PRESIDENTIAL REFORM OF THE REGULATORY STATE

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Introduction

This paper argues that the most promising approach to remedying the problems of the regulatory state is through unilateral presidential action. The idea will strike many readers as paradoxical. The "regulatory state" is commonly associated with, or even defined as, the consolidation of legislative, judicial, and executive powers in the branch of government headed by the president,[1] and we are accustomed to thinking that, in politics, the more power the better for those who hold it. However, the president's political interests frequently diverge from those of the agencies that nominally report to him, and he does have greater authority over their activities than anyone else. The presidency, I maintain, is the one institution in American politics that is capable of confronting the dynamics of autonomous executive government. And the personage who holds that office is uniquely responsible for confronting national problems that require assertive personal leadership.

Not all presidents will regard "the problems of the regulatory state" as sufficiently serious, or politically salient, to make them a personal priority. Indeed, many presidents will regard executive government as entirely unproblematic and essential to accomplishing their political and policy objectives ("It's good to be King"). But some will regard the problems as serious, salient, and in their court—or at least they might. We don't know because today's debates and advocacy on regulatory-state reform are concerned mainly with enacting statutes and beefing up congressional and judicial oversight. If the problem is excessive executive power, the solution is greater separation of powers and more checks and balances from the other two branches.

This paper aims to shift the discussion to the presidency. It sets out and justifies a program of presidential action that I hope others will criticize and improve. If that were to happen, a well-developed set of reform proposals might make their way from academic papers to wider notice, and eventually become part of the "storehouse of ideas" that practicing politicians draw upon in constructing their campaign platforms and responding to political exigencies as they arise. If, instead, my initiative falls flat, that will teach us (or at least me) something new about the dimensions of the problems we are facing.

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[1] Christopher DeMuth, "The Regulatory State," *National Affairs*, Summer 2012.

My game plan draws on the events that led to President Ronald Reagan's program of centralized White House review of agency regulations under a cost-benefit standard, established at the outset of his administration in 1981. During the prior decade, public policy schools and think tanks had developed robust programs of research and advocacy on regulatory policy—the "regulatory reform movement." Their work was focused not on the White House but rather on the agencies and their statutory programs. The reformers advocated, first, economic deregulation—the abolition of price and entry controls in competitive markets, as then practiced by old-line agencies such as the Interstate Commerce Commission (ICC) and Civil Aeronautics Board (CAB). And, second, for the newer programs of health, safety, and environmental regulation, a shift from "command-and-control" engineering standards to economic-incentive policies such as taxes and property rights. The regulatory reformers hit one homerun in the 1970s—the Airline Deregulation Act of 1978 that abolished the CAB—but otherwise their brilliant proposals were mainly ignored, or greeted with puzzlement or hostility, in the agencies and in Congress.

But something else was happening in that decade. The newer programs of "social regulation," especially those of the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), and National Highway Traffic Safety Administration (NHTSA), were growing dramatically. Those agencies issued rules through informal rulemaking which, their social benefits aside, were often extraordinarily costly, disruptive to regulated firms and industries, and politically controversial. In response, presidents Richard Nixon, Gerald Ford, and Jimmy Carter directed various officials in the White House and elsewhere in the Executive Office of the President (EOP) (primarily the Council of Economic Advisors (CEA) and the Council on Wage and Price Stability (COWPS)) to review major, high-visibility agency rules and prepare critiques and proposals for improvement.[2] Many of those officials were conversant with the academic regulatory reform literature.[3] But the focus of their attentions, in high-level decisions concerned with individual rulemaking proposals, had to be immediate and practical. What was the agency trying to accomplish? How much would it cost? Who was for it and who against? Was it good policy, and were there any bright ideas around for improving it?

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[2] Andrew Rudalevige, "Beyond Structure and Process: The Early Institutionalization of Regulatory Review," 30 *J. Pol. Hist.* 577 (October 2018); Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," 63 *Admin. L. Rev.* (Special Edition) 37 (2011).

[3] One of them, Charles L. Schultze, had made an important contribution to this literature—*The Public Use of Private Interest* (1976)—just before his 1977 appointment as chairman of the Council of Economic Advisers in the Carter administration, where he became actively involved in reviewing agency rulemaking proposals.

These rulemaking reviews, some of which were published by COWPS,[4] attracted the attentions of the regulatory reformers. Their policy critiques, having made little headway in the agencies or Congress, had found an audience in the EOP under three presidents of both parties. This led the reformers to explore what a more highly developed regulation-review program might look like—one that operated within the executive branch, took the regulatory statutes as given, was centralized in the manner of Office of Management and Budget (OMB) oversight of agency budgets, and incorporated a broader policy perspective than those of the mission-oriented regulatory agencies.[5] The reformers had at hand a method for systematizing the recurring questions about the merits of individual rules—that of cost-benefit analysis, heretofore devoted mainly to public-works projects.[6] And they had a toolkit of ideas that might be used to make rules more productive—such as setting standards for pollution outputs rather than engineering inputs, and using marketable permits to economize on pollution-control investments.

Ronald Reagan, a long-time critic of federal regulation, made regulatory reform a central part of his administration's economic program. Several academics from the reform movement worked on his transition in the fall of 1980 and concocted an enhanced version of the Carter review program—one that applied an explicit cost-benefit test to essentially all executive-branch rulemaking and laid down a "maximum net benefits" standard. By happenstance, President Carter signed the Paperwork Reduction Act in December 1980, establishing an Office of Information and Regulatory Affairs (OIRA) in OMB to review and approve (or disapprove or modify) agency forms and paperwork requirements. This provided a convenient institutional base for the Reagan regulatory review program established by Executive Order 12,291 at the outset of his presidency[7]: OIRA would review agency rules as well as paperwork requirements. The regulatory reviews, however, were based not on any statutory authority but rather on the president's constitutional authority to supervise and direct the executive branch.

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[4] See Mercatus Center, George Mason University, Council on Wage and Price Stability Archives.

[5] My contributions to this literature were Christopher DeMuth, "Constraining Regulatory Costs I: The White House Review Programs," *Regulation*, Jan.–Feb. 1980, 13; and "Constraining Regulatory Costs II: The Regulatory Budget," *Regulation*, Mar.–Apr. 1980, 29.

[6] See Murray L. Weidenbaum, "Benefit-Cost Analysis of Government Regulation," Center for the Study of American Business, University of Washington-St. Louis, Pub. No. 37, Feb. 1981. This paper was written just before Weidenbaum was appointed chairman of the Council of Economic Advisers in the Reagan administration, succeeding Charles Schultze. A recent retrospective is Christopher DeMuth, "Commentary on Jim Tozzi, 'Office of Information and Regulatory Affairs: Past, Present, and Future'," 11(1) *J. Benefit Cost Anal.* 41 (2020).

[7] Federal Regulation, 46 *Fed. Reg.* 13,193 (Feb. 17, 1981).

The Reagan program was a landmark in the evolution of federal regulatory policy, enduring in its essentials through five successive administrations of both political parties. The effectiveness of the program is the subject of continuing debate.[8] But the important point here is that a set of policy reform ideas originally addressed to the agencies and Congress gained institutional traction, albeit in a constrained form, at the White House—operating above the executive bureaucracy with a distinct presidential perspective.

Today's "problems of the regulatory state" are different and more foundational than those of the 1970s. The most prominent reform ideas are addressed not to policy design or methods but rather to constitutional fidelity, political legitimacy, and the rule of law. They are mainly addressed to the Congress and to the courts.[9] But these proposals, like those of the 1970s, are unlikely to be adopted in those venues to a degree commensurate with the problems at hand. Reconceiving the proposals for the presidency seems to me more promising. There is, however, little institutional momentum within the executive branch for pursuing them, such as there was in the 1970s. So I must also consider whether it is likely that a president himself would regard them as appealing; that President Trump has pursued some of them, going well beyond what President Reagan initiated, demonstrates that the notion is at least plausible.

The following sections take up those topics in order. Part I outlines my conception of the constitutional and political problems posed by today's regulatory state. Part II summarizes the major reform proposals and argues that neither Congress nor the courts are likely to adopt them to a degree commensurate to the problems (Congress not at all). Part III lays out my proposals for presidential action and assesses their feasibility.

I. The Problems of the Regulatory State

Most scholars of administrative law are philo-administrativists. They regard the regulatory state as an admirable adaptation to the circumstances of modern life and would like to fortify and expand it with perhaps a few tweaks[10]—or even turn its formidable powers from progressive to conservative causes.[11] I think their work fails to come to grips with the

[8] Susan E. Dudley, "The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States," *Regulation & Governance*, July 20, 2020.

[9] Some are addressed to the general public, urging organized civil resistance or a constitutional convention or amendments, but these are ignored in this paper. See Christopher DeMuth, "Our Corrupt Government," *Claremont Review of Books*, Summer 2015.

[10] Cass R. Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (2020); Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," 131(1) *Harv. L. Rev.* 1 (Nov. 2017).

[11] Adrian Vermeule, "Beyond Originalism," *The Atlantic*, March 31, 2020.

serious problems adduced below, which include but are not limited to departures from the liberty-protecting structure of the Constitution. But this paper does not contend with their arguments: my limited purpose here is to take the problems as I see them and to assess the political feasibility of the reform proposals being advanced by the regulatory state's critics.

