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Contemporary Conservatism and Government Regulation

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American conservatives have opposed the growth of government regulation in principle but accommodated that growth in practice. The disjunction was particularly striking during the recent decade of Republican ascendency (1999–2009). This chapter explains conservative hostility to regulation, describes and evaluates the growth of regulation through Republican as well as Democratic governments, reviews the record and legacy of the George W. Bush administration, and concludes with suggestions for conservative thought and action.

"Regulation" is a protean and potentially all-encompassing term: essentially every act of government aims to alter some course of events. A functional definition is that regulation is government prescription of terms and conditions of private transactions, usually in the form of rules written and enforced by specialized administrative agencies, aimed at achieving some public result.[1] That differentiates regulation from taxing and spending—but taxing and spending programs are replete with detailed specifications of how taxes are calculated and funds awarded, and many of them are, like naked regulations, intended to alter private conduct. In the United States, the federal government regulates state and local governments through grant conditions and "unfunded mandates." Beyond the functional definition, regulation has at least two political meanings in the American context: government efforts to manage private markets and hence "free enterprise" and "capitalism," and federal government efforts to centralize power and policy making within the federalist system. Ambiguities at the margin are unimportant in this chapter: conservatism's dilemma with the growth of regulation has some unique features but is not fundamentally different from its dilemma with the growth of government tout court.

Regulation in Conservative Thought

American conservatism, taken as a body of political thought and policy analysis rather than a political movement, is strongly disposed against government regulation. That disposition has four sources.

First, regulation generally entails restrictions on private property or markets. Government rules may specify or limit prices, product designs, or production methods; the uses of land or other property; the information firms provide to investors, consumers, or employees; the forms of financial or operating arrangements among firms; or who may provide goods or services in certain markets, and in the limit they may ban certain products or activities altogether. In every case, regulation impinges on property rights and economic freedom. Conservatives place a high value on property rights and economic freedom: they regard them as essential rather than secondary to civil rights and political freedom. And they admire the entrepreneur and the works of commerce and finance, both as expressions of human freedom and as sources of material prosperity. Conservatives readily acknowledge that some government impositions on property and business activities are appropriate and, if executed well, are compatible with property rights and economic freedom—classic cases are pollution control and antitrust restrictions on cartels. But they oppose other purposes, such as restricting market competition and international trade, and they are generally skeptical of the "public good" rationales for government controls on property and commerce.

Second, regulation is a problematic form of government action—a font of "unintended consequences" and "perverse consequences" even when the formal purposes are accepted as valid. This is because of the narrowness and specificity that are defining attributes of regulation. The government fixes one term of a private contract—a price term, a feature of product design, a disclosure statement, a production method—but leaves myriad other terms unregulated. And government is usually powerless to regulate the extra-contractual, behavioral responses of firms and individuals to its rules. The unregulated terms and conduct adjust and compensate for the fixed term, reflecting private purposes that are independent of the government's purpose; the result is always to compromise and sometimes to defeat entirely the government's purpose.[2] The minimum wage leads to unemployment among marginal groups; controls on the introduction of new pharmaceuticals retard innovation and worsen rather than improve public health; price controls raise rather than lower prices—or if they lower prices, produce queues whose time costs gobble up the price savings; safety standards raise product costs, deflecting some consumers to other products and activities with hazards of their own; unproductive financial regulations suppress desirable risk-taking, driving financial markets and corporate headquarters to jurisdictions with less onerous controls (e.g., from the United States to Europe and Asia).

Regulatory ineffectiveness vindicates conservative skepticism about government intervention in private social and commercial arrangements: it demonstrates the market's robustness and adaptability, its superior knowledge of varying local circumstance, and its subtle accommodation of variegated interests. But conservatives are offended by the waste and inefficiency, by the pretense that government regulators effectively "correct market failures," and by the corruption of popular understanding of the sources of social progress and problem solving. Moreover, the pervasiveness of "regulatory failure" leads to the suspicion that regulation is chosen over other, more effective policies deliberately and for surreptitious reasons. For example, a substantial tax on gasoline would be a highly effective means of encouraging energy conservation—and wildly unpopular for that reason. So Congress instead regulates the fuel economy of automobile fleets in a highly porous and ineffective manner.[3] Precisely because regulatory edicts are relatively easy to elide, they permit government officials to take credit for ambitious social goals without risking adverse political reaction to the significant costs and disruptions that a full-throttled pursuit of those goals would entail. And regulation, by targeting specific firms, industries, and economic groups, provides the government with great discretionary power to reward friends and punish foes for its own political reasons. Thus regulation facilitates the pursuit of unworthy purposes in the name of worthy purposes. Conservatives think policies should be judged by results, not good intentions—much less bad intentions.

Third, regulation is almost entirely the work of administrative agencies. There are exceptions—the American minimum wage is a legislative enactment—but for the most part regulations are produced by bureaucracies whose lawmaking authority is delegated from Congress. And the modern regulatory state, in its structure, profusion, and minuteness, is an artifact of the bureaucratic state. It could not have been created by direct legislation, given the numerous constraints the Constitution places on legislating and the inherent cumbersomeness of legislative decision making. Moreover, the problem of regulatory ineffectiveness—of private adaptations to narrow rules vitiating their intended effects—obliges close integration of lawmaking and administration. If regulation is to have any hope of success, the issuance of rules needs to be combined with continuing surveillance, enforcement, interpretation, and amendment. The elimination of checks and balances among these functions was achieved first by a legislative-executive hybrid, the regulatory commission, during the Progressive and New Deal eras—such as the Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), and Federal Communications Commission (FCC). In this form, a mini-legislature of five commissioners, composed through proportional representation of the two political parties, made rules by majority vote and also administered an agency that policed and enforced those rules and recommended new and revised rules. Later, beginning in the 1960s, the commission form was displaced by the hierarchical regulatory agency, such as the National Highway Traffic Safety Administration

(NHTSA) and Environmental Protection Agency (EPA). Here the legislative mimicry was dispensed with and a single administrator wrote the rules and supervised their enforcement, interpretation, and amendment. That was even more efficient.

American conservatives are limited-government constitutionalists. They are hostile to departures from the structure of government laid down by the U.S. Constitution, and few departures have been more dramatic than legislative delegation and the fusion of lawmaking, surveillance, and enforcement. At one level, conservative hostility to regulation is legalistic and traditionalist, born of devotion to the rule of law and fear of departures from tried-and-true arrangements. But the hostility is also practical and consequentialist: administrative government has proved to be a powerful innovation for increasing the size, scope, reticulation, and general busybodiness of the state. This is not only because of the relative alacrity of the hierarchy versus the committee, but also because delegated lawmaking permits elected representatives to diffuse and evade political accountability.[4]

Fourthly, regulation has facilitated the growth of government in another way—by taking public spending off-budget and out of sight. Most of the expenditures occasioned by regulatory policies are realized entirely within the private sector (the operating budgets of the regulatory agencies are a tiny fraction of the costs of complying with, or working around, their rules[5]). The compliance costs of regulated parties are public expenditures in the sense that they are required by law for public purposes, but they are imposed and incurred outside the procedures that constrain direct government spending—raising revenues through taxation or borrowing, legislative authorization and appropriation of spending, and budget controls. In an era of trillion-dollar budget deficits and hundred-billion-dollar spending authorizations, one would be forgiven for wondering whether traditional financial restraints amount to much anymore. Yet large spending bills and budget deficits are often front-page political controversies, while regulatory costs seldom are. In the language of public finance, regulatory costs are "insalient": they are not revealed to citizens and consumers as costs of pursuing government policies, but instead are embedded, to an unspecified and largely unknown degree, in higher prices for private goods and services. Insalient taxes—such as the corporation tax, many excise taxes, and the employer portion of the Social Security tax (and such as the proposed U.S. value added tax would be)—are handmaidens of big government.[6] The implicit taxes of complying with regulations are even more insalient: even the tax rates are unknown.

Regulation is not altogether free of checks and balances. Agency rules must survive judicial review (New Deal efforts to make agency rules unreviewable by courts were unsuccessful). But judicial review is confined to ensuring that rules are consistent with enabling statutes, not that they are cost-justified or otherwise necessary and appropriate. In recent decades, the growth of regulation has prompted the Office of Management and Budget (OMB) to establish cost-constraining procedures that mimic budget procedures: agencies are required to estimate the costs and

benefits of their rules and, internally within the Executive Branch, to justify them in these terms. But cost-benefit analysis is much more abstract and subject to interpretation and manipulation than expenditure controls, and is therefore much less constraining.[7]

Regulation in Political Practice

The conservative critique of regulation has had little durable influence on American politics and government. It has won occasional victories, and it provided the intellectual foundations of the "deregulation movement" from the Gerald Ford administration (1974–1977) through the Ronald Reagan administration (1981–1989), whose achievements included the Airline Deregulation Act of 1978 abolishing the Civil Aeronautics Board (CAB). But the critique has not prevented regulation from growing inexorably over time, and it has not even caused the Republican Party, its natural political home, to be a consistent or forceful opponent of regulatory growth. Following the financial market collapse of 2008 and the strenuous government responses to that collapse, "deregulation" has become a bipartisan dirty word. And "regulatory reform," which previously meant efforts to make worthwhile regulations (such as pollution controls) more economical and productive, has come to mean new regulatory controls of any sort, especially in the financial sector.

Of course, an intellectual critique is not a political program. The ideas described earlier are academic and reactive—the application of conservative precepts and microeconomic principles to the experience of government regulation since the Progressive Era and the New Deal. One finds those ideas mainly in law reviews, economics journals, and think-tank publications, from whence they are deployed in immediate policy debates mainly by conservative editorial pages, opinion magazines, pundits, and politicians. But the ideas are neither exclusively conservative nor all of conservatism. That regulation is frequently counterproductive—suppressing market competition, inflating prices, retarding innovation, increasing rather than diminishing health and safety risks—is a concern shared by many economists and other scholars who are liberals (in the American sense of the term) on policy issues such as taxation, health care, and social insurance. At the same time, many American conservatives today are primarily concerned with issues of morals, culture, personal conduct, marriage and family, or foreign policy and are relatively indifferent to issues of the size, scope, and methods of domestic government. "Big-government conservatives" see government as a positive force for promoting better social norms and private behaviors through regulation as well as taxing and spending. "Neoconservatives" are primarily concerned with maintaining a robust role for the United States in international politics, and may or may not have conservative views in domestic policy; the neoconservative patron saints, Daniel Patrick Moynihan and Henry M. Jackson, were forthright liberals on the domestic stage. Economic

conservatives vie with these and other schools, agendas, and constituencies both within the conservative movement and the wider Republican Party. And they are not consistently allied with any powerful interest group. Business firms and trade associations often favor regulation. Even when they oppose new regulatory programs, businesses often make peace with the programs or find them positively advantageous over time (on which more below). The growth of regulation has left business—especially large corporations in the best position to absorb and manage regulatory costs—increasingly co-opted and unreliable as a force for reform.

