NATIONAL AFFAIRS

The 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 is pursuing many hugely expensive pollution-control initiatives. The Federal Communications Commission wants to regulate the internet. Agencies are tightening highway fuel-economy standards and banning the incandescent light bulb. Price controls are making a comeback in health insurance and debit cards.

Congressional Republicans are up in arms, and their charges of over-regulation 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 clearly comfortable with executive government, as in its dispensation of waivers from the requirements of the Obamacare and No Child Left Behind statutes, as well as in its $20 billion compensation program for people affected by the BP oil spill (a program that had no statutory basis at all). The administration uses regulatory authorities to pursue unspoken policies, such as hobbling carbon-based energy production (evident in the rejection of the environmentally benign Keystone XL pipeline) and promoting labor unions (demonstrated by its campaigns to stop Boeing from building airplanes in South Carolina and to overrule state constitutions that guarantee the secret ballot in union elections).

Yet the apparent partisan divide over regulation is illusory. The modern regulatory state is a 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

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Bush administration set the stage for many of the Obama initiatives that Republicans are now attacking. Dodd-Frank's policy of designating some financial firms as "too big to fail" is a codification of the Paulson-Bernanke bailout approach of 2008. It was the Bush Treasury Department that first proposed a financial consumer-protection agency, and the Bush Environmental Protection Agency that first proposed regulating greenhouse gases 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 vigorously championed. Only Obamacare is a distinctively Democratic departure.

The profusion of regulation is primarily an institutional phenomenon, and only incidentally an ideological one. The regulatory agency — developed 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 purposeful. It was a way to accommodate growing demands for government intervention in the face of the constitutional bias for limited government.

Since the elections of 2010, congressional Republicans have been much less successful in restraining the growth of regulation — where the executive branch makes policy pretty much on its own — than in restraining the growth of taxing, spending, and borrowing, all of which require periodic legislation. But this failure has been instructive: It has inspired Republicans (and some Democrats) to propose a series of reforms to the regulatory process itself, aimed at limiting the independence of executive-branch policymaking.

To understand the promise and perils of these proposals, we must examine how the regulatory state accumulated its extraordinary powers in the first place — and how those powers have created serious political and economic dilemmas.

SOURCES OF REGULATORY POWER

The power of the regulatory agency, and the persistent growth of regulation, 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 pre-ordained missions — the promotion of clean air, safe products, fair financial practices, women's sports, and on and on.

There are cases, such as the light-bulb ban and the minimum wage, in which 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 Consumer Financial Protection Bureau created by Dodd-Frank: "[E]nsure that all consumers have access to markets for consumer financial products and services...[that are] fair, transparent, and competitive." In these cases, the agencies make the hard policy choices. They are the lawmakers.

There was, at first, a certain squeamishness in Washington about delegated lawmaking. That concern is reflected in the design of Progressive and New Deal agencies such as the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission. These pioneering regulatory commissions were mini-legislatures of five members with proportional representation from the two political parties. Decisions were made by majority vote, and members served fixed terms and were supposedly independent of presidential supervision.

But by the 1970s, when the second wave of regulatory growth crested, the initial qualms had been overcome and the legislative mimicry was dropped. Most of the new agencies — such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration — 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 foundation of regulatory power, the financial foundation, 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 borne almost entirely by the private sector. And while these costs are incurred for public purposes, they are free of the institutions of public finance. Government spending programs are subject to taxing, borrowing, authorizing, appropriating, and budgeting decisions, which require tradeoffs 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 trial-like proceedings with witnesses, cross-examination, and the thrust-and-parry of lawyers' arguments. A case might involve 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 not on adjudicated facts, but rather on written public comments and internal research — these agencies issued rules covering entire industries or economic sectors. A rule might require that all new automobiles be equipped with air bags designed in a certain manner, or that all packaged foods bear ingredient and nutrition labels of a particular sort. 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 era. 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. Then, in 1981, President Reagan began requiring agencies to submit their rules to the Office of Management and Budget before publication, along with cost-benefit analyses demonstrating that the rules' benefits exceeded their costs. All of Reagan's successors have continued this practice.

In the review process, disagreements between OMB and the agencies on the merits of proposed rules are resolved by senior White House staff or the vice president and occasionally by the president himself. A 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 foundation, its political foundation, is its 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 regulatory 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 thin 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 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, in contrast, 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 are largely insensible to the general public, and are felt mostly in the operations of business firms and other intermediate organizations. 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 campaign trail 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 involving every conceivable aspect of commerce and society. Federal agencies add about a thousand new mandates every year; many are relatively minor and uncontroversial, but somewhere between 50 and 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).

To be sure, the exercise of regulatory power has yielded important benefits. The Clean Air Act has contributed significantly to reduced air pollution, generating large health and aesthetic improvements; the Food and Drug Administration 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 with costs exceeding 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. Examples abound, but they rarely make much news.