Here is my litany of problems:[12]

A. The regulatory state, by combining lawmaking with the execution, enforcement, and adjudication of laws, violates the canonical political principle of separation-of-powers within government. The principle was established through centuries of political contention in Great Britain, was synthesized and elaborated by Locke, Montesquieu, and Madison, and became the organizing principle of American government in the federal Constitution and state constitutions. Modern government consists of three distinct forms of action—legislation (representation, deliberation, compromise), execution and enforcement (leadership, energy, administration), and adjudication (resolution of particular disputes, including disputes between the government and citizens). Combining any two or all three of them undermines the distinctive requirements of doing each one well, and is a proven recipe for corruptions of power and abuses of the rights of citizens. American government began compromising its constitutional separation-of-powers scheme more than a century ago and has since evolved in ways that make it impossible to recover the principle in its classical form.[13] However, the more recent developments summarized below point us back to the original principle and suggest that regulatory-state reform should attempt to recover essential aspects of it.

B. The regulatory state is often abusive, demonstrating that the admonitions of separation-of-power theorists retain their force in modern circumstances. The consolidation of lawmaking, law enforcement, adjudication, and day-to-day administration in a single agency gives it enormous power over regulated parties, especially those with long-term relationships involving numerous successive transactions, and gives rise to a large body of informal, unwritten, ad homonym law. Discretion and "flexibility" are often seen as essential to effective regulation of dynamic private markets. But regulatory agencies are

[12] The arguments in this outline are elaborated in Christopher DeMuth, "Can the Administrative State be Tamed?" 8 *J. Leg. Anal.* 1 (Spring 2016), 121; "Congress Incongruous," *Liberty Law Forum*, Aug. 3, 2015; "Our Voracious Executive Branch," *The Weekly Standard*, July 27, 2016, 18; and "Trumpism, Nationalism, and Conservatism," *Claremont Review of Books*, Winter 2018–2019, 32. My concern throughout is with is with executive actions that regulate private rights and obligations, not with the administration and adjudication of grants to state, local, and private parties or welfare and entitlement payments to individuals.

[13] Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (2014).

not entirely public spirited. Like all organizations, they are devoted to maintaining and enhancing the interests of the organization itself. Agencies run roughshod over private rights and interests when they threaten the agencies' own institutional interests.[14]

C. The regulatory state is a regime of delegated, specialized lawmaking. The function of the representative legislature is to resolve matters of political dispute through deliberation and compromise involving the interests and values of the full spectrum of the nation's constituent communities. While many will be unhappy with the result in any given case, most will recognize that the laws they live under were enacted by a process that incorporates the views of the entire citizenry through a process widely accepted as legitimate, with wins, losses, and ties for everyone. But Congress has increasingly left lawmaking to specialized, mission-driven agencies. Specialization is a powerful force for efficiency and progress in economic markets and other voluntary settings. But in government—the "monopoly of the legitimate use of violence"— it is a powerful force for eviscerating protections against excessive use of coercion and engrossing on private social ordering.

   1. Specialized agency lawmaking is unrepresentative. Regulatory agencies resolve issues of immediate concern to only the small segments of the population that attend to their proceedings, ignoring the interests of many others. Many agency rules could not survive a vote in a representative legislature.

   2. Specialized agency lawmaking is declarative and rationalized. Agency procedures and decision-making criteria are aligned to the talents and interests of citizens who are highly educated and articulate, politically attentive, and well organized with others of similar affinities. The values and interests of those who are less educated and politically proficient—whose communities are nonetheless represented in a legislature—are neglected.

   3. Specialized agency lawmaking is efficient and growth-oriented. The regulatory agency can make law with more dispatch and in much greater volume than a legislature, because (a) it is a hierarchy rather than a complex of committees, and (b) it has many fewer conflicts to resolve before taking action. The cumbersomeness of the representative legislature is an implicit guarantee of limited government. The regulatory state elides that guarantee, generating more law and state coercion than is

[14] An infamous example—and rare instance where agency "strong-arming" actually came to the attention of Article III judges—is *Sackett v. EPA*, 566 U.S. 120 (2012).

healthy for a free society and intruding into many areas better left to private markets and social ordering.

4. Specialized agency lawmaking is malleable and mercurial. Agency rules are easier to change than statutory law—and they are more likely to change, in response to the arrival of new administrations and also to subtler, continuous developments in enforcement programs, judicial doctrines, and internal agency politics. Moreover, agencies often write rules so as to preserve their own discretion and flexibility over time—which, when exercised through "guidance" documents, adjudication, or simply through changes in practice can produce unexpected shifts in the obligations of private parties.[15] All of this makes regulatory law less stable and predictable than legislative law, adding extraneous risks to private arrangements and necessitating large, socially wasteful expenditures on monitoring agency activities.

5. Specialized agency lawmaking is insular and accident-prone. The "policy stakeholders" clustered at any given regulatory program (banking, housing, pharmaceuticals, highway safety, etc.) have many sharp conflicts, to be sure—but they also develop a shared internal culture and common mindset about the necessities and parameters of right policy. Cloistered policymaking, unmediated by wider perspectives and "common sense," is often dysfunctional, generating policies that are extreme or unproductive or that impose large external costs. The housing collapse and ensuing financial crisis of 2008 is a dramatic example of sophisticated regulatory officials being oblivious to the dangers they were creating until the disaster arrived.

6. For all of these reasons, specialized agency lawmaking is politically polarizing and demoralizing. The displacement of the representative legislature removes many opportunities for workable compromise among conflicting interests, and leaves many citizens feeling that opportunities for electoral redress are being progressively narrowed. As government assumes responsibility for solving more and more problems, and performs its growing task-list less and less well, public confidence in government erodes. As government becomes a force for social division rather than unity, social trust erodes.

D. The regulatory state is able to deploy modern surveillance and information technologies in uniquely dangerous ways. While there is widespread concern over the abilities of

[15] See Aaron Nielson, "D.C. Circuit Review – Reviewed: 'I vote for Chenery I, not Chenery II'," *Yale Journal on Regulation: Notice & Comment*, Nov. 24, 2017.

private technology platforms, networks, and participants to confuse and mislead public discourse and invade personal privacy, none of them possess the coercive and integrative capacities of the federal executive branch. Government agencies can collect information by legal command, combine administrative and intelligence information from many disparate programs, and use information to punish or favor groups and individuals with great discretion and particularity.

E. The regulatory state is autonomous. Its combination of specialization, discretion, efficiency, and command of information makes it highly resistant to control by the legislative and judicial branches, which are far more constrained, and gives it an almost organic capacity for evolution, adaptation, and self-preservation.

II. The Inadequacy of the Regulatory-State Reform Proposals

The major proposals on offer for correcting the problems summarized in Section I take the form of revised doctrines of judicial review and new statutory law. I will begin with summaries of the four most prominent sets of reforms; there are others, but these will suffice for my purpose of explaining the shortcomings of all of them.

The first set, addressed to the judiciary, are (a) to resuscitate the dormant constitutional "nondelegation" doctrine and (b) to tighten or eliminate the administrative-law *Chevron* doctrine, and associated sub-doctrines announced from case to case, that defer broadly to agency interpretations of their statutes and rules and sometimes encourage agencies to apply their statutory mandates with expansive license.[16]

The second, addressed to the Congress, are to revise the rulemaking provisions of the Administrative Procedure Act (APA) in various ways. Many such revisions have been introduced in Congress in recent years, in the form of a "Regulatory Accountability Act" and other bills. The most ambitious proposals, all but the last of which have made some legislative headway, would (a) require formal adversarial proceedings, with higher standards of evidence and transparency, in certain cases where informal rulemaking is now permitted;[17] (b) make the Executive Order cost-benefit standard (described earlier) a default statutory

[16] These proposals are advanced in hundreds of law review articles and ably consolidated in Peter J. Wallison, *Judicial Fortitude: The Last Chance to Rein in the Administrative State* (2018). The *Chevron* and related agency-deference doctrines could also be revised by statute, and several proposals to this effect have been introduced in Congress in recent years.

[17] Essay Series, "Assessing the Regulatory Accountability Act," *Regulatory Review,* May 30 2017; Aaron R. Nielson, "In Defense of Formal Rulemaking," 75(2) *Ohio State L. Rev.* 237 (2014). Formal rulemaking would be required for "major" rules—OIRA terminology for rules with an "economic impact" of $100 million or more.

standard, subject to judicial review;[18] (c) provide that highly costly final rules may not take effect until after the conclusion of judicial review;[19] (d) establish a commission to identify established rules that are obsolete or counter-productive, which would trigger expedited procedures for revision or repeal;[20] and (e) impose a time-limit ("sunset") on rules or otherwise require agencies to periodically reevaluate and revise their stocks of established rules.[21] (A 2017 Senate version of a Regulatory Accountability Act included several much more modest APA reforms, recommended by the American Bar Association in 2016, such as requiring agencies to disclose all data and studies underlying their rulemaking proposals and extending the public comment period for certain rulemakings.[22])

The third proposal is for Congress to revise the adjudication provisions of the APA to move most licensing and enforcement adjudication out of the agencies whose policies are being adjudicated and into newly established, independent administrative law courts (either Article III courts or Article I courts on the model of the U.S. Tax Court).[23]

The fourth proposal—addressed to Congress and concerned with informal rulemaking, but more radical than APA reforms—is the "REINS Act," which has passed the House of Representatives several times in recent years.[24] REINS would require that "major" agency rules (generally, those with an "economic impact" of $100 million or more) be affirmatively approved by Congress before taking effect. The statute establishing the REINS procedure would provide for expedited up-or-down procedures in the House and Senate—rules would proceed directly to the floors (without being referred to authorizing committees) within 60 or

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[18] Jonathan Masur, "The Regulatory Accountability Act, Or: How Progressives Learned to Stop Worrying and Love Cost-Benefit Analysis," *Yale J. Reg.: Notice & Comment*, May 4, 2017; Philip A. Wallach, "An Opportune Moment for Regulatory Reform," Brookings Center for Effective Public Management, April 2014, pp. 6–9.