These circumstances are obscured by the continuing prestige of Reaganism. Ronald Reagan's presidency was the contemporary conservative movement's greatest success in practical politics, and his conservatism had a strong intellectual core that included adamant resistance to the growth of regulation and bureaucracy. But America has long since regressed to normal politics. American political parties are not ideological parties. They exist to win elections on behalf of certain political constituencies and their characteristic political values, not to advance broad philosophic principles such as limited government—much less to oppose techniques of government, such as regulation, which could be useful to the electoral tasks at hand. Moreover, the conservative movement has become increasingly allied with Republican Party interests since its heady ascendency in the Reagan era. It is increasingly an activist rather than intellectual movement, and judges itself by its success in the intensely practical environment of Washington, D.C., where most of its leaders now live and work. The context of normal politics rather than Reagan exceptionalism, and of conservatism's new position as a self-conscious part of the political establishment, provides a better basis for assessing the state of American conservatism and regulation today.

Regulatory Persistence: Theory and History

There are three prevailing explanations for the political durability of regulation despite its ineffectiveness or positive harmfulness. The most famous is the "public choice" explanation: regulatory programs, while parading in the rhetoric of the public interest, in fact favor narrow interest groups at the expense of the general public, and survive because interest groups have higher incentives and lower costs of political organizing than the passive general public.[8] The second is the "public misperception" explanation: the general public is not merely inattentive to regulatory policies but, when it is paying attention, mistakenly thinks that such things as trade restrictions and price controls are effective and beneficial.[9] The third is the "natural progress" explanation: the benefits that regulatory programs aim to promote, such as safer products, cleaner air, and lower prices, are also provided by private markets in the course of natural economic and technological progress, and this progress masks the ineffectiveness or harmfulness of regulatory programs and makes them difficult to oppose or reform.[10]

These arguments are powerful, well supported, and mutually reinforcing. They help explain why Republican politicians and conservative activists have not made greater use of the conservative critique of regulation. The result is that the history of regulation is a history of bipartisan growth.

Although the Republican Party has been much more rhetorically attuned than the Democratic Party to the virtues of private markets and vices of government intervention, in practice there has been no strong correlation of political party to regulatory policy apart from the New Deal. The Republican Party, from its founding by Abraham Lincoln down to the present day, has stood for business and commerce and the value of individual freedom. The Democratic Party, from Andrew Jackson down to the present day, has stood for the common man and the value of social equality. These sweeping generalizations gloss over many important features of the parties' evolving political platforms and electoral bases. They serve, however, to suggest why neither party has been a consistent friend or foe of government regulation, or economic intervention generally, in response to evolving social problems and political opportunities. Jackson's Democratic Party was founded in opposition to centralized government economic power in the form of the Second Bank of the United States. Lincoln's Republican Party was strongly protectionist and pro-tariff, and his administration collaborated energetically with commercial interests to achieve rapid internal development—both for its own sake and to crush the agrarian South in the Civil War and win freedom for the slaves.

A century later, the Democratic Party became identified as the party of regulatory activism primarily because of the New Deal and its profusion of new expertise-based, law-writing regulatory commissions such as the SEC and CAB. But the regulatory agency was not a New Deal invention. The granddaddy was the 1887 Interstate Commerce Commission (ICC); the FTC went back to the Progressive Era; the Food and Drug Administration (FDA) was formed during the Calvin Coolidge and Herbert Hoover administrations from statutory authorities pioneered by Theodore Roosevelt; and Hoover, as Secretary of Commerce, had vigorously championed the creation of the Federal Radio Commission in 1927—predecessor of the FCC (1934), and in retrospect a monumental mistake.[11] After Dwight Eisenhower famously made peace with the New Deal, the record again became thoroughly mixed. John F. Kennedy was a strong supporter of labor regulation but was the first president to propose weakening the ICC. Richard Nixon loathed the federal bureaucracy but instituted economy-wide wage-and-price controls; created the EPA by executive order; signed into law the statutes creating the NHTSA, Occupational Safety and Health Administration (OSHA), and Consumer Product Safety Commission (CPSC); pursued aggressive antitrust policies (including prosecution of the television networks for political rather than economic reasons); and instituted racial "affirmative action" requirements in federal contracting. Jimmy Carter was a determined regulator of energy markets but deregulated the airline industry and beefed up the procedures Nixon had initiated for White House oversight of agency rulemaking. A month

before leaving office, Carter signed the Paperwork Reduction Act, which established the institutional framework for Ronald Reagan's even stronger procedures for supervising regulatory policies under a cost-benefit standard. Those procedures were continued, in somewhat milder form, by Reagan's successors of both parties—George H. W. Bush, Bill Clinton, George W. Bush, and Barack Obama.[12]

To be sure, there has been a significant difference—significant especially in a discussion of conservatism—between Republicans and Democrats in their *posture* toward regulation. Democrats, as advocates of the common man and of greater social equality, have generally been committed to new regulatory initiatives to correct perceived social and economic abuses and injustices. Republicans, as representatives of business and proponents of individual freedom, have generally resisted new regulation and other interventions (the only post-nineteenth-century exceptions in the presidential lineage are Theodore Roosevelt in full flush and, as examined below, George W. Bush). But Republican leaders have also been practical politicians, obliged to accommodate themselves to circumstances as they found them, including inherited government programs and the popular sentiments and organized constituencies that have grown up around them. The temporal pattern is Democratic activism as the motive force for regulatory growth, followed by Republican acquiescence.

It is more than a detail to note that the constituencies favoring the regulatory status quo have often included staunchly Republican business groups, who had opposed the programs at the outset but then learned to live with and even to love them. The ICC, established in 1887, was the product of a populist, agrarian, social equality movement against the railroad barons in the big Eastern cities. But in operation the ICC promptly became a price-fixing cartel, and thereafter the railroads worked to sustain it, to strengthen its enforcement powers, and, following the development of the automobile, to extend its reach to those cartel-busting upstarts, the truckers and bus lines. No serious Republican, or Democrat, proposed to upset the ICC status quo until the late twentieth century, by which time the railroads had lost most of their capacity to charge monopoly prices even in concert, and many had been driven into bankruptcy by ICC regulation. In general, regulatory programs apply in the first instance to business firms, and it is business firms that invest in mastering their arcane details, forging compromises and working arrangements with their agency staffs and officials, and learning to operate in the interstices of their formal requirements. The firms thereby acquire an interest against the uncertainties that reform or abolition would entail, even when those changes would benefit the market system and economic freedom. As students of regulation know, this tendency applies to "social regulation"—regulation addressed to health, safety, and environmental issues—as well as to economic regulation of the cartelizing kind.

Thus it is not surprising that the first successful stroke of economic deregulation, the 1978 abolition of the CAB, was accomplished by Democrats Edward M. Kennedy and Jimmy Carter over the concerted opposition of the airline industry.

Both proponents and opponents believed that the CAB was running an effective cartel and that deregulation would result in more competition and lower prices for consumers. Neither side realized at the time, what became clear following deregulation, that the cartel rents had been going mostly to unionized employees—pilots, flight attendants, and maintenance workers—rather than to owners and executives. If that had been known, the usual bipartisan alliance for the regulatory status quo might have held, and the CAB might still be with us today.

Although business acquiescence contributes to Republican acquiescence, the phenomenon runs deeper. Typically, a regulatory program is hotly controversial at the time of proposal, legislative debate, and enactment, but thereafter becomes a fact of life—a feature of the governmental landscape, a reality that citizens and politicians of all stripes have accommodated to and that would be costly to try to dislodge. It becomes institutionally entrenched in the government and in the wider society, and also legally entrenched as successive administrative actions and statutory revisions are interpreted by the courts and give rise to a body of precedent. Republicans, when they find themselves in power, are cautious about challenging this edifice—because they have accommodated themselves to it philosophically, because they are temperamentally conservative, or because they have other priorities. Richard Nixon—among modern presidents the Republican regulatory champ prior to George W. Bush—regarded many of his administration's regulatory initiatives as obnoxious nonsense (excepting environmental protection, where he was a sincere proponent of moderate regulation). But his overriding priorities were to bring the Vietnam War to an honorable conclusion and to forge a new strategic alliance with China (and, eventually, to save himself from the Watergate scandal). These required time and political space and the maintenance of legislative coalitions. Eisenhower's refusal to lead a counterrevolution against the New Deal was condemned by the then-nascent conservative intellectual movement, but very few business executives or Republican politicians would have had the heart for it, and Eisenhower was surely right in thinking that the general public would have opposed it.

