINS, the initiative would remain with the executive branch. The regulatory agencies would continue to write the rules: They would pursue their specialized missions, draw upon their expert knowledge, protect their plots of bureaucratic turf, and maintain their interest-group coalitions—but now with the added necessity of crafting rules likely to win majorities of the House and Senate. The need to pass a legislative test would involve a different set of calculations than the need to pass a cost-benefit test, but the two would be similar in one important respect: In both cases, regulators would be obliged to balance the pursuit of their program missions against other, competing interests and perspectives.

The REINS procedure would be a new legislative-executive detente, similar to the trade-liberalization and military base-closing procedures that are often offered as examples of the utility of keeping Congress in its proper place. Under those precedents, Congress authorized the executive branch to negotiate trade treaties and prepare base-closing plans within general parameters, and pre-committed itself to bringing them promptly to the floor for up-or-down votes—either approval without amendment or disapproval. The trade negotiators and base-closing commissioners did their work with plenty of input from Congress, but in each case members were disarmed of many of the usual legislative weapons for advancing individual interests (delaying, amending, logrolling) and confined to the role of casting one vote among many on the entire final proposal. The results have been impressive: the closing or "realignment" of 350 military installations between 1989 and 2005, and the adoption of more than a dozen trade-liberalization agreements, including the North American Free Trade Agreement in 1993 and the South Korean and Colombian free trade agreements in 2011.

Indeed, one may discern in the REINS proposal and its antecedents the evolution of a new legislative function for an era of executive supremacy. To see this, consider the argument of *The Executive Unbound: After the Madisonian Republic*, a 2010 book by Eric A. Posner and Adrian Vermeule. The authors argue that the decline (they would say demise) of separation-of-powers constraints on executive action should not be cause for worry, because the president must face the electorate every four years and is held accountable between elections by a new array of auxiliary precautions—instantaneous reporting of every important action of government, public expectation that the president will either explain and justify those actions or correct them, and incessant national policy debate, punditry, polling, focus groups, and presidential approval ratings. In Posner and Vermeule's view, these are at least as good as the old Madisonian scheme for keeping government power reasonably in check and attentive to the public interest.

But this argument is much too facile. No doubt the concentration of power in the executive has prompted more intense public scrutiny of the president and political competition for the presidency, which in turn have disciplined the exercise of executive power. But the arrangement operates through politicization—the intrusion of politics into many hitherto private areas of life. It requires the public to be continuously attentive to political twists and turns for purposes of making an occasional, highly problematic decision—casting a vote every four years for one of a few presidential candidates, each one standing for a lengthy menu of policy positions in combination with a general philosophy and personal characteristics. And it induces the media and political activists and donors to focus tremendous resources on shaping public perceptions of the president throughout his term, and then on the quadrennial, all-or-nothing election for that office. These circumstances surely contribute to the political pathologies of the age: bitter partisanship, extreme and simplistic (in order to be attention-getting) formulations of policy questions, routine personal vilification of the president, and the "permanent campaign" of both the president and the out-of-office party, all of them leading to popular disillusionment with our system of government. Under the Madison arrangement, citizens were free to leave much of the day-to-day checking and balancing to professionals—politicians and judges.

A more productive response to concentrate executive power might be to disperse accountability for executive actions more widely among elected representatives. Under REINS, Congress and the president would share political responsibility for major regulatory decisions. In place of a national plebiscite on executive government every four years, we would have a continuous stream of "legiscites" on individual executive actions (confined to new regulation, but the approach could be extended). The legislative function in rulemaking, having evolved from lawmaker to kibitzer, would evolve further to co-lawmaker.

To be sure, party-line approval of rules from an administration of the same party would throw the issue back into the caldron of Posner-

Vermeule presidential politics—but the political and administrative unraveling of ObamaCare, enacted in this manner, will stand as a caution against such presumptuousness. In the typical case, the concatenation of legislative interests in a particular rule will differ significantly from partisan alignments and the ideological tropes of pundits and activists. Requiring legislators to vote for or against rules rather than merely striking poses, and freeing presidents of sole accountability for those rules, would be conducive to both policy and political moderation. The fate of the trade-liberalization agreements is instructive in this regard. Although important constituencies within both political parties have opposed them, their status as executive-legislative enactments (even with the legislative role circumscribed) has protected them from partisanship. President Obama, having attempted to make trade agreements a partisan issue in his 2008 campaign by suggesting he might renounce the North American Free Trade Agreement, has instead left NAFTA alone and pursued the South Korea and Colombia agreements to successful conclusions He will no doubt boast of these accomplishments in his 2012 campaign.

A final advantage of REINS is that it might encourage Congress to devote greater care to the regulatory statutes it enacts. The experience of voting on nitty-gritty agency interpretations of vague, aspirational, or contradictory statutory mandates could be sobering to the legislative mind. It might inspire the thought that Congress and the public would be better off with statutes that made real policy in the first place. Many regulatory statutes, such as the Clean Air Act and other EPA authorities, have fallen far behind experience and thinking on the problems they address; they force agencies into roundabout, wasteful rulemaking strategies, and could be reformed to great advantage. Replacing command-and-control regulations with economic-incentive policies (such as marketable rights and taxes) could remove issues from the REINS assembly line altogether. As we have seen, Congress has little incentive to address problems such as these under current circumstances. With REINS, Congress would be putting its own feet to the fire.