[19] House Committee on the Judiciary, Markups: H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists (REVIEW Act) Act, September 2016. The proposal responded to the effective mooting of the Supreme Court decision in *Michigan v. EPA*, 575 U.S. __ (2015), holding that EPA had taken insufficient account of costs in issuing a major air pollution rule. The EPA rule had taken effect, and most of the compliance investments incurred, before the Court's ruling. See Brad Plummer, "The Supreme Court Throws a Small Wrench in the EPA's Crackdown on Mercury Pollution," *Vox*, June 29, 2015.

[20] Wallach, *Opportune Moment*, *supra* note 18, pp. 4, 13–16.

[21] James Broughel, "A Regulatory Agenda for Trump's Second Term," *The Hill*, July 29, 2020; DeMuth, "Can the Administrative State be Tamed?" *supra* note 12, pp. 180–183.

[22] Christopher J. Walker, "Modernizing the Administrative Procedure Act," 63(9) *Admin. L.Rev.* 629 (2017).

[23] Michael Greve, "Why We Need Federal Administrative Courts," George Mason Legal Research Paper No. LS 20-05, March 25, 2020, and "Administrative Law is Bunk. We Need a Bundesverwaltungsgericht," *Law & Liberty Forum*, Nov. 1, 2019; Michael A. Rappaport, "Replacing Agency Adjudication with Independent Administrative Courts," 26(3) *Geo. Mason L. Rev.* 811 (2019); and Steven G. Calabresi & Gary Lawson, "The Depravity of the 1930s and the Modern Administrative State," 94(2) *N.D. L. Rev.* 821 (2018).

[24] Wallach, *Opportune Moment*, *supra* note 18, pp. 9–12; DeMuth, "Can the Administrative State be Tamed?" *supra* note 12, pp. 178–180.

90 days of submission for approval or rejection by majority vote without amendment. Rules that failed to be approved by both chambers would die on the vine. Rules approved by both chambers would need to be presented to the president for his signature (as required by *INS v. Chadha,* 462 U.S. 919 (1983))—but that would presumably be a foregone conclusion for rules already adopted by his agency heads and approved by OMB/OIRA. REINS is, in effect, a *Chadha*-compliant one-house legislative veto, achieved at the cost of Congress's pre-committing itself to expedited floor votes on all major rules.[25]

These proposals have many intrinsic merits and are valuable additions to policy debate. As guides for practical action, however, they are deficient: They fail to account for the causes and dynamics of executive government that greatly limit the possibilities of judicial and statutory reform. Our regulatory state and its problematics did not come about through accident or inadvertence or the persuasiveness in times past of abstract arguments that might now be reconsidered. From the beginning, it has been a deliberate, considered creation of Congress. Since 1970, it has acquired new scope and power primarily as a result of social and technological developments that are not easily controlled by legislation or judicial decree.

The regulatory agency, which first appeared in the late 19th and early 20th centuries, is usually described as an embodiment of Woodrow Wilson Progressivism. The essential idea is that the modern world then coming into being—industrial, urban, interconnected, "complex"— demanded expert, detached, agile administration in place of the amateur, parochial, cumbersome decisions of elected legislatures. But that is academic storytelling. The early regulatory agencies, beginning with the ICC in 1887, were all creatures of Congress—conceived on Capitol Hill in response to populist and corporatist agitations (in the ICC case, from farmers and other shippers on one side and railroads on the other), and enacted with little executive involvement.[26] Far from being politically neutral and aloof, the agencies were mini-legislatures with partisan balance, highly porous to outside influence, reporting directly to Congress and supposedly "independent" of the executive branch. Presidents Theodore Roosevelt and Woodrow Wilson provided strong rhetorical support but continued to leave the heavy policy lifting to Congress. The Federal Reserve Act of 1913, touted as President Wilson's greatest Progressive triumph, was a thoroughly congressional measure with designed-in statutory roles for private banks and regional interests.

[25] Adumbrated in Stephen Breyer, "The Legislative Veto after *Chadha*," 72 *Geo. L. J.* 785 (1983–1984).
[26] David R. Mayhew, *The Imprint of Congress* (2017), pp. 42–48.

When the Depression arrived, FDR and his New Dealers were actively involved in establishing the next generation of regulatory agencies, but they largely adopted the existing template for independent commissions, most prominently the Securities and Exchange Commission (SEC), Federal Communications Commission (FCC), and CAB. The big exception was FDR's cherished National Industrial Recovery Act, a highly centralized and discretionary executive enterprise that the Supreme Court unanimously held unconstitutional on nondelegation grounds in *Schechter v. United States,* 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (which remain good law, cited in recent court decisions beginning to unlimber the nondelegation doctrine).

The third wave of regulatory growth, beginning in 1970, was also largely congressional. President Richard Nixon established the EPA by reorganizing existing agencies, but its statutes, such as the Clean Air Act and Clean Water Act, were thoroughly congressional in their authorship, as were those of the profusion of new agencies Congress created on its own, such as NHTSA, OSHA, and the Consumer Product Safety Commission. Soon after came an array of energy conservation statutes. The civil rights agencies, established in the late 1960s, were given direct enforcement authorities in 1972, and their portfolios were progressively expanded to include discrimination based on handicapped status, age, and other personal characteristics.

The new, 1970-and-onward regulatory programs differed from their predecessors in two fundamental respects. Progressive and New Deal regulation had been devoted mainly to regimenting production in transportation, communications, power, and banking, often at the expense of consumers. And although the agencies possessed wide discretion to promote "the public interest," they exercised that discretion mainly by adjudicating narrow issues involving one or a few parties—such as whether to renew a radio station's license, or to permit an airline to serve a new route over the objections of rivals.

The new agencies were radically different. Instead of cartelizing production, they promoted health, safety, environmental quality, consumer protection, and personal dignity and participation. Rather than managing self-contained commercial disputes, they were missionary and aspirational, pursuing open-ended objectives of strong interest to growing numbers of individual citizens. And their primary modus operandi was not case-by-case adjudication but informal rulemaking. The practice had barely existed before 1970. An agency, after public notice and comment, and free of live adversarial hearings with established standards of evidence, could issue rules covering entire economic sectors, specifying automobile design, food labels, manufacturing methods, employment practices,

and much else. The rules were typically highly detailed and prescriptive and often involved costs and benefits of scores or hundreds of millions of dollars. The new agencies were less like executive courts and more like executive legislatures—but most were headed, in place of a bipartisan commission, by a single administrator serving at the pleasure of the president. These arrangements fostered much more efficient, profuse regulating. The scope and autonomy of executive branch de facto lawmaking grew over time, culminating in the 2010 Dodd–Frank Act and Affordable Care Act, which introduced a host of further innovations.

The transformation and dramatic growth of the regulatory state since 1970 has been driven by two broad social developments—high affluence and high technology. In wealthy, educated societies, many more people have the time, interest, and facility for politics, and they bring many refined, upscale issues to the table. Traditional domestic issues of jobs and economic welfare now jostle with a multitude of new ones concerned with personal health and safety, environmental quality, consumerism, and individual and group identity, dignity, lifestyle, discrimination, and "access." At the same time, modern technology, especially in the form of mass media and networked communications, has radically lowered the costs of political organization. The slightest complaint or enthusiasm can now find far-flung allies, achieve self-awareness as a political cause, and press its claims in the public square and in the Congress. On the government side, political aspirants and officeholders can now build their careers as solo entrepreneurs, by joining and servicing networks of ideological and economic interest. Party and legislative hierarchies that had long disciplined political careers and policy platforms have lost their clout.

These developments first became manifest in the late 1960s and early 1970s, following a quarter-century of unprecedented postwar economic growth and technological progress, and they have been steadily gaining power in the half-century since.[27] They have swamped Congress with demands for action that vastly exceed the capacities of legislative decision-making, with its teeming internal conflicts, elaborate procedures, and built-in constitutional cumbersomeness. They are what have led Congress to delegate policy-making to missionary agencies that can be proliferated essentially without limit. They have given members of Congress a new electoral business model—affinity networking, agency lobbying, and

[27] A close historical analogy is the 1815–1830 fluorescence of art, science, technology, commerce, and political and social relations in England, Europe, and the United States, following several decades of constant war and revolution, recounted in Paul Johnson, *The Birth of the Modern* (1991). During the depression years of the 1930s, or the wartime and postwar years of the 1940s, it scarcely would have occurred to anyone to promote environmental protection or transgender-friendly bathrooms; and, if it had, the promoters would have found it nigh impossible to form effective national advocacy organizations; and, if such organizations had been formed, their causes would have been greeted with puzzlement or contempt from the general public, the political parties, and legislators.

nonstop personal fundraising—in which the canonical legislative functions of deliberation and collective choice play little role. And they have generated a new form of regulatory government, fundamentally different from anything known to earlier eras, that Congress is ill equipped to control and is increasingly indisposed even to try.