President Reagan is the great exception, and an instructive exception. A movement conservative, he had been, in the years before his presidency, a crusading newspaper columnist who often inveighed knowledgeably against government regulation. In office, he made "regulatory relief" one of four cornerstones of his economic program (along with tax reduction, fiscal restraint, and stable money). His first, flamboyant act in office was to abolish petroleum price controls by executive order, and he promptly established strict White House procedures for reviewing agency rule-making proposals and reconsidering existing rules. He presided over a sea change in antitrust policy and relished preaching the virtues of individual and commercial freedom and the vices of regulation. Apart from antitrust, however, the results were mostly temporary rather than lasting. Many inherited rules were modified or rescinded—perhaps the most consequential being the abolition of the FCC's Fairness Doctrine in 1987—and the rate of regulatory growth declined

markedly during his first term. But Reagan made no effort to abolish or substantially reform any of the agencies that issued those regulations (the fate of the CAB was sealed before he arrived, and the ICC was not abolished until 1995), and his initial ambitions to reform the EPA were abandoned following a scandal involving the agency's Superfund program in 1983. He ended up acquiescing in several major rules, such as the automobile airbag requirement, that he had once strongly opposed. Regulatory growth had resumed by the end of his second term.[13]

Similarly, Newt Gingrich, the other successful conservative movement politician of recent vintage, challenged regulation only at the margins and not at the core. His "Contract with America" was mainly concerned with tax and fiscal policy and crime, welfare, and cultural issues (such as teenage pregnancy). It contained a few proposals to apply economy-wide regulations (such as employment opportunity and workplace safety rules) to Congress itself, and to tighten congressional and executive oversight of agency rule-making. Some of the oversight proposals were enacted, but with scant practical effect. The proposal to apply regulations to the Congress was adopted, but coverage and compliance have been less thorough than in the private sector.[14]

Conservative Politicians Otherwise Engaged

The record, then, is that even the most strong-minded conservative politicians are disinclined to challenge regulation at the fundamental level that their intellectual and academic allies would favor. For example, the economic cases for abolishing the FCC and OSHA are very strong, and in the case of the FCC would produce enormous, widely shared economic benefits, mainly through dezoning the electromagnetic spectrum and vesting its allocation to private property and markets.[15] But no Republican president or congressional leader would even consider advancing either idea. These are not isolated examples. Conservative policy scholars would abolish many programs of economic regulation and fundamentally restructure many programs of health, safety, and environmental regulation, but their proposals are altogether absent from serious political debate. This is in contrast to tax, Social Security, and health care policy, where Republican leaders routinely advance ambitious conservative reform proposals. The distance between the intellectual and practical wings of the conservative movement is greater in regulatory policy than in any other area of economic policy.

I can offer two explanations for this state of affairs. First, conservative and Republican politicians are usually more temperamentally conservative—cautious, reactionary, wary of disturbing the status quo for abstract reasons—than are their liberal and Democratic counterparts. After all, the liberal politician who champions an ambitious new regulatory venture is confronting a status quo at least as entrenched as the subsequent status quo precipitated by the program itself. Liberals seem by nature more activist and confrontational than conservatives—perhaps more

discontented and irascible, certainly more willing to overturn applecarts. A conservative temperament may lead one to a conservative political program as a philosophic matter but trump that program as a practical matter.

Second, mobilizing political support for deregulation is systematically more problematic than mobilizing either (a) support for regulatory creation or (b) support for alternative projects that conservatives favor. The passage of a major regulatory statute is typically preceded by years or decades of preparatory work outside the government itself: publicizing, organizing, petitioning, and public consciousness-raising concerning the injustices or abuses to be remedied. When the moment of legislating arrives, it often takes the form of a single stroke for social betterment—the legislator votes for clean air or fair prices or full disclosure, and leaves the more contentious work of setting standards and allocating costs and benefits to be done piecemeal by administrative agencies. Deregulation is different. The costs and benefits have been parceled out, the derivative economic adjustments have been accomplished, the compromises made and the coalitions formed. And, critically, the regulatory agency exists for purposes of enforcing the coalition in the face of reformist threats—rewarding those who remain in the fold and punishing those who attempt to defect. At the moment of regulatory creation, the prospective beneficiaries mostly know who they are and have organized themselves, while the prospective losers are usually less well identified. Once the program gets established, the beneficiaries of deregulation may be somewhat more self-aware and organized, but those who would lose out are even more so—they are an organized team with a game plan, position assignments, public funding, and a coach to call the plays.

Finally, regulatory programs feature high complexity and narrow focus. As a result, undoing them lacks political leverage and popular resonance as compared to competing conservative projects such as reducing taxes, reforming entitlement or welfare programs, or defeating communism or terrorism. It is not surprising that ambitious politicians who do combine conservative philosophy with activist temperament devote themselves to projects which, however controversial, can be readily communicated and promise benefits that are large and palpable. The income tax, for all of its complexity, is less mysterious than the regulations of the FCC. The basic structure of the income tax and proposals to change it can be explained in straightforward dollar-and-cents terms; it directly touches and is familiar to vast numbers of people, and its influence extends to the entire economy.

Regulation under George W. Bush

The political dilemmas of achieving conservative regulatory reform have become vastly more acute following the presidency of George W. Bush, which brought a tremendous expansion of federal regulation along with spending and deficits. Much of that expansion came in response to a succession of crises and other external

shocks—the terrorist attacks of September 11, 2001, the corporate accounting scandals of 2001–2002, the sharp increase in energy prices in 2004–2007, and the financial market upheavals and severe economic contraction of 2008. Crises invariably spur the growth of government through regulation and other means,[16] and those of the Bush years would have prompted some regulatory growth under any president of either party. But President Bush was more than a bystander or crisis manager. He arrived in Washington with substantial expansionist ambitions of his own, and when crises arose he was disposed by political calculation and personal temperament toward aggressive interventionist responses. A "compassionate conservative," he was not acquiescent or tactical about regulation in the manner of Richard Nixon but rather assertive and authentic in the manner of Theodore Roosevelt.[17]

Administering the Regulatory State

Abnormal regulatory growth did not come in the routine administration of the established regulatory programs, where the Bush record was similar to those of his predecessors, Republican and Democratic, other than Reagan. At the EPA, OSHA, and other agencies, there were many public debates over individual rule-making proposals, many inside debates between the agencies and OMB, and many charges that regulators were going either too far or not far enough. But regulation continued to grow, with no remarkable departures in pace or substance.[18] The number of new "major rules" (those estimated to cost $100 million or more annually or designated by OMB as unusually important for other reasons), and the costs and benefits of those and lesser rules, were not appreciably different than during the Clinton and George H. W. Bush administrations.[19] Specific forays into administrative reform illustrated general propositions emphasized earlier: that regulatory considerations are often secondary to other political objectives, and that ingrained regulatory policies are very difficult to modify even marginally.

- The Bush administration's "Faith-Based and Community Initiative" involved significant deregulation of a sort: the elimination of restrictions that had prevented religious groups from competing for social service grants and contracts.[20] But that was ambiguous from the standpoint of government intervention in private society. The purpose was to widen the array of institutions that could receive federal grants (funding increases were of course part of the effort). The result was increased government involvement in religious organizations and a new set of regulations—to ensure that public funds went only to social services and other secular efforts and not to religious instruction, worship, and proselytizing. Although the Obama administration came to office intent on revising many of the business-oriented rules adopted during the Bush administration, it promptly announced that it would continue the faith-based initiative in all essentials.[21]

- Similarly, Bush's Department of Labor advanced a determined agenda of conservative economic reforms to OSHA, wage-and-hour, and labor union rules—including stricter union financial disclosure requirements which *increased* regulation and paperwork.[22] In this case, the Obama administration moved quickly to rescind the requirements citing excessive regulatory burdens.[23]
- In environmental policy, the Bush administration pursued two important reforms under the Clean Air Act. The first was to permit substantial renovations of manufacturing and power plants without triggering costly "New Source" pollution standards applicable to all-new facilities; the purpose was to relax regulatory impediments to plant enhancements that would improve operating efficiency and thereby reduce pollution.[24] The second was to establish a regime of "marketable permits" for power plant emissions; the purpose (building on successful reforms introduced in the Reagan and George H. W. Bush administrations) was to make pollution controls more cost-effective by allowing plants to calibrate abatement investments according to differing abatement costs. Both were worthy attempts to harness private economic incentives to environmental improvement. But they were easy to misrepresent as weakening environmental protection,[25] and ran aground on tactical disagreements and missteps and a series of adverse court decisions.[26] The efforts, lasting nearly eight years, were abandoned in late 2008 and accomplished nothing.

President Bush did not pursue any large legislative initiatives for regulatory reform or deregulation. This was not for lack of opportunities. The FCC, for example, was a prospect for root-and-branch deregulation at least as attractive as the CAB had presented to the Carter administration. The Bush FCC did some important good deeds, especially in removing regulatory barriers to competition between telecommunications and cable television firms. This produced a surge of investment in the deployment of "broadband" technologies and enormous improvements in the quality and costs of telephone, Internet, television, and radio communications.[27] But for the most part the Commission was content, through eight years of Republican management, to continue a program of industrial controls that misallocated resources, suppressed innovation, and stimulated ferocious rent seeking in a vital economic sector, all without any justification in monopoly or other "market failure."

Throughout his tenure, President Bush opposed domestic regulation of carbon dioxide and other greenhouse gas emissions to avert the risks of global warming, and also opposed U.S. ratification of the Kyoto Protocol to establish international controls. This was not, however, the obdurate resistance to a growing consensus for new regulation, or a reflection of Republican solicitude for business interests, that his opponents and the media portrayed it to be. The Senate had voted 95–0 against the Kyoto Protocol in 1997 during the Clinton administration, largely because the treaty would have permitted unregulated emissions growth in China

and India—thereby negating emissions reductions in the United States and Europe while inducing further migration of economic production to those nations. The political and institutional obstacles to an effective greenhouse gas control regime remained just as formidable and bipartisan after Bush retired.[28] Although President Obama made high priorities of domestic "cap-and-trade" legislation and international controls, those initiatives were effectively dead at the end of his first year in office.

Big-Government Conservatism

The big change in the regulatory trajectory during the Bush administration came not at the quotidian administrative level but rather through proposals for new legislation and, eventually, responses to external shocks. In the first instance, the change reflected a calculated departure in Republican strategy, expressed in Bush's signature political slogan, "compassionate conservatism." President Bush and his advisers believed that the Republican Party was on the cusp of achieving a long-term governing majority potentially as durable as the Democrats' New Deal majority had been. That majority could be sealed, they believed, by embracing spending and regulatory initiatives that Republicans had traditionally opposed but were popular with important constituencies. More generally, they believed that traditional, limited-government conservatism, with its aversion to policy activism, had lost much of its cachet since the Reagan years and needed to be replaced with something more energetic and attuned to popular sentiments. In this view, a sustainable Republican Party required a modernized conservatism that was less squeamish about the exercise of power.[29]

In his first term, President Bush won passage of two of his top campaign proposals, the "No Child Left Behind" (NCLB) school-reform program and the addition of a pharmaceutical drug benefit to the Medicare medical insurance program for older Americans.[30] Both initiatives were important departures from traditional Republican positions. NCLB nationalized control over important aspects of primary and secondary schooling, long considered the province of local and state government, and expanded the Department of Education, which the Republicans had proposed abolishing as recently as 1996. The Medicare drug benefit had a Republican antecedent: Ronald Reagan had won a similar measure in 1988. But the Reagan version had been wildly unpopular, primarily because it was financed by new taxes on program recipients (Reagan had insisted that it be deficit-neutral), and was repealed in 1989.[31] The Bush version learned from that failure and was a big-government fiscal innovation: it was the first enactment of a new government entitlement with no taxes to pay its costs.