One recent instance, however, did attract public notoriety. In 2008, the EPA notified Michael and Chantell Sackett that it considered 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 scandalized 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 the agencies' underlying discretion in this manner: If a firm does so and wins, the agency will see to it that the firm is punished in the long run.

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 — protecting the environment, reducing systemic financial risk — come down to detailed rules that prescribe specific, observable features of prices, products, 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 in conflict with, the rule-writers' purposes. Firms and individuals do not go limp: They continue to pursue their private ambitions 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.

These myriad compensating adjustments to minute rules are the source of the "unintended consequences" of regulation that fill the editorial pages and social-science journals. One recent example 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. 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 by 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. Thus 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 afford the considerable expenses of the agency's pre-marketing testing protocols. The SEC was blind to Bernard Madoff's 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 home ownership using 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 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.

At present, neither provides much of a counterweight. Congress shoulders much of the blame for fostering regulatory power in the first place, and is seldom nimble enough to check individual cases of excess.

In recent years, legislators have tried repeatedly to countermand controversial rulemaking initiatives, such as the EPA's efforts to regulate greenhouse gases; every one of them has failed, with the exception of a pathetic nine-month delay in enforcing the light-bulb ban.

The judiciary, meanwhile, is designed to address individual cases, and under the Administrative Procedure Act of 1946, courts may set aside regulatory decisions that are "arbitrary," "capricious," or "an abuse of discretion." In practice, however, the courts are usually highly deferential to regulators. (The Sacketts' complaint against the EPA was decided under the Administrative Procedure Act, but it was an enforcement case, not a rulemaking.)

Several current regulatory reform proposals skirt the issue of constitutional balance, attempting to discipline rulemaking from within the executive branch. Senator Mark Warner of Virginia, for example, has proposed an ingenious "pay-go" procedure, under which regulatory agencies would have to rescind or modify existing rules as a condition of issuing new rules. And several senators and congressmen have proposed moratoria on new major rules until the unemployment rate falls to a certain level. But these procedures would operate at the discretion of the president (who could make exemptions to the rulemaking moratorium) and OMB (which would manage the pay-go exercise). Suggestions for involving the legislative branch — such as by giving the Congressional Budget Office a role alongside OMB in overseeing rulemaking — have foundered on the separation of powers: When Congress acts, it must do so by statute.

But two reform proposals do have constitutional teeth. One would summon the courts, 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 potentially 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 last December 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, subject to judicial review (it would also make major rulemakings more formal, with live hearings and cross-examination).

Under this proposal, any time 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 in question 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.

The cost-benefit standard is a regulatory analogue to spending-program budgets: The costs of regulations are constrained by their own benefits and by the requirement to choose rules with the largest margin of benefits over costs. It is also an appealing rule of statutory construction. In every case in which Congress has punted broad policy discretion to an agency, some legislators will favor an expansive construction of the statutory mandate, others a narrow construction. But if one sought to design a rule for all such mandates that could win the consent of most legislators, it would be hard to improve on a requirement that every agency pursue its mission as cost-effectively as possible. Since 1981, five presidents of both parties have chosen the cost-benefit standard—sometimes after strenuous internal debate—as the best means of countering agency parochialism. That is a remarkable degree of policy consistency.

Many people think of cost-benefit analysis as an arcane, technocratic procedure, but that is only half right: The procedure does have its technical aspects, but its purpose is to transcend arcanery and clarify choices. Its immediate purpose is to summarize complex decisions for high-level review, requiring narrowly focused rule-writers to answer such essential questions as "Why is this rule a good idea?" "How much will it cost?" and "What alternatives have been considered?" At the same time, it disciplines the rulemaking process itself. In any contentious rulemaking proceeding, opponents want to focus only on the costs and proponents only on the benefits; 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 authoritative and are difficult to gainsay when the rules land in court. Cost-benefit analysis, conscientiously applied, requires everyone to confront issues they would rather downplay. In this manner, the procedure imports into informal rulemaking some of the productive tension of the live adversarial proceeding.

It is true that estimates of benefits and costs often involve large ranges of uncertainty and inescapable questions of subjective valuation and political judgment. But these problems are inherent in the regulatory enterprise: Cost-benefit analysis clarifies policy debate by separating the easy questions from the difficult ones, and by focusing argument on the difficult ones. For instance, there is a wide range of plausible estimates of the social value of reducing mortality rates, but many health and safety regulations involve costs well outside the plausible range.

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, and more empirical view of rulemaking proposals than do their agency counterparts; they are more alert to the problems of unintended consequences. 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.

Yet these improvements, while real, have been marginal. In every administration, OMB has approved many dubious rules. While some cost-benefit analyses are sophisticated and illuminating, others are offhand estimates or post hoc rationalizations of decisions made on other grounds. Because of the wide variation in analyses accepted by OMB, the disciplining effects of the cost-benefit standard have tended to be weak. 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 adversaries 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 exaggeration of the benefits of its new air-pollution rules. It has touted benefits of many hundreds of billions of dollars per year, an amount that would vastly exceed the rules' 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 overall benefits in the range of $37-90 billion per year, comfortably exceeding the costs of $10 billion per year. Buried in the analysis, and obscured in the EPA's promotional materials, was the fact that the estimated benefits of the mercury reductions themselves were minuscule — no more than $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's methods of estimating air-pollution reduction benefits 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 the EPA's most expensive new regulatory ventures.