The judiciary may be seen as standing apart from these social and political developments, and in a position to restore a modicum of constitutional order if it musters the fortitude to try. The fortitude, at least, may be building. Conservative legal scholars have advanced impressive critiques of the Supreme Court's nondelegation and administrative deference (*Chevron* et alia) doctrines in recent years, and the Court now seems poised to revisit both branches of its jurisprudence. In its 2018 Term, the Court came close to finding a statutory violation of the nondelegation doctrine for the first time since *Schechter Poultry* and *Panama Refining* in 1935, with a majority inviting additional cases on the subject (in *Gundy v. United States*, 588 U.S. ___ (2019)). And it effectively abolished its *Auer* doctrine of deference to agency interpretations of their own regulations (in *Kisor v. Wilkie, Secretary of Veterans Affairs*, 588 U.S. ___ (2019)). In theory, a revived nondelegation doctrine would oblige Congress to fashion more of its own policy decisions[28] and consequently to choose its interventions more carefully; as a result, American law would become somewhat more representative and predictable and less expansionist. Similarly, less judicial deference to agency interpretations of their statutes and rules would limit agencies' abilities to become governments unto themselves. Both steps would reinstate a portion of our discarded separation of powers.

But these steps, however worthy in themselves, are unlikely to go very far toward addressing the problems described in Section I. Judges and justices may stand apart from the modern political dynamics that have fostered the regulatory state, at least after they have survived Senate confirmation hearings. But they come face to face with the manifestations of those dynamics in regulatory appeals—in the mountains of documents, multiple petitioners, technical analyses, recondite theories, adjudicated facts, and speculative judgments presented to them, and in the evident congressional support for the missions of the agencies that compiled the records and made the judgments. The volume, mass, and momentum of the regulatory juggernaut limit the possibilities of effective judicial supervision.[29]

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[28] Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress," 90(5) *N.Y.U. L. Rev*. 1463 (2015).

[29] "The arc of [administrative] law bends toward deference." Adrian Vermeule says this is intrinsic to the nature of legal reasoning—*Law's Abnegation: From Law's Empire to the Administrative State* (2016). Michael Greve and I

If the courts were to move beyond incremental tightening of their regulatory deference doctrines, they would encounter serious problems in their relations with the agencies. Courts necessarily defer to some degree to agency policy judgments as well as findings of fact (otherwise there would be no point to having agencies in the first place—trial courts would do). But the boundaries between facts, policy, and law are highly indistinct in many of the regulatory decisions that courts review (as they were in the original *Chevron* case itself, where both law and policy turned on the meaning of one statutory word, "source"). This means that the more the courts move toward independent, definitive, controlling judgments of "the law"—that is, of the meanings of terms of regulatory statutes—the more they will be making policy decisions themselves. At the same time, however, rulemaking is only one device in the agencies' toolkits: they have manifold other "sub-regulatory" means of accomplishing their objectives, as we noted in Section I. Taking a larger policymaking role in the subset of controversies that appear before them, while still having little purchase on the actual course of agency policy—even in controversies they thought they had decided—would seem to be an unattractive proposition for the courts.

Similarly, if the Supreme Court begins to enforce its long-dormant nondelegation requirement—that Congress must provide "intelligible principles" to guide the regulatory agencies—that will knock out a few statutes where no such principle is stated, and hooray for that. But if the Court goes just one step further in the direction of classical legislating—requiring not only general principles but specific decision-making criteria—it will cast a constitutional pall over such deeply imbedded, widely relied-upon institutions as the Federal Reserve System (Fed), Food and Drug Administration (FDA), and FCC, as well as numerous regulatory statutes passed by huge congressional majorities since 1970. Sensing the problem, Justice Gorsuch's dissent in *Gundy* (joined by Chief Justice Roberts and Justice Thomas) laid out a more calibrated, multifactor test for judging permissible delegations; even so, Justice Kagan's opinion for the Court was able to warn that, if the delegation at issue in the case were unconstitutional, "then most of Government is unconstitutional."

In my view, the delegation in *Gundy* is easily distinguishable from most of government, and there are several avenues for useful tightening of the deference and nondelegation doctrines that would restore a modicum of our constitutional traditions. Doctrinal reforms

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say it is intrinsic to the dynamics of agency regulation summarized in the text and elaborated in Greve, "Adrian's Abnegation," *Law & Liberty*, Dec. 19, 2016 and DeMuth, "Can the Administrative State be Tamed?" *supra* note 12, pp. 129–142.

will not, however, be able to match the realpolitik of agency specialization and versatility that characterize most of regulatory government.

Congress's limitation as a venue for regulatory-state reform requires no speculation—it is a matter of record. The regulatory state is Congress's creation, and Congress has never, as an institution, exhibited the slightest regret. Rule-of-law reforms to the APA, akin to those summarized at the beginning of this section, have been introduced in Congress many times in recent decades (and indeed as early as the 1950s), and none has been enacted. During the 114th Congress (2015–2016), when the Obama Administration was engaged in an aggressive program of regulatory expansion, often fueled by extravagant interpretations of regulatory statutes, the Republican House of Representatives did pass several versions of the Regulatory Accountability and REINS acts—but these were symbolic, "political messaging" gestures, with zero chance of passing the Democratic Senate much less being signed by President Obama. Apart from these gestures, individual members of the House and Senate responded to Obama initiatives with speeches and press releases and one celebrated lawsuit (challenging the Administration's expenditure of unappropriated funds on ObamaCare subsidies), but the institutional Congress offered no resistance at all.

The record of the 115th Congress (2017–2018)—a period of unified Republican government across the Congress and executive branch—was little different. Congress did repeal 15 fairly narrow late-Obama-era regulations under the Congressional Review Act, but that statute's procedures are effective only in the early months of new administration of a different political party than its predecessor, and merely streamline the repeal of regulations the new administration could have repealed on its own. REINS and Regulatory Accountability bills continued to die in the Senate, even though the Trump administration endorsed both.[30] Congress conspicuously failed to repeal-and-reform ObamaCare (the Republican's leading 2016 campaign pledge) or to make significant reforms to Dodd-Frank. It also failed to counter the president's tariff campaign that many of them, and many Democrats too, opposed on legal or policy grounds; tariffs are an area where Congress had delegated particularly wide discretion to the executive over matters it had previously tightly controlled, so its failure to undelegate even a portion of that discretion was particularly striking.

[30] The Trump Justice Department has continued to press for APA reform. See U.S. Department of Justice, Office of the Deputy Attorney General, Modernizing the Administrative Procedure Act (August 2020).

Congress's inaction on regulatory reform is part and parcel of a broader relinquishment of its lawmaking, financial, and oversight powers vouchsafed in Article I. Think tanks, university research centers, and advocacy groups are now bristling with programs on congressional reform. Their proposals include REINS-like procedures for subjecting agency rules to congressional votes, and much else— beefing up professional staffs, creating specialized offices for regulatory oversight and scientific assessment on the model of the Congressional Budget Office, returning authority from party leaderships to authorizing and appropriating committees under strong chairmen, reinstating annual budgeting and appropriations by revamping the ineffectual 1974 Budget Control Act, and reforming the Senate's filibuster and other rules that have transformed it into a 60-vote assembly for most legislative business.

There are many excellent ideas here, but precious few members of Congress are interested in any of them. In 2016, Senator Mike Lee (R-Utah) launched an "Article I Project" dedicated to reviving Congress's exercise of its constitutional powers and reestablishing separation-of-powers government. The project attracted a grand total of nine Senators and Representatives, several of whom have since retired or been defeated for reelection. Despite Senator Lee's energetic efforts, it has gone nowhere.[31] In 2018, in the face of President Trump's tariff campaign, Senator Lee proposed a REINS-like procedure limited to requiring congressional approval of new tariffs—which seemed like a legislative sweet spot but found only a few takers.

The fact is that most members of Congress are uninterested in, or positively averse to, reclaiming their Article I powers. Passing laws and budgets and maintaining fiscal discipline is hard, obscure, often thankless work. One must attend to colleagues with differing and often conflicting views and interests, forge compromises that no one is entirely happy with, and explain one's half-a-loaf votes to agitated, single-minded donors and supporters.

But today's representatives wish to be recognized as individuals, not as participants in a murky process of collective choice. They have discovered that it is more gratifying, and safer to their electoral prospects, to toss political hot-potatoes to the executive branch, quietly lobby the agencies from case to case, and then loudly cheer or condemn the agencies' decisions for the delectation of their supporters. (Not actually paying for the programs they have championed is another means of easing the burdens of office.) The legislative

[31] The Article I Project's website—A1P—is still up but shows no postings since June 2016, a few months after the project was established.

workweek is now about two-and-a-half days. This leaves ample time for extra-legislative pursuits: presenting a strong personality on talk shows and social media, networking with commercial and ideological affinity groups, giving speeches and writing books, nonstop personal fundraising, and in general strutting and fretting on the national stage as if they were running for president (which, in fairness, they often are).