Both programs were very costly. No Child Left Behind came in at about $10 billion per year, the Medicare drug benefit at about $40 billion, all of it financed by new borrowing. Both also required the construction of elaborate new regulatory

programs. The NCLB statute, although regulating state and local school authorities rather than private industry, was structured very much like the Clean Air Act: it combined extreme regimentation (every primary and secondary student in the nation was to take standardized proficiency tests in reading and math every year), lofty but vague objectives (every school must make "adequate yearly progress" toward "universal proficiency" by 2014), and bureaucratic remedies for failure to meet the objectives ("supplemental education services," "corrective action," "restructuring plans"). It also contained special performance requirements for low-income students, special-needs students, non-college-bound students, and "major racial and ethnic subgroups" as well as discrete programs or requirements for early literacy, teacher training, technology in the classroom, parent involvement, constitutionally protected prayer, and much else. All of them needed to be elaborated through Department of Education regulations, and state and local compliance with the regulations needed to be monitored and enforced.[32]

The Medicare drug program was less centralized than the established Medicare programs for hospital and physician care. It operated through contracts with competing private insurance companies, and the firms had some flexibility in designing coverage features and terms; among other virtues, these reforms obviated the need for a federal drug formulary.[33] Nevertheless, the program imposed numerous coverage requirements on the private insurers and also provided them with large and complex subsidies, and therefore entailed substantial new regulation. Moreover, the new benefit generated strong political pressures for the introduction of pharmaceutical price controls, just as traditional Medicare had led to de facto price controls on covered hospital and physician services.[34]

Also in his first term, President Bush signed into law the McCain-Feingold Campaign Reform Act of 2002, which introduced sweeping new regulatory controls on campaign finance and political speech. He had not advocated the legislation during his presidential campaign; indeed, he had opposed it, and his reversal was a particularly striking departure from limited-government conservatism. As a candidate and during his first year in office, Bush had expressed pointed, specific, well-founded constitutional objections to the bill then working its way through the Congress. But when the bill passed with all of the objectionable provisions intact, he (somewhat sheepishly) signed it and said he would let the courts sort out the constitutional issues. He then instructed his Justice Department to advocate the statute's constitutionality in court, which it did with success.[35]

Moralism in Politics

President Bush's departures from traditional conservatism were, however, more than a matter of attempting to broaden the Republican political base and popular appeal. He was also a strong moralist, and moralism translates to an expansive view of government—as it did, among American presidents, for the other conservative

moralist, Theodore Roosevelt, as well as the two liberal moralists, Woodrow Wilson and Jimmy Carter. Like all modern presidents, Bush celebrated private morality from the presidential pulpit, regularly calling attention to exemplary deeds of average citizens. But the point here is a separate one. To an extraordinary degree, Bush's official addresses and statements employed moral language to describe public issues and moral appeals to advocate political choices. That was so across the full range of domestic and foreign policies, from the war on terror to energy conservation.[36] And his rhetoric was an authentic expression of his conception of political leadership, which was to treat policy issues as matters of right and wrong, good and evil, and ethical imperative. Indications of this mindset were the words he used to summarize his political philosophy—"compassionate conservatism," elaborated as "when someone hurts, government must act"—as well as the absurd title of his school-reform program—No Child Left Behind, setting forth a utopian, intrinsically unachievable goal. And consider his striking description of his executive role as "the decider"—much more august than the usual conception of the chief executive who pragmatically navigates and adapts to a succession of events. Complementing this self-conception was his impressive serenity, surely grounded to a degree on moral certainty, in the face of his administration's mounting reversals and unpopularity during his second term.

Bush was, accordingly, relatively uninterested in institutional considerations such as limited government and federalism, and impatient with economic calculation, trade-offs, and the balancing of costs and benefits in government policy and in private behavior—all of them involving constraints on the pursuit of the categorical good. His two Inaugural addresses and seven State of the Union addresses were profuse, detailed, and frequently eloquent in addressing matters of private and national character—duty, sacrifice, charity, tolerance, faith—and in associating those virtues with the innumerable initiatives he was pursuing. At the same time, the addresses said next to nothing about limited government, federalism, subsidiarity, overregulation, or the merits of competition, private enterprise, and free markets.[37] In the terminology of Max Weber, Bush was guided by "the ethics of conviction" rather than "the ethics of responsibility."[38] An approximate modern formulation of Weber's position is the maxim that government policies should be judged by results (the ethics of responsibility) rather than intentions (the ethics of conviction). George Bush would probably subscribe to that maxim in the abstract, but in practice he almost always put conviction in the forefront.

This point should not be overstated. Successful democratic politicians are, ipso facto, pragmatists. President Bush was not indifferent to the consequences of his decisions, and he favored many economic policies whose benefits rested on material calculus. He was an adamant free trader and the first president to forthrightly champion Social Security reform. In his first term he won major reforms to reduce taxation[39] and correct abuses in civil litigation.[40] As noted above, his Medicare drug benefit established a beachhead of private, competitively supplied insurance

within the traditional Medicare framework of regimented, command-and-control government insurance.[41] And, in the much-debated instance of government funding for medical research involving embryonic stem cells, he personally crafted a nuanced policy replete with ethical trade-offs.[42]

Yet he was strongly inclined to see presidential leadership and decision making as matters of ethical categorizing. This played an important role in his response to crisis. He was an unrestrained spender in response to developments that involved human suffering, even when they were far removed from any Republican grand strategy. Following Hurricane Katrina in August 2005, federal emergency-relief spending exceeded $120 billion, vastly higher than for any previous natural disaster. Foreign aid—one of the least popular categories of federal spending—more than doubled during his administration, even without accounting for Iraq and Afghanistan.[43] His responses to the crises that punctuated his tenure were similarly extravagant when it came to new regulation.

Crisis and Response

The first crisis to inspire new regulation was the terrorist attacks of September 11, 2001. The attacks prompted (among a great many other things, of course) elaborate new "homeland security" procedures and documentation requirements at airports and other transportation depots, along with tighter regulation of immigration and certain financial transactions. Those measures accounted for most of the growth in regulatory agency budgets during the Bush administration prior to the financial crisis of 2008,[44] and probably for most of the growth in (vastly larger) private compliance and opportunity costs. The programs would certainly have been instituted in some significant degree by any administration of either party. America found itself in a strange new form of warfare with a shadowy enemy whose modus operandi was the surprise attack by a small group of combatants in a congested civilian venue, intended to kill as many innocent people as possible. Defending against such threats inevitably required not only military counterattacks but regulation of civilian commerce, communications, transportation, and finance. Death by airplane crash is a matter of special dread to a great many people, and in the aftermath of the horrific 9/11 crashes the public was prepared to support security precautions costing many times (in dollars and inconvenience) what a standard cost-benefit analysis would justify.

Nevertheless, the regulatory responses were extraordinarily ungainly and heedless of relations of cost to risk-reduction. The new airport passenger boarding procedures—dubbed "security theater" by specialists—were overcentralized, rule-bound, intrusive, indiscriminate, and impervious to improvement with experience.[45] They went well beyond what any other nation had imposed in the face of similarly grave security threats (as in the case of Israel[46]) and may well have set new records for regulatory cost-ineffectiveness. The creation of two gigantic new government

bureaucracies, the Department of Homeland Security in 2002 and Office of the Director of National Intelligence in 2004, was similarly bureaucratic. Both reorganizations were based on the principles of centralization and suppression of competition and pluralism within government, with consequences for actual improvements in security and intelligence that were dubious in the extreme.[47]

The second crisis—far less substantial than the first but nevertheless a political preoccupation for nearly a year—was the corporate accounting frauds of 2001 and 2002. The exposure of fraud at Enron Corporation in late 2001 was followed by the firm's bankruptcy and the prosecution of its top executives. The exposure of fraud at WorldCom in mid-2002 was similarly followed by bankruptcy and prosecutions. In between and subsequently, several major corporations announced substantial retroactive earnings restatements, many leading to federal, state, and private legal actions. In response, the Bush administration energetically supported, and Congress promptly enacted, a sweeping expansion of federal authority over corporate governance (previously largely a matter of state law) and accounting, the Sarbanes-Oxley Act. In signing the Act in July 2002, President Bush declared, "This law says to every dishonest corporate leader: you will be exposed and punished; the era of low standards and false profits is over; no boardroom in America is above or beyond the law." Sarbanes-Oxley did indeed penetrate every American boardroom, imposing intricate and costly procedures and audit requirements on management for scant evident benefit, and significantly increasing the regulatory power of the SEC.[48] The act also created a new regulatory agency, the Public Company Accounting Oversight Board, which set new standards for bureaucratic autonomy: its members were not appointed and confirmed by the president and Congress and could not be removed by the president, and they were vested with independent power (not dependent on congressional action) to set and collect taxes to fund the Board's operations. In the course of responding to the accounting frauds, the Justice Department employed criminal prosecution in unprecedented fashion to liquidate one of the nation's most distinguished accounting firms, Arthur Anderson, for the document-retention violations of a few employees. The Supreme Court eventually reversed the conviction (unanimously),[49] but by then the firm was irretrievably out of business and its 26,000 U.S. employees had been dismissed.