PROSPECTS FOR REFORM

The Regulatory Accountability and REINS acts will not pass the Senate in the current Congress. They are, however, serious proposals, and one hopes they stick around. They are serious because they confront the essential regulatory problem—autonomous executive power—and do so by summoning the only countervailing powers in our constitutional structure: the judiciary and the legislature. Future regulatory reform proposals may employ different standards and procedures, but the test of their seriousness will be whether they assign roles to the courts or Congress that are definite, regular, and robust. As the debates proceed in the coming years, three features of the REINS and cost-benefit proposals merit special attention.

First, the two proposals are mutually exclusive. The REINS Act has been drafted to preserve judicial review of REINS-approved rules, provoking justified criticism that it is aimed less at congressional accountability than at hobbling rulemaking with additional procedural burdens. But regardless of how REINS is written, it would displace judicial review in practice. If a rule failed to secure congressional approval, that would be the end of it. If a rule were approved—passed by majorities of both Houses and signed by the president—no court would hold that it was arbitrary, capricious, an abuse or discretion, not in accord with the agency's authorizing statutes, or insufficiently justified by a demonstration of benefits and costs. Courts would rightly treat such rules as statutory law, and invalidate them only on constitutional grounds.

It would be helpful if proponents of the REINS and Regulatory Accountability bills acknowledged this reality. There are some possibilities for combining elements of the two proposals. REINS could require that regulations submitted to Congress be accompanied by full cost-benefit analyses. A judicially enforced cost-benefit standard could apply to rules beneath the $100 million REINS threshold. Ultimately, however, there is a choice to be made—between an economic test enforced by courts and a political test enforced by Congress.

Second, either proposal could be established by unilateral executive action. If a President Romney were to follow through on his promise to submit major rules for congressional approval, he could not oblige Congress to follow the REINS commitment to prompt floor votes without amendment. But he could strongly encourage such treatment, for example by vowing to veto any amended rule; and his taking the first step could lead Congress to respond with a REINS-like statute. A president could also make the cost-benefit standard subject to judicial review. He could require that agencies include their cost-benefit analyses, now usually limited to the White House review process, in the formal rulemaking records that courts review on appeal. Courts would then apply the "arbitrary, capricious, [or] an abuse of discretion" standard in the light of agencies' on-the-record assessments of the benefits and costs of their regulatory actions. If an assessment were as sloppy and tendentious as the SEC's in the *Business Roundtable* case, it would be difficult for a court to avoid concluding that the agency had acted arbitrarily.

It may seem paradoxical that a president would embrace a procedure designed to limit the discretion of the executive branch. But a president's interests are not the same as those of the government he superintends. He is not a chief executive in the conventional sense. Rather, he sits atop a sprawling confederation of hundreds of independent fiefdoms, each one capable of acting in ways that he may or may not approve of from case to case, and that he may or may not have the time or inclination to countermand when he does disapprove. In these circumstances, a fixed standard may be more advantageous than wide discretion, and shared accountability better than sole accountability. A judicially enforced cost-benefit standard would often, though not always, direct agency discretion in ways that served a president's political interests and policy objectives. Similarly, sharing accountability with Congress would permit a president to fortify difficult or controversial actions he favored, at the cost of sometimes preventing him from doing what he wanted to do.

At some point, a president may conclude that one calculus or the other works to his advantage, or that one reform or the other would be beneficial in its own right. And if he does, he will be in a position to act—he will not need to wait for the slow emergence of a congressional consensus. Indeed, presidential leadership may be necessary to precipitate such a consensus. We may find that restoring some balance against excessive executive power depends on the very expeditiousness of executive action that has contributed so substantially to the problem in the first place.

Third, neither proposal would address all of the serious problems of the regulatory state. Rulemaking is an important weapon in the executive arsenal but by no means the only one. Others are informal enforcement through "strong-arming" (as the Supreme Court put it in the *Sackett* case) and selective waivers to favored parties. Some problematic regulatory programs, such as FDA approval of new drugs and medical devices, operate mainly through case-by-case administration rather than rulemaking. And the proposals would apply only to the costliest, "major" rules. The REINS and Regulatory Accountability bills, in establishing high thresholds for congressional and cost-benefit judicial review, implicitly acknowledge the limits of legislative and judicial processes as counterweights to executive lawmaking.

Nor would the review procedures put an end to the problems of agency specialization, unintended consequences, and the trespass of government into areas better left to private markets and society. Neither procedure would have led the SEC to spot the Madoff fraud—a failure of omission rather than commission. Neither would have led the financial regulators to grasp the titanic risks of promoting subprime mortgage loans and securities—a comprehensive failure of perception that included the Congress, and that a cost-benefit analysis would have ratified rather than exposed. Although REINS could inspire Congress to improve some of the regulatory statutes, there is no reason to think it would revive the deregulation movement of the Carter and Reagan years.

Problems such as these are ultimately the result of the government's doing too many things, including many things that cannot be done well, or at all, by writing and enforcing rules. They would be ameliorated somewhat by enhanced judicial and legislative supervision and by the infusion of economic thinking into the work of the regulatory agencies. But deeper reform will require a degree of intellectual activism and political leadership that is nowhere in evidence today. If experience is any guide, a crisis of some sort may be required to summon such leadership—as the stagflation of the 1970s helped precipitate transportation deregulation, and as the AIDS epidemic of the 1980s forced the FDA to adopt some minor but useful reforms. In the meantime, the Regulatory Accountability and REINS proposals are what we have to work with. They have admirably drawn attention to the pathologies of our regulatory state, and would correct some of them. Reformers need some place to start, and would do well to make the most of these proposals.

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