In regulatory policy as in other fields, the difficulty for the reformer is that Congress, by constitutional dispensation, has enormous formal powers but no duties other than to represent. The president is directed to faithfully execute the laws and protect the Constitution, judges to resolve cases and controversies that come before them (and to explain their decisions, although this is an implicit, not constitutional, requirement). But members of Congress take direction only from voters, sufficiently to get reelected. They hold most of the constitutional marbles but don't have to do anything with them. Passing laws, holding hearings, setting budgets, checking and balancing or just rubber-stamping the executive—these are options, not duties. Congress is a wholly reactive, discretionary institution. The reformer has no constitutional precepts to appeal to, akin to those invoked in "original understanding" jurisprudence for the judiciary and the "unitary executive" for the executive.

III. A Program for Presidential Reform

The president is the constitutional officer standing at the fulcrum of the regulatory state and the Congress. By dint of constitutional and statutory powers and duties and the prerogatives of his office, he directs the legal, administrative, and discretionary powers of the agencies and possesses additional powers unique to himself. His and his vice president's constitutional roles in the legislative process are augmented by his executive role and by many natural advantages of action and agenda-setting; these give him an outsized presence in the deliberations and decisions of a bicameral assembly of 535 representatives otherwise beset by serious collective-action problems. As our sole elected official with a national mandate, he can, if he cultivates and sustains popular support, exercise substantial influence over the course of the judiciary as well as the Congress and bureaucracy and has done so throughout American history.

The president is far from omnipotent. In his relations to the regulatory and other executive agencies, he lacks the advantages of specialization and information that each of them possesses—the "deep state" has been an impediment to presidents long before Donald Trump. The vesting of executive authority in a single personage masks substantial collective-action problems behind the president's every move: As anyone who has worked at the White

House or EOP can attest, the setting is a continuous riot of conflicting priorities, personal intrigue and shifting cabals, shuffling and reshuffling of many urgent matters clamoring for Oval Office decision, and surprise intrusion from the outside of domestic and foreign problems that must be moved to the head of the queue until the next one soon arrives.[32] Our president has accumulated many more responsibilities than a single mortal can possibly execute well. The post-1970 phenomena of low-transaction-cost political organization and cause-proliferation, which have deconstructed the institutional Congress, have rattled the presidency as well.

So the presidency holds singular advantages but also serious disadvantages as a vehicle for reforming the regulatory state. It is worth noting, however, that the most consequential post-1970 regulatory reforms have in fact originated with the president. Foremost among these is the OMB-OIRA program of cost-benefit rulemaking review discussed in the Introduction. There are many more. In negotiations with Congress over the 1990 Clean Air Act (CAA) amendments, the George H. W. Bush White House conceived and insisted on a controversial "cap and trade" emissions trading scheme for sulfur dioxide pollution that environmental groups strongly opposed. The scheme, a model of the regulatory reformers' argument for economic incentives over command-and-control, has been a notable success (high-benefits, low costs) and has since been extended to nitrogen oxides and other air pollutants.[33] President Trump has augmented the OIRA review program with a "regulatory budget" that requires agencies to repeal two rules for every new one and to achieve net annual reductions in incremental compliance costs.[34] Although it is too soon to judge the policy's effectiveness (or, of course, its durability across administrations), it has certainly coincided with a dramatic reduction in the rate of issuance of new rules; and it holds the potential for improving the incentives and practices of agency rule-writers.[35]

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[32] Vividly described in Tevi Troy, *Fight House: Rivalries in the White House from Truman to Trump* (2020) (reviewed in Philip Terzian, "First Aide," *Commentary,* June 2020).

[33] Richard Schmalensee and Robert N. Stavins, "Lessons Learned from Three Decades of Experience with Cap-and-Trade," Fondazione Eni Enrico Mattei, Jan. 1, 2015; Alan I. Barreca, Matthew Neidell, and Nicholas J. Sanders, "Long-Run Pollution Exposure and Adult Mortality: Evidence from the Acid Rain Program," NBER Working Paper 23524, June 2017.

[34] Reducing Regulation and Controlling Regulatory Costs, Executive Order 13,771 (Jan. 30, 2017).

[35] See Keith B. Belton and John D. Graham, "Deregulation Under Trump," *Regulation*, Summer 2020; Connor Raso, How Has Trump's Regulatory Order Worked in Practice?" Brookings Center on Regulation and Markets, Sept. 6, 2018; DeMuth, "Trump vs. the Deep Regulatory State," *Wall Street Journal,* Nov. 17, 2017, and "Commentary on Jim Tozzi," *supra* note 6; Ted Gayer, Robert E. Litan, and Philip A. Wallach, "Evaluating the Trump Administration's Regulatory Reform Program," Brookings Center on Regulation and Markets, Oct. 20, 2017; and Susan Dudley, "Regulating Within a Budget," *Regulatory Review*, Apr. 23, 2018. For pointed criticisms of the Trump policies in practice and theory, see Cass R. Sunstein, "Why is Trump Gutting Regulations that Save Lives?"

The president's appointment power has also, occasionally, been a tool for lasting regulatory reform. President Reagan, through his appointment of William Baxter and other law-and-economics practitioners to the Antitrust Division of the Department of Justice in the early 1980s, instigated a revolution in antitrust policy that would never have emerged from Congress[36] and that has, through the accumulation of administrative practice and judicial doctrine, been a durable accomplishment. President Jimmy Carter's appointment of Alfred E. Kahn as chairman of the CAB in 1977 was the indispensable first move in airline deregulation: Kahn's aggressive relaxation of the Board's price and entry controls upended the seeming impregnable airline cartel, generating sharply conflicting interests among airlines that opened the way for legislative abolition.[37] Since 1981 and especially since 2001, Republican presidents have made concerted efforts to appoint judicial conservatives to the federal bench—a practice that has, among other things, moved the Supreme Court and lower courts slowly but steadily toward less deferential regulatory oversight.

In what follows, I will describe how a president might directly effectuate a good number of the regulatory-state reforms currently conceived as statutory reforms, strengthen the effectiveness of judicial review of agency rules, and oblige Congress to take a greater role of its own in regulatory policy. I will focus on the substance of presidential actions, not on how those actions might be organized within the EOP or promulgated through this or that executive order. And I am not propounding a full-fledged program in which all of my proposals are to be implemented in concert. Some of my proposals will overlap or conflict with others, and some will no doubt prove to be more practicable than others. My purpose here is simply to demonstrate that the possibilities of direct presidential reform are much greater than has been generally recognized.

A. Procedures, Standards, and Judicial Review

The legislative proposals for revising the APA's rulemaking provisions are the most straightforward opportunities for direct presidential reform. Under the existing APA and

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New York Times, April 17, 2020; Stuart Shapiro, "The Limits of Thinking of a Regulatory Budget Like a Fiscal Budget," Brookings Center on Regulation and Markets, Dec. 4, 2019

[36] Congress resisted the antitrust reforms in at least one notable case, albeit unsuccessfully. In a 1983 rider to Department of Justice appropriations, it forbade the department to argue for abandoning the *Dr. Miles* per se rule against resale price maintenance in a pending case before the Supreme Court. See Frank Barbash, "Won't Argue Antitrust Law Change," *Washington Post*, Dec. 1, 1983. The Court did overrule *Dr. Miles* many years later (2007) with DOJ support, long after the rider and a few extensions had expired. Appropriations riders blocking administration initiatives, in frequent use through the late 1980s, have become rare with congressional abandonment of regular annual appropriations,

[37] See John Howard Brown, "Jimmy Carter, Alfred Kahn, and Airline Deregulation: Anatomy of a Policy Success," 19 *Independent Review* 1 (Summer 2014), pp. 85–99.

judicial administrative-law doctrines, agencies have wide discretion to choose between informal and formal rulemaking and, where nothing more than informal rulemaking is specified in the agencies' "organic statutes," to determine the procedural and evidentiary particulars of more-than-informal rulemaking.[38] So the president could, for example, direct agencies, in cases of "major" rulemakings, to hold on-the-record adversarial hearings on issues of law, fact, and policy, with standards for expert testimony and evidentiary findings.

The president could also restrict agencies from using sub-rulemaking procedures and sheer announcements to create private rights and obligations. President Trump has already done this in the much-studied, much-litigated question of "guidance" documents—which can give valuable notice of an agency's legal interpretations, enforcement intentions, and administrative practices, but can also go much further.[39] In similar fashion, his Department of Education employed notice-and-comment rulemaking to revise the Obama Administration's campus sexual-assault program, which had been established in 2011 by an out-of-the-blue "Dear Colleague" letter to school and college administrators.[40]

The legislative proposal mentioned earlier, to prevent costly final rules from taking effect before courts have affirmed their legality, points to another opportunity for procedural unilateralism. In the aftermath of its decision in *Michigan v. EPA*,[41] the Supreme Court stayed implementation of EPA's final "Clean Power Plan" rule pending completion of judicial review, then underway in the D.C. Court of Appeals.[42] That unusual action concerned an extravagantly ambitious regulatory initiative (surely the most far-reaching in

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[38] Several of the organic regulatory statutes specify evidentiary standards higher than those of the APA's informal rulemaking provisions, but none to my knowledge restricts agencies from formalizing rulemaking and heightening evidentiary standards beyond the APA provisions or informal-plus requirements of some organic statutes.