The third development—again a serious external shock rather than a full-blown crisis—was the sharp and sustained increases in energy prices beginning in 2004. In response, President Bush championed and won a series of measures to subsidize alternatives to petroleum and regulate energy production and consumption. In his 2006 State of the Union Address, he defined the problem in stern moral terms: "America is addicted to oil, which is often imported from unstable parts of the world. The best way to break this addiction is through technology." In that address, he proposed a variety of projects for funding research and development on biomass, solar, wind, and hydrogen fuels; a year later, in his 2007 State of the Union, he upped the ante with proposals for goals and timetables and new regulatory requirements for reducing

energy use, increasing domestic oil production, and increasing the substitution of ethanol and other alternatives for petroleum. He also proposed substantial expansion of exploration and development of new domestic sources of oil and gas, but Congress largely rejected them. The major enactment, the Energy Independence and Security Act of 2007, was all regulation; it set ambitious new requirements for increased use of ethanol in gasoline, tightened CAFE fuel economy standards for cars and trucks and efficiency standards for a wide variety of consumer appliances and industrial machinery, and established lighting standards requiring the abolition of the incandescent light bulb. Ethanol subsidies and energy efficiency regulations are renowned among economists for their ineffectiveness and perversity.[50]

The Bush administration's responses to the accounting scandals and energy shocks were similar to its efforts to improve domestic security through large gestures of bureaucratic centralization. The emphasis was on action for its own sake—action as a demonstration of concern and determination rather than action derived from an assessment of causes and effective response. The perpetrators of the accounting frauds were all ruined, not only by criminal prosecution and civil litigation under pre–Sarbanes-Oxley laws but by the bankruptcies of their firms, which also imposed heavy losses on their investors. It added nothing, and subtracted a great deal, to subject all public corporations to a new layer of national regulation that focused the attention of executives and directors on regulatory compliance rather than business performance. The costly new energy regulations and subsidies promised at best trivial reductions in energy use and dependence on foreign oil. (A sufficiently stiff energy tax would have actually achieved the results the administration and Congress pretended they were achieving.) That a Republican administration responded to conventional economic shocks as it did—careless of the relationship of action to consequence or of the values of competition, pluralism, and markets—dramatized the disappearance of conservative thought and advocacy in regulatory policy. Those responses were harbingers of what was to come in the administration's final year, when a far deeper economic crisis arrived.

The financial market collapse of 2008 began in the first half of the year with the appearance of serious declines in the liquidity and capital positions of many banks and other firms with large investments in home mortgages. Those initial tremors were followed, in the fall, by the insolvency of several leading financial institutions and the government rescue of some of them but not others, by panic and paralysis in credit markets, by a stock market collapse (the major price indices declining by more than one-quarter), and by the onset of a "Great Recession" featuring sharply falling consumption and production and rising unemployment. The unfolding events prompted increasingly aggressive government responses. In the course of the year, the Federal Reserve provided a succession of special lending programs and targeted capital infusions into several major financial firms, increasing its balance sheet from about $800 billion to more than $2.2 trillion. The Treasury Department made additional investments of $300 billion in more

than 600 financial and commercial firms. Regulatory powers were employed in unprecedented ways to arrange mergers of insolvent investment banks into commercial banks. By the time the Bush administration left office in January 2009, the federal government had bailed out, and thereby acquired significant control of, many of the nation's largest banks, one of its largest insurance companies (AIG), the two quasi-public mortgage firms Fannie Mae and Freddie Mac, and two automobile manufacturers (General Motors and Chrysler).

The administration's management of the crisis was not action for action's sake. Treasury Secretary Henry Paulson and Federal Reserve Chairman Ben Bernanke, who led the response, believed the economy was on the brink of a profound calamity and were determined to do whatever necessary to prevent it.[51] Some of their rescue actions were clearly successful, such as the provision of abundant liquidity and the extension of bank deposit insurance to money market funds when a run on the funds appeared imminent. Yet they made momentous errors—errors of excessive and excessively free-wheeling interventionism—that worsened the crisis and set the stage for extension rather than reform of harmful financial regulations.

The crisis began in the housing sector, where the Federal Reserve Board's very-low-interest-rate policies in the early 2000s stoked a spectacular speculative bubble. By standard measures, U.S. home prices doubled from the beginning of 2000 through the middle of 2006—the steepest increase on record—and then plunged 18 percent in the two years through the middle of 2008 and 25 percent by the end of that year.[52] Bursting bubbles can be painful and costly for those who bought in at the top, but the damage is usually confined to the collapsing market. The housing bubble was different for two reasons. First, financial markets had become vastly larger and more reticulated in the decades leading up to 2008. An important aspect of that growth had been the "securitization" of home mortgages which had traditionally been held by the banks that originated them and had immediate contact with the mortgagors. "Mortgage-backed securities" (MBSs)—combining hundreds or thousands of mortgages of various sizes, interest rates, geographic regions, credit risks, and other characteristics—came to be an important component of the asset portfolios of many banks and pension funds and were actively traded in international markets. The diversification of MBSs was thought to provide protection against the risk of default on individual mortgages, in place of the particular knowledge that mortgagee-bankers had traditionally relied on.

Second, beginning in the 1990s and accelerating in the early 2000s, the federal government pursued a wide-ranging campaign to promote homeownership among people of low income and residents of poor and minority neighborhoods.[53] The campaign included a few explicit, on-budget subsidies to homeowners, but mostly, and critically, it was waged through regulation and subtle forms of subsidy of banks and other providers of home mortgages and secondary markets for those mortgages. Bank regulators obliged banks to loosen mortgage-lending standards and extend home loans to large numbers of people of very modest means. They also

adjusted banks' capital-adequacy requirements to provide strong incentives for investing in MBSs (not as part of the homeownership campaign, but rather in response to the perceived low risk of MBSs which the government backing fortified). Most important, the two giant "government-sponsored enterprises," Fannie Mae and Freddie Mac, which operated with special tax exemptions and implicit federal guarantees of their borrowings, began to make massive investments in mortgages for people of low and very low income and in MBSs designed to steer capital towards such mortgages.

The result of these and complementary initiatives was the emergence of huge markets in "nonprime" mortgages—previously unthinkable loans requiring little documentation of mortgagors' income or creditworthiness, little or no down payment (the traditional requirement had been that prospective homeowners invest at least 20 percent of a home's purchase price), and extremely liberal payment terms (but at higher rates of interest than conventional loans). By mid-2008, nonprime mortgages constituted about half of the mortgages and half the mortgage debt in the United States—27 million loans, amounting to $4.6 trillion. Most of them—72% of nonprime loans amounting to 60% of nonprime debt— were held or guaranteed by Fannie Mae, Freddie Mac, and federal agencies or provided privately to comply with federal regulations; much of the rest was the result of market responses to the government programs and rules; and about $2.2 trillion in nonprime debt was distributed in MBSs in private investment portfolios around the nation and world.[54]

The extreme and growing riskiness of the booming nonprime mortgage market was masked so long as housing prices continued to rise steeply. But when the bubble burst and prices collapsed, millions of people found themselves with mortgage debts greater than the values of their homes, and those with little or no equity in the homes had scant incentive to continue making payments. Delinquencies and foreclosures soared, and MBSs held throughout the financial economy suddenly became "toxic." In the course of 2008, several major institutions with heavy MBS exposure found themselves illiquid or insolvent; eventually, uncertainty over the extent of the problem, exacerbated by the government's erratic rescue efforts, caused credit markets to seize up altogether, as firms grew wary of even the most routine transactions with one another.

The policy antecedents of the financial collapse were an extreme example of the dangers of regulation described at the beginning of this chapter—here including efforts to manage and channel markets through direct participation (Fannie and Freddie) as well as through rule making. Although promoting homeownership has deep roots in American politics, it is inconceivable that trillions of dollars could have been committed to low-income homeownership through direct budget appropriations. Regulation and guarantees were able to do so with little restraint or even public notice, and also with great leverage—infiltrating markets so widely that the sudden loss of loan values yielded paralysis and collapse that spread quickly from credit markets to equity markets to the "real" commercial economy.

But that is not how the crisis was perceived in the fall of 2008. It was instead regarded as a "failure of capitalism" and result of insufficient regulation, and of course it was possible in hindsight to point to capitalist excesses (overly generous compensation for purveyors of MBSs) and regulatory omissions (inadequate capital standards for banks) that were somehow related to the collapse. Charges such as these were to be expected; the remarkable thing was that the Bush administration seemed to have no view of its own about the source of the crisis, and acted in ways that extended the politicization of financial markets.

- As the crisis unfolded, Secretary Paulson and Chairman Bernanke acted as deal makers rather than policy makers, as market participants rather than providers of rules and resources for the restoration of markets. Bear Sterns, a mid-sized investment bank, was merged into J. P. Morgan Chase, a commercial bank, with exceedingly generous government financing that made even unsecured creditors whole; then, six months later, the much larger investment bank Lehman Brothers was allowed to go bankrupt. The day of the Lehman bankruptcy, Merrill Lynch was merged into Bank of America with no publicly acknowledged financing or pressure; the next day, the insurance firm AIG, which had enormous liabilities to Merrill Lynch, was saved from bankruptcy with an $85 billion government loan. In these and other cases, federal officials were tight-lipped about the transactions they had orchestrated and those they passed over, thereby violating the first rule of financial crisis management, which is to make unvarnished market information and clear principles of government action widely available. Throughout, the ad hoc, closed-door nature of the government's rescue measures served to increase market uncertainty and delay the revival of financial activity.
- When the magnitude of the insolvency of Fannie Mae and Freddie Mac became apparent, the firms were placed in government "conservatorship" with a commitment of more than $100 billion and the promise of much more. Given the firms' central role in the economic fiasco, the proper and obvious solution would have been to stabilize them as a prelude to orderly liquidation after mortgage markets had recovered. Instead, the fabulous public bailouts of the firms were for resurrecting them as government-backed agents of mortgage expansion.
- After Congress appropriated $700 billion for a "Troubled Asset Relief Program," Secretary Paulson announced that funds would be used not to buy "toxic" assets from banks and other financial institutions but rather to make direct investments in the firms. That gave the government substantial control, at least temporarily, in many of the nation's most important financial institutions, in a way that asset purchases would not have.

The great dilemma in managing financial crises is that government rescue of insolvent firms, undertaken to maintain the functioning of wider markets, creates "moral hazard": the demonstration of government backing in times of crisis

undermines prudent financial management, and the government's own safety-and-soundness regulation, and thereby increases the likelihood of further crises. Moral hazard is a dilemma that cannot be eliminated entirely, but the Bush administration's management of the crisis of 2008 was moral hazard on steroids. The saving of Bear Sterns in March, followed by the startling failure to save Lehman Brothers in September, cost six precious months of market adjustment to the collapse of MBS values and then a shock that turned the crisis decisively worse. Placing Fannie and Freddie into conservatorship announced that the essential but painful process of reestablishing prudent mortgage lending standards could be deferred. Making large investments in hundreds of troubled financial institutions, ranging from major banks to small investment funds, demonstrated that not just Fannie and Freddie but the entire financial sector consisted of "government-sponsored enterprises"—a proposition that was to be strengthened by legislation during the Obama administration greatly expanding financial market regulation.[55] In this manner, a financial collapse substantially caused and exacerbated by political interventions in private markets paved the way for even greater interventions.