Similarly, the EPA, the National Highway Traffic Safety Administration, and the 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 in this case, too, almost all of the stated benefits — about 90% — are from a single, highly debatable source. They are not public benefits at all, such as reduced air pollution or decreased dependence on foreign oil. Rather, they are 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 prices in the future; 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 energy secretary 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 be not a press release, but instead an analysis that could survive scrutiny in an adversarial proceeding before judges who are obligated to explain their decisions in terms of law and precedent. This change would in turn 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 different courts and judges in a variety of policy contexts. The result would be a body of regulatory law, as well as a critical academic literature in the disciplines of law, economics, and public health, among others. With regulatory discretion defined by cost-benefit precedent available to everyone, policymaking would become less declarative, more professional, and more economically literate.

This shift has already happened in anti-trust law. Before the 1980s, policies toward mergers, pricing, and marketing were populist, unpredictable, and economically harmful (they would have throttled, for instance, the revolution in computer and information technology of the 1990s and 2000s). But in the 1980s, the anti-trust statutes were re-interpreted to require that enforcement actions promote economic efficiency and consumer welfare. Many disagreements remain, and there is still much room for executive discretion. Nevertheless, the embrace of economics has made anti-trust law more precise and predictable, its enforcement agencies more professional, and its results more beneficial.

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 their boards 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 effects upon "efficiency, competition, and capital formation." Those provisions, amounting to a cost-benefit standard customized for financial regulations, 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.

Ultimately, the court vacated the rule. In so doing, however, it 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 addressed the most recent in a succession of rulemakings in which 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. In time, the SEC will learn that it has to take economics seriously, just as the anti-trust agencies learned decades ago. This 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 branch of government.

The Regulatory Accountability Act would impose the same discipline throughout the regulatory establishment—including the older, supposedly "independent" regulatory commissions such as the SEC and FCC, which have been exempted from the White House review programs. The source of discipline would not be the cost-benefit standard itself, but would instead be the use of that standard as a means 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 hope of immediate passage. REINS would require that new major 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 issued 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 that 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. The proposal has a simple, commonsense appeal: Should not members of Congress stand and be counted on regulatory 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 vehemently 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 arm's 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 loathe — are also legislated regulations. Much of the anti-REINS liberal angst probably results from imagining Obama-administration rules subjected 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 there would often 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 own party. Congressional majorities often decline to embrace the causes of passionate advocacy groups, but they do sometimes embrace them, and when they do 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 passively standing 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 legislatures have been reduced to reluctant handmaidens of a few national leaders and the European Central Bank). The trend has many 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 lightning speed of communications, which plays strongly to the advantage of decisive executive action. In the face of these developments, 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 it of the executive props it 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 using only routine enforcement discretion. That would be a true revolution, putting the federal government on a path to a much smaller size dictated by the capacities of the 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 would the need to pass a cost-benefit test, but the two would be similar in one important respect: In both cases, regulators would be obligated to balance the pursuit of their program missions against many other, competing interests and perspectives.

The REINS procedure would be a new legislative-executive détente, similar to those of 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 “re-alignment” of 350 military installations between 1989 and 2005, and the adoption of more than a dozen trade-liberalization agreements over the past three decades.

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 debates, 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 developments for the purpose 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 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 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.

A more productive response to concentrated executive power would be to disperse accountability for executive actions more widely among elected representatives. Under REINS, Congress and the president would share formal 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 (REINS confines this approach to new regulations, but it could be extended). 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 these agreements, their status as executive-legislative enactments (even with the legislative role circumscribed) has largely 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 agreements with South Korea and Colombia 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. Congress has little incentive to address such problems under current arrangements; with REINS, however, Congress would be putting its own feet to the fire.

THE 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 an 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 criticism that it is aimed less at congressional accountability than at slowing rulemaking with additional procedural hurdles. 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 or capricious, an abuse of 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, and for establishing judicially enforced cost-benefit standards for 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 force

Congress to follow the REINS commitment to prompt floor votes without amendment. But he could strongly encourage such treatment—by, for example, vowing to veto any amended rule.

A president could also facilitate judicial review of the cost-benefit standard by requiring that agencies include their cost-benefit assessments in the final rulemaking records that courts review on appeal. Courts would then apply the established "arbitrary," "capricious," or "an abuse of discretion" standard in the light of an agency's on-the-record assessment of the benefits and costs of its regulatory action. If the assessment were as sloppy and tendentious as the SEC's in the *Business Roundtable* case, it would be hard 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, and that he may or may not have the time or inclination to countermand when he does disapprove. Under these circumstances, 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 await the slow emergence of a legislative 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 through 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 non-prime mortgage lending — 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, it would not 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 they would do well to make the most of these proposals.