[39] As, for example, in an EPA guidance memorandum tightening air emissions monitoring requirements, set aside in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). President Trump's Executive Orders 13,891 and 13,892 (Oct. 9, 2019) provide, *inter alia*, that agencies may not use guidance documents to alter private rights and obligations independent of agency regulations or enforcement actions, and that they review and cull their existing guidance documents, establish public databases of guidance documents currently in effect, and establish notice-and-comment procedures for issuing "significant" guidance documents in the future. These measures follow several recent reports and recommendations of the Administrative Conference of the United States (of which the author is a public member), compiled at ACUS, Guidance Documents.

[40] Office for Civil Rights, Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020). The Department garnered more than 124,000 comments on its 2018 Notice of Proposed Rulemaking and devoted more than 500 Federal Register pages to evaluating the comments and explaining its seven-page final rule. A superb analysis of the proceeding and final result is R. Shep Melnick, "Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct," Brookings Governance Studies, June 11, 2020.

[41] *Supra* note 19.

[42] See Jonathan H. Adler, "Supreme Court Puts the Brakes on the EPA's Clean Power Plan," *Washington Post (Volokh Conspiracy)*, Feb. 9, 2016;

the history of U.S. administrative law) with a novel statutory basis that many observers, probably including a majority of the Court, regarded with great dubiety.[43] But it was an important precedent, and highlighted one of the ways that agencies can outflank courts and achieve momentous legal results on their own. It is also the case that litigation may be used to delay or defeat beneficial rules, and that many rules, good and bad, establish standards and practices that are easily revised if courts strike the rules down. A presidential order could strike the right balance by providing that rules requiring very large, irreversible investments may not take effect before legal challenges (inevitable in such cases) have been resolved.

The president could also direct that all rules, or some subset of "major" rules, specify that they expire in (say) 15 years. Regulatory sunset provisions have been talked about in Congress but have provoked enough opposition to keep them out of the Regulatory Accountability bills of recent years. Such provisions are, however, much more than paroxysms of anti-regulation ideology. Regulated businesses complain frequently about "outdated" and "obsolete" rules, and recent administrations of both parties have responded with "regulatory lookback" exercises to ferret out such rules. The most substantial of these, undertaken by the Obama Administration, produced "credible but small" results.[44] That is probably the most that can be expected: lookback exercises are episodic, contentious, and agency-led. Agencies have strong incentives to maintain stockpiles of accumulated rules, which give them substantial discretion over regulated parties and the ability to repurpose "obsolete" rules to new circumstances.

The Trump Administration's two-for-one rule for issuing new regulations may prove to be a better approach to the problem of rule accumulation, but a regulatory sunset would be even better (and would not conflict with the two-for-one rule). And sunsets would have additional advantages. New regulations are necessarily based on speculative estimates of their benefits and costs, and practical experience often shows that the estimates were wide of the mark. A sunset provision, by requiring agencies to periodically re-propose and re-justify their rules, would require them to pay much more attention than they currently do to evaluating the effectiveness of their rules in practice and justifying them empirically. The

[43] See, e.g., Laurence H. Tribe, "The Clean Power Plan is Unconstitutional," *Wall Street Journal*, Dec. 22, 2014.
[44] Connor Raso, "Assessing Regulatory Retrospective Review Under the Obama Administration," Brookings Center on Regulation and Markets, June 15, 2017.

ultimate purpose of a regulatory sunset is not housekeeping but creating agency cultures of continuous demonstrable improvement in achieving their statutory goals.[45]

The president cannot, of course, directly affect the standards and doctrines of judicial review of rulemaking or other regulatory actions. He can, however, improve the effectiveness of judicial review—helping the courts cope with the dilemmas discussed in Section II—indirectly, through reforms to agency practices such as those described above. A particularly important opportunity would be to move incrementally toward judicial review of the cost-benefit analyses required for major rules by the White House review program. At present, the cost-benefit test is strictly a matter of internal executive branch review and decision-making. It has helped identify many cost-ineffective as well as cost-beneficial rules; some highly ineffective ideas have not made it to the *Federal Register* even as proposed rulemakings, and many plausible ones have been improved in the course of OIRA review and public rulemaking. But agencies sometimes do and sometimes do not include their economic analyses in the rulemaking records accompanying their final rules, and, in explaining and justifying those rules, they are frequently either vague about the import of the analyses or distance themselves from the analyses on statutory or policy grounds.[46]

But a forthright explanation and comparison of the estimated benefits and costs of a rule, quantified as the nature of the rule permits, can be highly useful in giving form to capacious statutory language and to such judicial-review standards as "substantial evidence" and "arbitrary or capricious."[47] The Supreme Court's opinion in *Michigan v. EPA*, mentioned earlier, is an invitation to the agencies to integrate their cost-benefit analyses explicitly into their statutory interpretations and rulemaking decisions. EPA and other agencies have been moving toward accepting the invitation.[48] The president could make this an executive-wide movement by requiring all agencies to include their cost-benefit analyses in their rulemaking

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[45] Michael Greenstone's excellent assessment of the problem proposes a regulatory sunset geared to the evaluations of an independent review board (which, unlike my simple sunset, would require statutory enactment), along with improvements in regulatory cost-benefit analysis and other measures. "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," D. Moss and J. Cisternino, eds., *New Perspectives on Regulation* (2009), ch. 5.

[46] Caroline Cecot and Robert W. Hahn, "Transparency in Agency Cost-Benefit Analysis," 72(2) *Admin. L. Rev.* 157 (Spring 2020); Robert H. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?" 22(1) *J. Econ. Pers.* 67 (Winter 2008).

[47] Paul R. Noe and John D. Graham, "The Ascendancy of the Cost Benefit State?" 5(3) *ALR Accord* 85 (Jan. 15, 2020); Cass R. Sunstein, "Cost-Benefit Analysis and Arbitrariness Review," 41(1) *Harv. Env. L. Rev.* 1 (2017)

[48] U.S. Environmental Protection Agency, Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process, 83 *Fed. Reg*. 27524 (June 13, 2018); Lisa A. Robinson, "Regulating Cost-Benefit Analysis," *Regulatory Review*, Aug. 27, 2018. The SEC has also taken strides in this direction—see the website of its Division of Economic and Risk Analysis.

records and explain their statutory interpretations and policy decisions in light of the findings of those analyses.

B. Quasi-Independent Adjudication

Most enforcement actions and other disputes between regulatory agencies and their subjects are adjudicated by the agencies themselves. It is an arrangement long predating the rulemaking revolution of the 1970s, going back to the New Deal and Progressive Era. The central modus operandi of the regulatory state, it is in stark tension with the Constitution's provision of a judiciary independent of the government's political organs, not to mention everyday intuitions about fairness and due process.

While there are many variations from agency to agency, the essential arrangement is that enforcement actions and other legal disputes are usually (and at the agency's discretion) adjudicated by an Administrative Law Judge (ALJ) or other agency employee ("administrative judge" or AJ) rather than an Article III district court, through procedures and evidentiary standards that sometimes approach those of courts but are often considerably more relaxed.[49] In regulatory cases, ALJ decisions may be appealed to the head of the agency, which may a single administrator (EPA) or a commission (SEC, FTC, CFTC). Agency-head reviews are essentially plenary, with little or no deference to ALJs on matters of law or fact, and are subject to judicial review under highly deferential *Chevron*-esque standards. Most of the 2,000-plus ALJs (and many thousands more AJs) adjudicate disputes over government benefits (such as Social Security and Medicare), agency contracts, and immigration—but about 175 ALJs adjudicate disputes over private rights and obligations. ALJs are afforded some insulation from enforcement staff and other agency officials, and protected from dismissal and salary reduction, in order to promote their independence from agency interests. Until recently, ALJs were appointed by collaborative procedures involving agency staffs and the Office of Personnel Management; but now, following the Supreme Court's decision in *Lucia v. SEC*, 585 U.S. __ (2018) and President Trump's conforming executive order,[50] ALJs are appointed directly by the heads of the agencies whose disputes they adjudicate.

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[49] For a thorough overview, see Michael Asimow, *Federal Administrative Adjudication Outside the Administrative Procedure Act*, Administrative Conference of the United States, Sept. 11, 2019, whose scope is considerably broader than its title suggests.

[50] Excepting Administrative Law Judges From the Competitive Service, Executive Order 13,843, 83 *Fed. Reg.* 32,755 (July 13, 2018).