Conservatism and Regulation—The Prospect

In the inauspicious circumstances described in the preceding pages, members of the deregulation wing of the conservative movement, and economic conservatives in general, would do well to double down with time-tested principles and methods. Our intellectual traditions have always been in tension with the natural propensities of the political world that we study and sometimes participate in. Yet our traditions have continued to grow and have developed their own structure and integrity. They have proved useful in understanding, explaining, and solving exigent problems. Although they are now out of fashion, practical developments may summon them and demonstrate their utility once again. For the duration, these traditions suggest three intellectual strategies.

The first is to renew criticism of regulatory policies that are ineffective or perverse. Regulations that are merely wasteful may be regarded as "good enough for government work." It is quite another thing to show that regulations are making matters worse. Such demonstrations have been politically effective in the past—when it was shown that unregulated intrastate airline fares were lower than regulated interstate fares, and that FDA regulation was preventing American marketing of life-saving pharmaceuticals widely in use in other nations. There are many such cases in current policy, including energy conservation and alternative-energy regulations and subsidies, regulation of new pharmaceuticals and medical devices, and regulation of financial markets and corporate governance. The advantage of such arguments in the current political environment is that they are philosophy-free. They do not require adherence to distinctively conservative precepts concerning

the value of property rights or efficacy of markets and consumer choice; they appeal directly to the American spirit of pragmatism.

The second strategy is to forge alliances with liberals, as was done with great effect in the cases of airline and trucking deregulation. The Democratic Party now in power is a statist rather than liberal party. Yet there are many traditional liberals in the academic and intellectual worlds, and some in active politics, who take their egalitarianism, environmentalism, and other isms seriously. In the regulation of labor markets and education, in civil litigation, and in state regulation and licensure, populist rhetoric is used to mask policies that enrich tightly organized groups by restricting individual freedom, to the disadvantage of the less well connected and less well off. Environmental regulation has become so costly, and so encrusted with ineffective rules and perpetual litigation, that fundamental reform now promises large gains to all sides. Two examples of thoroughly cross-partisan reform efforts are Common Good, devoted to reforming civil litigation with special emphasis on medical care, schooling, and recreation;[56] and Breaking the Logjam, devoted to producing a new generation of environmental laws.[57] There are many more such opportunities. In regulatory policy, economic conservatives work in a small political tent but a big intellectual tent.

The third strategy is to grind away on problems that are of fundamental importance because of their relationship to critical features of private enterprise and limited government. Among these are ending the FCC's cartelization of communications markets, devising cost-effective transportation security procedures, and averting the threat of pharmaceutical price controls. But the top priorities are protecting the efficiency and competitiveness of financial markets in the aftermath of the collapse of 2008, and protecting international markets against the threats of protectionism and "policy harmonization."

Financial markets are the heart of capitalism—they are capitalism, in the sense that they allocate capital by market competition, rather than political direction, to projects whose economic value is yet to be realized. Because modern banking operates at fractional reserves and also serves as an arm of monetary policy, the case is very strong for safety-and-soundness regulation and obligatory insurance of some categories of assets. But financial markets are also vulnerable to harmful regulation and "politicization," and the fact that they will already be regulated for good reasons increases this vulnerability. Exchanging money for future obligations rather than current goods involves an inherent, irreducible degree of uncertainty and speculation, and also raises the possibility of bubbles (there are no bubbles in goods except where, as in the case of homes, they also serve as financial vehicles). These circumstances mean that, when mistakes are made, financial markets are exposed to political second-guessing and reallocation of gains and losses, and to the imposition of supposedly corrective regulation that can succeed only where regulators are more prescient than market participants. Finally, political officials are especially interested in the allocation of capital. They do a good deal of it in the course of customary

government functions (as in the financing of roads, bridges, and national defense), and come to realize that participation in financial markets presents opportunities for pursuing political objectives outside the customary constraints of taxation and appropriation. The financial crisis of 2008 is an instructive example of the "systemic risk" of rigging financial markets for redistributive ends. A worthy program of post-2008 financial regulatory reform would combine (a) sensible safety-and-soundness regulation and insurance against financial runs, (b) removal of regulatory impediments to competition in corporate control and in financial risk-assessment and price-discovery, (c) commitment to clear ex ante rules for government response to financial bubbles and busts and resolution of failed financial firms, and (d) development of transparent, on-budget substitutes for politicized finance such as Fannie Mae and Freddie Mac.[58]

Free trade was, until recently, a bipartisan, consensus issue in American politics. It has ceased to be so, because of the rise of China as an economic power, the resurgence of unions in domestic politics, and, for the time being, the severe economic downturn. But free trade remains a well-grounded consensus issue among economists, and now is a critical moment to redeploy that consensus against protectionist pressures. Trade wars are a special temptation during hard economic times, and also a special hazard because they can deepen and prolong the agony. And today there is an additional reason for protecting freedom in international markets: to preserve competition not just in goods and services but in government policy.

Globalization—the increasing mobility of capital, commerce, people, and ideas across national boundaries—constrains national governments by reducing their effective policy jurisdiction. One example, mentioned earlier and documented in recent research on the Sarbanes-Oxley Act, is that relatively costly and ineffective U.S. regulation of financial markets may drive firms to relocate elsewhere. In earlier times, before the development of today's travel, communications, and information technologies, the geographic market for most financial activities was no larger, and often much smaller, than the territory of a single nation, especially that of a very large nation such as the United States. In that world, a U.S. regulator such as the Securities and Exchange Commission held a strong policy monopoly. If the SEC's rules were inordinately costly, regulated firms and their customers adapted to them as best they could. For the most part, firms could not escape them altogether by moving their operations to friendlier jurisdictions, and customers could not take their business to firms operating from such jurisdictions. Today, many financial markets are effectively global, and many firms have achieved international scale. In these circumstances, some firms will shift their operations to jurisdictions with more efficient regulatory regimes, and those that do not will lose business to firms in more efficient jurisdictions.

Government policies are hardly the only factors affecting a nation's relative commercial attractiveness. The United States offers a large internal market, wealthy consumers, and laws that are generally transparent and fairly enforced—virtues that

can compensate for a multitude of policy vices. The effect of globalization on a nation's policies are at the margin, in conjunction with other factors pro and con. But three tendencies are important. First, globalization reduces each state's policy monopoly over its citizens. Second, the loss of monopoly power leads individual states to seek less burdensome policies. Third, the loss of monopoly, and therefore the tendency to seek less burdensome policies, will be most pronounced with regard to more mobile factors of production such as capital and information. Taxes on corporate income and capital gains were previously very difficult to avoid (other than through the unattractive means of reducing income and asset values); they have recently become the subject of intense international competition and consequent reductions in tax rates. The FDA tried for a time to restrict the access of U.S. citizens to foreign Web sites that contained information on pharmaceuticals that went beyond uses the agency had approved for Americans; the effort was only partial successful, and the increased information that is seeping through will dampen the FDA's long-time enthusiasm for suppressing domestic information about drug efficacy.

Governments can forestall the decline in their policy discretion by agreeing to harmonize their policies, in effect forming policy cartels. The many attempts to do so—in taxation and in labor, environmental, and financial market regulation—have so far been less than successful because of the immense coordination problems and increasing diversity of national economic interests. But policy harmonization efforts will continue with increasing intensity so long as efforts to subdue globalization through overt trade protectionism fail. There are certainly many cases, such as public health and climate change, where the nature of the problem requires a coordinated international response. But where harmonization aims to suppress competition in domestic policy making, it should be strongly opposed.

The importance of international policy competition is particularly urgent in light of the decline in traditional conservative political values, such as limited government and spending and regulatory restraint, documented in this chapter. The vigor of American democracy has depended on a continuous tension between liberalism and conservatism. The liberal viewpoint is activist, comfortable with government power, and eager to reform society and launch new projects to address social ills and redress injustices. The conservative viewpoint is cautious, alert to the dangers and corruptions of power and the advantages of private ordering, and desirous of maintaining established arrangements and institutions. In regulatory policy, the liberal-conservative argument has worked to the disadvantage of the conservative vision over time, as we have seen. But presumably the argument has had some moderating effect on the growth of government and the enthusiasms of power, and some improving effect on the substance of individual policies.

The worry today must be that the big-government activism of the Bush administration, although a failure in immediate partisan terms, was not an episode but a trend. If wariness of government power has disappeared from our politics,

then the natural constraints on power arising from international policy competition may be critical. Indeed we may speculate that growing intergovernmental policy competition could be a *cause* of the decline of limited-government values in domestic politics. The principle of limited government may have been appealing, in times when governments held much greater effective power over citizens than they do today, as a constitutional self-denying ordinance—an assurance that those in authority would exercise power with restraint and within generally accepted limits. Globalization may be a substitute for that principle. In a world where government power is being naturally eroded—and especially one where that power is minutely distributed among a multitude of specialized government bureaus, each one operating in a tiny ambit of the economy or society—it may be more realistic to conceive of government as a holding company for numerous small firms operating in competitive markets. Business firms do not talk about limits on their ambitions or seek to reassure investors or consumers that they do not intend to grow or to seek new markets; in general, they do just the opposite. U.S. governors, to take a closer analogy, are state boosters because they have to be. National governments that are feeling the competitive heat and sensing their effective power slipping away may behave increasingly in this manner.

Notes

1. Christopher DeMuth, "What is Regulation?" in *What Role for Government?*, Richard J. Zeckhauser and Derek Leebaert, eds. (Durham, N.C.: Duke University Press, 1983), pp. 262–278, available at www.chrisdemuth.com/id58.html.
2. This argument is elaborated in Christopher DeMuth, "Unintended Consequences and Intended Non-Consequences," American Enterprise Institute, June 2009, available at www.aei.org/docLib/20090608-Bradley-June.pdf.
3. See the research cited below at note 50.
4. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (New Haven: Yale University Press, 1995).
5. Estimating the costs of government regulations to the private economy is problematic in the extreme, but the reigning guestimate that federal regulation imposes $1.75 trillion in annual compliance and transfer costs is not unreasonable. The best recent discussion and compilation is Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," U.S. Small Business Administration, September 2010, available at www.sba.gov/advo/research/rs371tot.pdf. Cf. 2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, U.S. Office of Management and Budget, 2008, available at www.whitehouse.gov/omb/assets/information_and_regulatory_affairs/2008_cb_final.pdf. The budgets of the federal regulatory agencies total about $54 billion for Fiscal Year 2009. Veronique de Rugy and Melinda Warren, "Expansion of Regulatory Budgets and Staffing Continues in the New Administration: An Analysis of the U.S. Budget for Fiscal Years 2009 and 2010," Mercatus Center, George Washington University, and Weidenbaum Center, Washington University St. Louis, October 2009, available at http://mercatus.org/sites/default/files/publication/Regulators-Budget-Report-Final-Version-October-29.pdf.
6. See Amy Finkelstein, "EZTAX: Tax Salience and Tax Rates," *Quarterly Journal of Economics*, 124:3 (August 2009), pp. 969–1010); Raj Chetty, Adam Looney, and Kory Kroft, "Salience

and Taxation: Theory and Evidence," *American Economic Review*, 99:4 (September 2009), pp. 1145–1177; and Gary Becker and Casey Mulligan, "Deadweight Costs and the Size of Government," *Journal of Law & Economics*, 46:2 (October 2003), pp. 293–340.

7. Christopher C. DeMuth and Douglas H. Ginsburg, "Rationalism in Regulation," *Michigan Law Review* 108 (April 2010): 877–912, available at www.michiganlawreview.org/assets/pdfs/108/6/demuthginsburg.pdf; Robert W. Hahn and Robert E. Litan, "An Analysis of the Tenth Government Report on the Costs and Benefits of Federal Regulations," Regulatory Analysis 07-02, AEI Center for Regulatory and Market Studies, June 2007, available at www.reg-markets.org/publications/abstract.php?pid=1197.
8. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965, 1971) and *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven: Yale University Press, 1982); George Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2 (1971): 3–21; Richard A. Posner, "Theories of Economic Regulation," *Bell Journal of Economics and Management Science* 5: 2 (1974): 335–358.
9. Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton: Princeton University Press, 2008) and "Special-Interest Secret," *Wall Street Journal*, May 12, 2007; David Romer, "Misconceptions and Political Outcomes," *Economic Journal* 113 (January 2003): 1–20, available at http://elsa.berkeley.edu/~dromer/papers/EJ_January03.pdf.
10. Sam Peltzman, *Regulation and the Natural Progress of Opulence* (Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, September 2004), available at www.aei.org/docLib/Peltzman-Lecture.pdf.
11. See R.H. Coase, "The Federal Communications Commission," *Journal of Law & Economics* II (October 1959): 1–40.
12. Additional contemporary examples of Republican regulatory initiatives (and Democratic initiatives to moderate regulatory costs) are offered in DeMuth and Ginsburg, note 7 above, at pp. 881–883.
13. Christopher DeMuth, "Regulatory Policy in the Reagan Administration," in *American Economic Policy in the 1980s*, Martin Feldstein, ed. (Chicago: University of Chicago Press, 1993), available at www.chrisdemuth.com/id52.html.
14. See U.S. Congress, Office of Compliance, *State of the Congressional Workplace*, FY 2009 Annual Report, http://www.compliance.gov/wp-content/uploads/2010/07/Annual-Report-for-Web-508C-2010.pdf; Jordy Yager, "More than 70 percent of congressional offices violate OSHA safety standards," *The Hill*, February 24, 2010, http://thehill.com/home-news/%20house/83311-over-70-percent-of-offices-violate-osha-standards. Note that this step consisted of extending, not reforming, regulation. The Congressional Accountability Act of 1995 passed with huge bipartisan majorities (390-44 in the House and 92-2 in the Senate); some legislators favored it because they thought it would lead Congress to be more sensitive to the burdens of regulation on the private sector, some because they did not want Congress to appear to be above the law, and some because they wanted to extend regulatory benefits to Congress's 30,000 employees.
15. Peter Huber, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm* (New York: Oxford University Press, 1997); Jack Shafer, "New Wave: The Case for Killing the FCC and Selling Off Spectrum," *Slate*, Jan. 12, 2007, available at www.slate.com/id/2157734.
16. Christopher DeMuth, "Guns, Butter, and the War on Terror," *Wall Street Journal*, April 29, 2004, available at www.chrisdemuth.com/id32.html; Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987).
17. An excellent insider's account of regulatory (and other) policymaking in the George W. Bush administration is John D. Graham, *Bush on the Home Front: Domestic Policy Triumphs and Setbacks* (Bloomington: Indiana University Press, 2010). Graham is a leading academic

student of regulatory policy and was administrator of the Office of Information and Regulatory Affairs, the OMB office responsible for regulatory oversight, from 2001–2006. His book provides detailed accounts of many matters touched upon in this chapter—the No Child Left Behind program, the Medicare prescription drug benefit, energy conservation and global warming policies, administrative efforts at "regulatory reform," and the financial crisis of 2008.

18. See the articles by John D. Graham and Paul R. Roe, Cary Coglianese, Jerry L. Mashaw, and Roger G. Noll in "Symposium: Reflections on Executive Order 13,422," *Yale Journal on Regulation* 25 (Winter 2008), available at http://yale-jreg.org/archives/?series=51; and Stuart Shapiro, "Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations," *Journal of Law and Politics* 23 (2007), available at http://policy.rutgers.edu/faculty/shapiro/SS_11.08.pdf.
19. See OMB 2008 Report to Congress, note 5 above, pp. 45–47 figs. 2–1 and 2–2, and Robert W. Hahn, *Reviving Regulatory Reform: A Global Perspective* (Washington, DC: The AEI Press. 2000), ch. 3, available at http://reg-markets.org/admin/authorpdfs/redirect-safely.php?fname=./pdffiles/RRR.pdf.
20. See Innovations in Compassion: The Faith-Based and Community Initiative, The White House, December 2008, 30–34, available at http://georgewbush-whitehouse.archives.gov/government/fbci/pdf/innovation-in-compassion.pdf; and Melissa Rogers and E.J. Dionne Jr., *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations,* Brookings Institution, December 2008, pp. 22–26, available at www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf.
21. "Obama Announces White House Office of Faith-based and Neighborhood Partnerships," The White House, February 5, 2009, available at www.whitehouse.gov/the_press_office/ObamaAnnouncesWhiteHouseOfficeofFaith-basedandNeighborhoodPartnerships.
22. See Graham, note 17 above, at pp. 261–266.
23. U.S. Department of Labor, Labor Organization Annual Financial Reports, 74 *Federal Register* 52,401–413 (Oct. 13, 2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi; and Trust Annual Reports, 74 *Federal Register* 63, 335–336 (Dec. 3, 2009), available at http://frwebgate.access.gpo.gov/cgibin/getpage.cgi?position=all&page=63335-&dbname=2009_register.
24. The Clean Air Act of 1970 imposed much more stringent air pollution standards on new plants than existing, "grandfathered" plants. That created perverse incentives to maintain production capacity through incremental upgrading, rather than replacement, of old, relatively higher-polluting plants. The result was a contentious enforcement battleground over what kinds of maintenance, repair, and renovation should and should not lead to imposition of costlier "New Source" standards—which delayed or prevented many needed plant improvements. The issue involved complex trade-offs between tighter regulatory standards and "natural" pollution reductions through technological progress. But the concurrent Bush "marketable permits" initiative described in the text would have substantially resolved those trade-offs in favor of cost-effective pollution reductions.
25. An egregious example is Bruce Barcott, "Changing All the Rules," *New York Times Magazine,* April 4, 2004. But the efforts also garnered their share of good press, such as Juliet Eilperin, "Bush Pollution Curbs Are Rated Equal to Clinton's," *Washington Post,* July 22, 2006.
26. See DeMuth and Ginsburg, note 7 above, at pp.899–900, and references cited therein.
27. Cesar V. Conda and Lawrence J. Spiwak, "Kevin Martin's Record of Success," *Washington Times,* Jan. 22, 2009, available at www.washingtontimes.com/news/2009/jan/22/kevin-martins-record-of-success.
28. See Lee Lane and W. David Montgomery, "Organized Hypocrisy as a Tool of Climate Diplomacy," *AEI Energy and Environment Outlook,* December 2009, available at www.aei.org/outlook/100095.