These arrangements have attracted increasing, and increasingly critical, academic and political attention in recent years.[51] The extent of agency favoritism from in-house adjudication has been empirically investigated, with varying conclusions;[52] but the general pattern is that the tag team of ALJ adjudication and agency-head review is biased against private parties to an unsettling degree. That pattern accords with the strong natural intuition about parties being judges in their own cases, which is a factor of independent importance in assessing the arrangement. And it accords with many well-documented accounts of agencies rigging internal procedures in their favor, by selecting favorably-disposed ALJs from case-to-case (sometimes when the cases are already underway) and a variety of other tactics that are largely immune from correction when and if the cases arrive in Article III courts.[53]

Reflecting this increased attention, the Trump Administration has been the first to move beyond rulemaking review to centralized White House oversight of agency adjudication. In October 2019, President Trump issued an executive order requiring, among other things, that agencies take steps to ensure "fairness and notice" in enforcement actions and adjudications, and to afford opportunities to be heard before taking actions affecting the legal rights or obligations of particular persons.[54] Then, in January 2020, OMB published a public notice requesting comments and information on several particular matters, including the duration of investigations and proceedings, burdens of persuasion, production of exculpatory evidence, and guarantees of adjudicators' independence.[55] Finally (so far), in May 2020, President Trump issued a further executive order that, in addition to calling for regulatory and enforcement forbearance during the Covid-19 pandemic, set forth ten "principles of fairness"

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[51] The academic literature is extensively cited and discussed in Greve, "Why We Need Administrative Courts," and Rappaport, "Replacing Agency Adjudication," *supra* note 23.

[52] See Jean Eaglesham, "SEC Wins with In-House Judges," *Wall Street Journal*, May 6, 2015, *cf.* Urska Velikonja, "Are the SEC's Administrative Law Judges Biased? An Empirical Investigation," 92 *Wash. L. Rev.* 315 (2017), and David Zaring, "Enforcement Discretion at the SEC," 94 *Texas L. Rev.* 1155 (2016); and Maureen K. Ohlhausen, "Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?" 12(4*) J. Comp. Law and Econ.* 623 (Dec. 2016).

[53] In addition to the now-canonical *Sackett v. EPA, supra* note 14, see the accounts of in-agency machinations in *Lucia* and recent Patent and Trademark Office cases in Richard A. Epstein, "Structural Protections for Individual Rights: The Indispensable Role of Article III—or Even Article I—Courts in the Administrative State," 26(3) *Geo. Mason L. Rev.* 777 (2019), pp. 782–788, and those presented in New Civil Liberties Alliance, Comments in Response to OMB Notice on Improving and Reforming Regulatory Enforcement and Adjudication, March 16, 2020. See also Todd Gaziano, Jonathan Wood, and Elizabeth Slattery, The Regulatory State's Due Process Deficits, Pacific Legal Foundation (May 2020).

[54] Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Executive Order 13,892, 84 *Fed. Reg.* 55,239 (Oct. 15, 2020).

[55] U.S. Office of Management and Budget, Request for Information, Improving and Reforming Regulatory Enforcement and Adjudication, 85 *Fed. Reg.* 5,483 (Jan. 30, 2020). The New Civil Liberties Alliance comments cited *supra* note 53 were in response to this notice.

for administrative enforcement and adjudication, evidently derived from the OMB notice-and-comment exercise. The order instructs agencies to revise their procedures to conform to the following principles, consistently with their statutes and program responsibilities:[56]

(1) The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.
(2) Administrative enforcement should be prompt and fair.
(3) Administrative adjudicators should be independent of enforcement staff.
(4) Consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject of an administrative enforcement action.
(5) All rules of evidence and procedure should be public, clear, and effective.
(6) Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.
(7) Administrative enforcement should be free of improper Government coercion.
(8) Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.
(9) Administrative enforcement should be free of unfair surprise.
(10) Agencies must be accountable for their administrative enforcement decisions.

The Trump adjudication initiative, like his earlier regulatory budget and two-for-one rulemaking initiatives, is obviously a work in progress; its effectiveness, and durability across administrations, can only be guessed at at this point. Most of the "principles of fairness" are more general and hortatory than the rulemaking cost-benefit standard. They lack the gatekeeper enforcement mechanism of OIRA rulemaking review, and they are internal executive branch policies without formal effect on judicial review. Nevertheless, they are authoritative pronouncements from the executive branch's CEO, laying down central norms of due process for an arena of legal action where they have often been given short shrift: they demonstrate the plausibility of White House constitutional leadership that is an essential assumption of this paper. The principles are without evident partisan valence (partisans of the regulatory state will have to say they are just unnecessary) and therefore hold some prospect for enduring across administrations. They will certainly be cited by parties challenging agency decisions in court, and could lead judges to pay more attention than they have in the past to problematic aspects of administrative adjudication.

[56] Regulatory Relief to Support Economic Recovery, Executive Order 13,924, 85 *Fed. Reg.* 31,353 (May 19, 2020). The New Civil Liberties Alliance, for one, was happy with these principles, see Karla Rollins, "Trumps Regulatory 'Bill of Rights': A Good Start," NCLA Blog, June 30, 2020.

What the Trump principles do not address, of course, is the institutional separation of agency rulemaking and enforcement from the adjudication of private rights and obligations under their rules and statutes. That would seem to be beyond the realm of presidential supervision, requiring momentous statutory revisions such as those mentioned earlier—moving regulatory adjudication to independent, Article III or Article I courts, and overturning more than a century of legal form and practice.[57] Yet even here, the president could take a substantial step in that direction on his own, by separating the 175 or so regulatory ALJs physically from the agencies, staff, and officials whose actions they adjudicate. Here the prow of regulatory-state reform would be not OIRA but rather the General Services Administration, which administers federal office buildings. The ALJs would be relocated to a separate, dedicated office building in downtown Washington, D.C., with its own hearing rooms, cafeteria, and NCAA basketball ladders and softball teams should they ever be revived.[58] The purpose would be to foster an esprit de corps of adjudicatory independence, self-regard, and mutual loyalty, drawing on research that has shown that physical separation breeds objectivity and on the similar arrangements already in place in several states.[59] Most ALJs would continue to be employees of specific agencies, but—importantly—they would rotate among the cases of different agencies through court-like random-assignment procedures to the extent the appointment statutes permitted (some of the smaller agencies are already serviced by outside adjudicators). And OIRA, too, could play an important role in the new dispensation: Executive Order 13,843 would be revised to elevate the appointment of regulatory ALJs from agency heads to the president himself, and OIRA would be the natural office for vetting and recommending such appointments. The initiative would need to navigate many questions of statutory requirement, generalist-versus-specialist judging, and agency-head review—and that is part of its appeal. Like the presidential rulemaking reforms discussed in the previous section, it would proceed incrementally, possibly setting the stage for larger statutory reforms based on experience rather than abstract argument.

C. Confronting Congress

My most ambitious reform proposal is to employ REINS-like procedures to challenge Congress to take greater responsibility for the course of the regulatory state. The REINS bills that passed the House during the Obama Administration had a strongly partisan, anti-Obama

[57] See the papers by Greve, Rappaport, and Calabresi & Lawson, *supra* note 23, and by Epstein, *supra* note 52.
[58] Many ALJs are located in their agencies' regional offices around the country, requiring separate arrangements.
[59] Citations forthcoming.

cast, and were designed, as their name suggests, for congressional blocking of executive excesses.[60] But their procedures could be adapted for purposes of presidential initiative and constitutional rebalancing. The basic idea is for the president to refer final agency rules to Congress for review and approval—on his own initiative, in the absence of a REINS enabling statute with its congressional pre-commitments to expeditious procedures. There are three important variations on the basic idea, concerning the criteria, terms, and purposes of legislative referrals. I will consider the first two together and then the third.

First, the criteria for referral. The REINS bills require congressional approval of "major" rules as defined and determined by the OIRA review program, with special procedures for cases where Congress suspects an administration is misclassifying rules in order to evade review. A presidential REINS could similarly apply to all major rules—a form of presidential pre-commitment. Alternatively, it could be invoked at the president's discretion when he considered a rule to be of sufficient national importance to merit congressional consent. Or the two could be combined—all major rules plus additional ones of special importance. The Trump and Obama administrations have faced many regulatory decisions that would have been excellent candidates for referral, considered just as a matter of refamiliarizing Congress with the practice of voting on matters that are highly consequential and plainly "laws" in the common understanding of the word. These include rules on greenhouse gas emissions; financial regulation; infrastructure permitting; net neutrality; "disparate impact" in mortgage and other lending; campus sexual assault; energy efficiency; and motor vehicle emissions, fuel composition, and fuel economy.

Terms of congressional referral closest to those of the REINS bills would be for the president to announce that he would promulgate a submitted rule if and only if it were approved by majority vote of both chambers, without amendment, within 60 days of submission. But a president's conditioning issuance on approval "by majority vote" in the Senate would conflict with the Senate's "filibuster" rules requiring 60 votes for passage of most legislation. The REINS bills have provided for a Senate simple-majority vote—similar to the filibuster-override procedures in the Congressional Review Act and in trade liberalization and military base-closing programs. But no REINS bill has passed the Senate. For the president to say that he would be guided by a simple Senate majority, in the absence of a statutory pre-commitment, would be regarded as an afront to the senators' exclusive

[60] David Schoenbrod, in *DC Confidential: Inside the Five Tricks of Washington* (2017), pp. 150–156, proposes a variant of the REINS bills, shorn of their partisan and rule-blocking provisions, which he calls the Responsibility for Regulation Act.

jurisdiction over their internal rules and procedures—so it would be best for the president to leave the determination of "approval" or "disapproval" for the houses to decide for themselves. Similarly, the president might request that the House and Senate move regulatory referrals directly to their floors rather than through their committee systems—as in the REINS bills—but he probably shouldn't, because those requests would in all likelihood be ignored. And there are further departures from REINS to defer to congressional sensibilities and legitimate concerns over agenda control and calendar management. Referrals for affirmative approval might have a time limit of longer than 60 days, or no time limit. Or the president might give Congress a veto option, announcing that he would issue a rule unless both chambers, or either one, voted to disapprove it within 60 days.

Choosing the criteria and terms for referrals involves conflicting considerations of policy and politics. A president who pre-committed himself to referring all major rules would be placing himself on high constitutional ground, making it clear that his objective was to establish a regular legislative role in the rulemaking process for important national policies. But doing so would create large strategic dilemmas that would vary from administration to administration. For example, several of the major Trump rules have replaced (and relaxed) Obama rules, and the current Democratic House would have been expected to disapprove them, or just ignore the referrals, in order to preserve the Obama rules. On the other hand, referring rules at the president's discretion would expose the process to charges of political opportunism that would undermine its objective of constitutional rebalancing.

Looming over dilemmas such as these is the circumstance that Congress is likely to look unkindly upon any presidential referral initiative, regardless of its criteria or terms. A foretaste is the bipartisan congressional outrage that greeted President Trump's May 2018 request for approval of a few minor spending rescissions under a referral procedure established by Congress itself in 1974.[61] The congressional votes on the referral reflected both partisan and pork-barrel considerations, but it was the procedure itself—obliging members to stand and be counted on highly specific, visible, practical (as opposed to aspirational) policy questions—that seemed to be galling to both sides. The procedure I am proposing would similarly take them out of their comfort-zone as kibitzers of executive lawmaking.

[61] Molly E. Reynolds, "Why Trump's move to rescind spending might find favor in the House, but not the Senate," Brookings Institution, May 8, 2018. The administration originally proposed $60 billion in recessions, then reduced its request to $15 billion, which passed the House and was defeated in the Senate in June.

For congressional referral to have any hope of success, it would need to be launched and sustained as a mechanism of constitutional reform and legislative accountability, with as little vulnerability as possible to partisan attacks and charges of case-by-case political expediency. That would require a president who thought it more important that new rules for power plant emissions or dishwasher energy efficiency or internet privacy be established with congressional consent than that they be established at all; and while many of these matters would be peripheral to his political interests, some would be central. And that is a conception of the presidency quite different from the prevailing one, where executive lawmaking has become an important means of maintaining the president's and his party's political coalition.

Nevertheless, presidential pre-commitment to refer major rules is not utopian and need not await the second coming of George Washington. Mitt Romney made exactly such a pledge in his 2012 presidential campaign. Although major rules often attract national public notice at the time they are issued, with of course heavy emphasis on political tactics and repercussions, most of them will be delayed for years by litigation—and, as explained below, congressional approval could short-circuit these delays. It is important to understand that the purpose of congressional referral is to alter *agency* behavior. Instead of crafting rules to navigate the interests of immediate program "stakeholders" and the demands of judicial review, agencies would craft rules to attract majority votes in the House and Senate. That is the mechanism by which the work product of the regulatory state would become more broadly representative and common-sensical. It is, to be sure, a bet that agencies collaborating with congressional leaders, committee members, and coalitions-of-the-willing would actually achieve this result; and the bet is a better one for technical, industry-specific rules where interest-groups transcend partisan alignments. But, whether successful or not, the procedure would change incentives across the government, so one cannot predict its effects by assuming that congressional behavior would be the same as under current procedures.

One of the advantages of proceeding by presidential initiative, rather than a REINS-like statutory codification, is that it can proceed incrementally, by trial and error and mutual confidence-building. I would opt for starting small. I would have the president begin by referring rules selectively, following earnest consultation with congressional leaders of both parties, and to select a portfolio of rules that included some easy ones and some hard ones both for Congress and for his administration. Easy cases might include uncontroversially obsolete, arcane, and silly rules such as those unearthed in the regulatory "lookback" exercises—Congress's dispatching them in a flourish would allow legislators to demonstrate

their opposition, not just in rhetoric but in action, to the infuriating red tape of unaccountable bureaucrats. Hard cases would include administration priorities, such as the Obama Clean Power Plan and the Trump campus sex rules, where the prospects of congressional codification and policy durability could counterbalance those of a short-term partisan stroke. I would issue new rules only when and if approved by both House and Senate, but would not set a time limit on approval or attempt to guide internal congressional procedures in any way.

At the same time, a president initiating the referral process would need to be prepared to counter congressional sabotage (for instance, by simply ignoring the referrals). He might respond by sending up a steady stream of time-sensitive, politically salient rules. Eventually, a strategy of congressional passivity would break down. If members became accustomed to voting on concrete policies, and to surviving the tweets and blogs of interest groups and ideological warriors to vote another day and win reelection, they might eventually take an interest in setting the terms of the referrals in a statutory REINS procedure of their own. Whatever the president's opening moves, the aim should be to establish precedents that would encourage subsequent presidents to continue the process (as in the initially controversial OIRA review program) and lead eventually to a statutory program derived from actual experience.

The purposes of the referral procedure described so far are to reintroduce a degree of separated-powers lawmaking, to revive the practice of congressional collective choice on matters of national importance and controversy, and to induce specialized agencies to write rules that take account of non-specialized, outside-the-silo viewpoints to the extent of attracting two congressional majorities. But the procedure could be adapted for another, distinctive purpose: to amend outmoded and ineffective regulatory statutes.

To see how this might work, consider the consequences of affirmative congressional approval of a submitted rule. The rule would then be issued by Act of Congress (with the president's signature)—it would be more than a mere agency issuance interpreting and applying an established statute such as the CAA. Congress could clearly vote to abolish a provision of the Code of Federal Regulations and tell the responsible agency to start over. But what if it modified a regulation, or enacted a new one, that conflicted with the terms of the earlier statute the regulation had been based upon?

The REINS bills treat this puzzle as an avoidable complication. They say that an affirmative congressional vote does not approve the substance of a rule, much less incorporate its policies into statutory law, but only gives the agency the go-ahead to issue the

rule—still subject to full-fledged judicial review. The effect of this hair-splitting is uncertain. Administrative law is about agency discretion under the organic statutes and APA. It is doubtful in the extreme that a court would find that a rule issued with Congress's formal review and statutory approval was, as the APA puts it, "arbitrary, capricious, [or] an abuse of discretion." But if a congressionally approved rule clearly violated an agency's organic statute on the matter at hand, courts might accept the invitation to step in.

I propose that this aspect of congressional referral be grasped as a mechanism for incremental statutory reform. Many energy, labor, and environmental regulatory statutes are archaic and counterproductive and barnacled with court decisions over long-forgotten disputes. There are, for example, specific provisions in the CAA that have kept EPA from pursuing incentive-based environmental policies and that are at war with other parts of the Act. Some provisions permit the balancing of benefits and costs and the institution of "cap and trade" marketable permit programs and have, as mentioned earlier, been used to mediate environmental and economic goals with great success. But other provisions either forbid such approaches or have been read by courts (rightly or wrongly) as doing so, and have upended the agency's efforts to achieve important statutory goals such as reducing "down-wind" interstate pollution.[62] Other regulatory statutes, such as CAFE and other energy efficiency statutes, have simply fallen behind the technological times.

In cases such as these, there really is such a thing as agency expertise—accumulated experience has demonstrated better ways to pursue statutory goals, but those ways require statutory, not just regulatory, revisions. Yet is has usually proven impossible keep the statutes up to date through standard legislative procedures. A presidential initiative for congressional referral could provide a means for doing so.

Where a referred rule departed from a reasonably clear statutory provision, or from judicial interpretations of broad or ambiguous provisions, the agency would explain the departure and the reasons for its new approach. The reasons could not, for the initial referral procedure, be the sheer policy preferences of the administration. Rather, they would be limited to improving the agency's pursuit of the missions Congress had already assigned to it. Such reasons might be to vindicate broader policies of the statute in question; to eliminate

[62] Several years ago, a group of leading law professors, environmentalists, and business executives developed a promising consensus upgrade to the CAA. David Schoenbrod, Richard B. Stewart, and Katrina M. Wyman, *Breaking the Logjam: Environmental Protection That Will Work* (2010). But congressional leaders, when presented with the proposal, seized up in terror at the thought of Congress's taking on a task so herculean and fraught with political symbolism. Reforming the Clean Air Act *tout court* is not going to find its way onto the congressional agenda any time soon, but a succession of incremental, empirically grounded reforms would be highly feasible.

confusions arising from conflicting statutory provisions; to clear away obsolete provisions; to improve agency performance based on its experience and evidence with the existing provisions; to better reconcile the agency's missions with each other or with other congressional policies; or to overturn errant court decisions.

Under this procedure, Congress would approve the rule itself, not just its issuance. In cases of uncertain statutory authority, the submitted rule would be accompanied by suggested statutory revisions, and Congress could enact the revisions along with its approval of the implementing rule. Approved rules and statutory tweaks would still, of course, be subject to judicial review on constitutional grounds—but not under "administrative law." In this, fully realized form, congressional reference would aim to introduce a new mode of executive-legislative interaction for statutes as well as rules—one that combines the executive's advantages of initiative and policy specialization with Congress's advantages of representation, political accountability, and the citizen's perspective.

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