29. See Sidney M. Milkis and Jesse H. Rhodes, "George W. Bush, the Party System, and American Federalism," *Publius* 37 (2007): 478–504; and Tim Conlon and John Dinan, "Federalism, the Bush Administration, and the Transformation of American Conservatism," *Publius* 37 (2007): 279–303.
30. President Bush's election platform had three additional domestic policy planks: tax reduction, which succeeded in legislation enacted in 2001 and 2003, and immigration reform and Social Security reform, both of which failed despite energetic efforts. None of these was "big-government conservatism," and only one was a departure from established Republican doctrine—the proposal to provide illegal immigrants with a path towards legal resident status and citizenship. That proposal was the only one of this group with direct regulatory implications: it would have eventually eliminated the requirements that employers police their workforces for the presence of illegal immigrants.
31. Thomas Rice, Katherine Desmond, and Jon Gabel, "The Medicare Catastrophic Coverage Act: A Post-Mortem," *Health Affairs* 9 (Fall 1990): 75–87, available at http://content.healthaffairs.org/cgi/reprint/9/3/75.pdf.
32. See the papers collected in Frederick M. Hess and Chester E. Finn Jr., eds., *No Remedy Left Behind: Lessons from a Half-Decade of NCLB* (Washington, D.C.: The AEI Press, 2007), and Gail L. Sunderman, ed., *Holding NCLB Accountable: Achieving Accountability, Equity, & School Reform* (Thousand Oaks, Calif.: Corwin Press, 2007).
33. Joseph Antos, "Ensuring Access to Affordable Drug Coverage in Medicare," AEI Working Paper No. 118, American Enterprise Institute, Dec. 6, 2005, available at www.aei.org/publication23518.
34. Mark McClellan et al., "Medicare Part D and Prescription Drug Prices," AEI Policy Fact Sheet, American Enterprise Institute, Jan. 5, 2007, available at www.aei.org/publication25420.
35. As recounted in Christopher DeMuth, "Unlimited Government," *The American Enterprise*, January/February 2006, available at www.chrisdemuth.com/id120.html.
36. As carefully documented and analyzed by Colleen J. Shogan in *The Moral Rhetoric of American Presidents* (College Station: Texas A&M University Press, 2006).
37. In Bush's two Inaugural and seven State of the Union addresses I find fewer than ten references to limited government, federalism, private enterprise, or regulation—all of them brief, formulaic, and qualified.
38. Max Weber, "Politics as a Vocation," *The Vocation Lectures* (Indianapolis, Ind.: Hackett Publishing, 2004), pp. 32–95. Weber's "ethics of conviction" is sometimes rendered as "ethics of ultimate ends." The former is the closer translation of Weber's *Gesinnungsethik*, but "ultimate ends" captures an additional strand of his argument: because government policies rest ultimately on the application of force and violence, and because the politician makes and executes policies on behalf of citizens whose ends, moral and other, differ and often conflict, the responsible politician cannot be content with identifying an ultimate good but must compromise and balance goods and evils. The ethics of conviction means that "if an action performed out of pure conviction has evil consequences, then the responsibility must lie not with the agent but with the world, the stupidity of men—or the will of God who created them thus. With the ethics of responsibility, on the other hand, a man reckons with exactly those average human failings.... Whoever makes a pact with the use of force, for whatever ends (and every politician does so), is at the mercy of its particular consequences" (pp. 84, 89).
39. On this and other Bush tax reforms see Alan D. Viard, ed., *Tax Policy: Lessons from the 2000s* (Washington, D.C.: The AEI Press, 2009), available at www.aei.org/book975.
40. See Ted Frank, "The Class Action Fairness Act Two Years Later," *AEI Liability Outlook*, March 2007, available at www.aei.org/publication25851.
41. See Kimberley A. Strassel, "Competence Man: The Dr. McClellan Medicare Cure," *Wall Street Journal*, April 20, 2007, available at www.opinionjournal.com/columnists/kstrasselpw/?id=110009964.

42. See "President Discusses Stem Cell Research," The White House, Aug. 9, 2001, available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html; and Advancing Stem Cell Science Without Destroying Human Life, The White House April 2007, available at http://georgewbush-whitehouse.archives.gov/dpc/stemcell/2007/index.html.
43. President Bush's longtime speechwriter and policy adviser, Michael J. Gerson, in his book *Heroic Conservatism* (New York: HarperOne, 2007), makes the case for big-government conservatism on both ethical and political grounds. But the political arguments are themselves strongly moralistic: "My party... must carry this message of idealism and courage to a tired nation in a pivotal moment or face a severe judgment of history" (p. 10).
44. See de Rugy and Warren, note 5 above, at p. 5.
45. See Jamie Belcore and Jerry Ellis, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," Working Paper No. 08–13, Mercatus Center, George Mason University, June 2008, available at www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0813_RSP_Homeland Security and Regulatory Analysis.pdf; Jeffrey Goldberg, "The Things He Carried," *The Atlantic*, November 2008, available at www.theatlantic.com/doc/200811/airport-security; Robert Poole, *Airport Security: Time for a New Model*, Reason Foundation, Jan. 1, 2006, www.reason.org/news/show/127389.html; and any issue of Poole's superb *Airport Policy and Security Newsletter*, available at www.reason.org/areas/topic/313.html.
46. David Asper, "Learn a Lesson from Israel on Airport Security," *National Post*, Dec. 28, 2009, available at http://network.nationalpost.com/np/blogs/fullcomment/archive/2009/12/28/david-asper-learn-a-lesson-from-israel-on-airport-security.aspx.
47. On the organization of intelligence gathering and analysis see Richard A. Posner, *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform* (Lanham, Md.: Rowman & Littlefield, 2006), and "The Reorganized U.S. Intelligence System after One Year," *AEI National Security Outlook*, April 2006, available at www.aei.org/outlook/24213.
48. See Henry N. Butler and Larry E. Ribstein, *The Sarbanes-Oxley Debacle: What We've Learned, How to Fix It* (Washington, D.C.: The AEI Press, 2006); Roberta Romano, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance," *Yale Law Journal* 114 (2006): 1521; papers presented and discussed at "Is Sarbanes-Oxley Impairing Corporate Risk-Taking?," Seminar, American Enterprise Institute, June 18, 2007, available at www.aei.org/event1534; Alex Pollock, "Has Sarbanes-Oxley Harmed Entrepreneurs?," Speech, Hudson Institute, May 24, 2007, available at www.aei.org/publication26375; and Peter J. Wallison, "Sarbanes-Oxley As an Inside-the-Beltway Phenomenon," *AEI Financial Services Outlook*, May 2004, available at www.aei.org/publication20582, and "Blame Sarbanes-Oxley," *AEI Financial Services Outlook*, September 2003, available at www.aei.org/issue/19123.
49. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
50. See Pietro Nivola, *The Long and Winding Road: Automotive Fuel Economy and American Politics*, Brookings Institution, Feb. 25, 2009, available at www.brookings.edu/~/media/Files/rc/papers/2009/0225_cafe_nivola/0225_cafe_nivola.pdf; Sam Kazman, "Automobile Fuel Economy Standards," Competitive Enterprise Institute (2008), available at http://cei.org/cei_files/fm/active/0/EnvironmentalSource_EnergyAuto.pdf; Robert Crandall and Hal J. Singer, "Don't Drink the CAFE Kool-Aid," AEI-Brookings Joint Center for Regulatory Studies, Publication 07–24 (September 2007), available at http://www.reg-markets.org/policy/page.php?id=297&PHPSESSID=2e3fd8046d998889d5bbc045ab15e6a9; Andrew Kleit, "CAFE Adieu," AEI-Brookings Joint Center for Regulatory Studies, Publication 04–14 (July 2004), available at http://aei-brookings.org/admin/authorpdfs/redirectsafely.php?fname=./pdffiles/phpsO.pdf, and papers cited therein; Kenneth Green, "Ethanol and the Environment," *AEI Environmental Policy Outlook* (July 29, 2008), available at www.aei.org/outlook/28396; and Pietro S. Nivola and Robert W. Crandall, *The Extra Mile: Rethinking Energy Policy for Automotive Transportation* (Washington, D.C.: The Brookings Institution Press, 1995).

51. As recounted in Henry M. Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System* (New York: Business Plus, 2010). Cf. Phillip Swagel, "The Financial Crisis: An Inside View," *Brookings Papers on Economic Activity*, Spring 2009, pp. 1–63.
52. See U.S. Home Price Values, S&P/Case-Shiller Home Price Indices, available at www.standardandpoors.com/indices/sp-case-shiller-home-priceindices/en/us/%20?indexId=%20?spusa-cashpidff--p-us----. Home prices continued to fall throughout the financial crisis—by about 32 percent by mid-2009, at which point prices began to stabilize.
53. Detailed analyses of the 2008 financial crisis and its sources in housing and mortgage policies are provided in Jeffrey Friedman, ed., *What Caused the Financial Crisis* (Philadelphia: University of Pennsylvania Press, 2011), based on papers published in *Critical Review* 21:2–2 (2009); Thomas Sowell, *The Housing Boom and Bust* (New York: Basic Books, 2009); Jeffrey Friedman and Wladimir Kraus, "A Silver Lining to the Financial Crisis: A More Realistic View of Capitalism," *AEI Regulation Outlook,* January 2010, available at www.aei.org/outlook/100933; Peter J. Wallison. "Deregulation and the Financial Crisis," *AEI Financial Services Outlook,* October 2009, available at www.aei.org/outlook/100089, and "Cause and Effect: Government Policies and the Financial Crisis," *AEI Financial Services Outlook,* November 2008, available at www.aei.org/publication29015. Accounts emphasizing the complementary contributions of monetary policy, macroeconomic errors, and private-market practices are John B. Taylor, *Getting Off Track: How Government Actions and Interventions Caused, Prolonged and Worsened the Financial Crisis* (Stanford, Calif.: Hoover Press, 2009); Allan H. Meltzer, "Epilogue: The United States in the Global Financial Crisis of 2007–2009," in *A History of the Federal Reserve: Volume II* (Chicago: University of Chicago Press, 2010); Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (Cambridge, Mass.: Harvard University Press, 2009); Jerry Z. Muller, "Our Epistemological Depression," *The American,* Jan. 29, 2009, available at www.american.com/archive/2009/our-epistemologicaldepression/?searchterm=Jerry%20Z.; and Alex J. Pollock, "The Human Foundations of Financial Risk," *AEI Financial Services Outlook,* May 2008, available at www.aei.org/publication27982. An exhaustive chronology is Federal Reserve Bank of St. Louis, "The Financial Crisis: A Timeline of Events and Policy Actions," available at http://timeline.stlouisfed.org/pdf/CrisisTimeline.pdf.
54. The figures in this paragraph are from Edward Pinto, "Sizing Total Exposure to Subprime and Alt-A Loans in U.S. First Mortgage Market as of 6.30.08," American Enterprise Institute, April 21, 2010, available at www.aei.org/docLib/Pinto-Sizing-Total-Exposure.pdf; and "Sizing Total Federal Government and Federal Agency Contributions to Subprime and Alt-A Loans in U.S. First Mortgage Market as of 6.30.08," American Enterprise Institute, April 21, 2010, www.aei.org/docLib/Pinto-Sizing-Total-Federal-Contributions.pdf. The term "nonprime" covers two somewhat different departures from conventional mortgages—"subprime" and "Alt-A" mortgages, as explained in the Pinto papers and elsewhere.
55. See Peter J. Wallison, "The Dodd-Frank Act: Creative Destruction, Destroyed," AEI Financial Services Outlook, August 2010, available at www.aei.org/outlook/100983.
56. The Common Good website is http://commongood.org. Cf. Philip K. Howard, *Life Without Lawyers* (Norton, 2009).
57. Breaking the Logjam is a project of the New York University School of Law and New York Law School. Its website is www.breakingthelogjam.org.
58. On the last proposition see Edward L. Glaeser and Joseph Gyourko, *Rethinking Federal Housing Policy: How to Make Housing Plentiful and Affordable* (AEI Press 2008).