

An Opportune Moment for Regulatory Reform

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INTRODUCTION



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Regulatory reform has been a fixture of American politics for many decades. At various times in its history, it has been a remarkably bipartisan affair.¹ Though our recent financial crisis has given a strong partisan valence to “deregulation,” the movement dating to the 1970s that reshaped the airline, trucking, rail, and telecom industries had as its champions not only business-friendly Republicans but such lions of the left as Senator Ted Kennedy and future-Supreme Court Justice Stephen Breyer. Reformers more recently have been at pains to clarify that they are not out to roll back all regulation, but want to ensure that regulatory goals are achieved with the least possible cost. Since the Reagan administration, regulatory reformers have steadily advanced and institutionalized cost-benefit analysis, making it a permanent and accepted part of rulemaking under presidents of both parties. As these things go, regulatory reformers have been extraordinarily successful.

Notwithstanding this big-picture success, however, regulatory reform now faces a critical juncture. The polarization of Congress has threatened to make the issue a purely partisan one, with Republicans demanding sweeping reforms of a regulatory apparatus they see as choking off economic growth and Democrats suspecting that their friends across the aisle use calls for “smarter regulation” as a façade to dismantle regulation, regardless of its benefits. In keeping with the style of the times, the Republican-controlled House of Representatives has passed a number of reforms that never had any chance of passing the Democrat-controlled Senate, let alone receiving the President’s signature. A number of voices on the left encourage

¹ Robert W. Crandall, Christopher DeMuth, Robert W. Hahn, Robert E. Litan, Pietro S. Nivola, Paul R. Portney, *An Agenda for Regulatory Reform* (Washington, DC: AEI and Brookings, 1997), 3.

Democrats to wake up to what they see as the essential corruption behind cost-benefit analysis (CBA), which they say intentionally “muddies rather than clarifies fundamental clashes about values” in an attempt to exclude the needs of the disadvantaged.²

Reformers need to arrest this trend and carve out a clearly bipartisan space for continuing the work of ensuring regulatory effectiveness, and 2014 may be an opportune time to do so. Republicans apparently hope to use their regulatory reform agenda as a central issue for courting swing voters, without much expectation that they will achieve legislative progress.³ Potential reformers should not settle for mere symbolism. For anyone who believes in the basic importance of good regulation, making regulations more effective should be too important to turn into a token issue, and, as I argue here, there is enough common ground in 2014 to make several kinds of reform a serious possibility. In this paper, I explore four categories of reforms – regulatory budgets, cost-benefit analysis, empowering Congress, and regulatory lookback – proceeding from the least to the most promising opportunities for bipartisan cooperation in improving our regulatory process. The common theme is that our regulatory system would be improved by building nonpartisan governmental capacity to evaluate the effects of regulation.

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REGULATORY BUDGETS

For several decades, many reformers (especially on the libertarian right) have kicked around the idea of a regulatory budget, arguing that there is no reason why only fiscal matters should be subjected to a centralized, comprehensive review process forcing legislators to explicitly confront hard tradeoffs. Regulatory budget advocates emphasize that shifting regulatory burdens onto businesses rather than taxpayers as a whole does not make them any less real, and hope that simply making the totality of these burdens transparent and debating their relative merits will lead to regulatory reductions.⁴ It is an appealing idea, at least in theory.

2 Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: The New Press, 2004), 9; see also, Amy Sinden, Douglas Kysar, and David M. Driesen, “Cost-benefit analysis: New foundations on shifting sand,” *Regulation and Governance* 3 (2009): 48-71; and much of the work coming out of the Center for Effective Government (previously known as OMB Watch), such as Katherine McFate, “Cost-Benefit Analysis: The Stunning Triumph of a Flawed Tool,” *The Fine Print* (blog) (September 18, 2012) (<http://www.foreffectivegov.org/cost-benefit-analysis-the-stunning-triumph-of-a-flawed-tool>).

3 Robert Costa, “Congressional Republicans are focused on calming their divided ranks,” *Washington Post* (February 17, 2014) (http://www.washingtonpost.com/politics/congressional-republicans-focused-on-calming-their-divided-ranks/2014/02/17/0210bcc2-9599-11e3-8461-8a24c7bf0653_story.html?hpid=z1#).

4 Clyde Wayne Crews Jr., “Toward a Regulatory Budget: Ending The Abuse of Executive and Legislation Power,” *Forbes* (October 21, 2013) (<http://www.forbes.com/sites/waynecrews/2013/10/21/toward-a-regulatory-budget-part-1-ending-the-abuse-of-executive-and-legislative-power/>).

In practice, it runs into problems. Budgeting is meant to focus decision-makers' minds on inevitable tradeoffs. Fiscal policy is of course the paradigmatic case. We only have so much money to spend; spending on one thing necessarily leaves less for others; and we can compare costs against each other with perfect clarity, since a dollar is a dollar regardless of the use to which it is put. But in the regulatory realm, things are quite different. If we choose a top-line "budget constraint," the level will seem wholly arbitrary—since it isn't necessarily true that we have only so much capacity to regulate. More importantly, comparing regulatory costs is far harder than comparing fiscal costs. Regulations' direct compliance costs can be summed up with relative ease⁵, but direct compliance costs are often only a small subset of full opportunity costs, which evade anything resembling straightforward measurement. Comparisons between regulations which include only their most easily-observed costs could therefore lead to sub-optimal decisions. Operationalizing the appealing-sounding idea of a regulatory budget requires answering a set of very difficult methodological questions about how costs would be estimated, or else the rule becomes an invitation for agencies to game the system through low-ball estimates. No serious legislative proposal has adequately addressed these issues.

Our regulatory system would be improved by building nonpartisan governmental capacity to evaluate the effects of regulation.

This is true even of less comprehensive attempts to force thinking about tradeoffs by requiring a kind of budgeting mentality at the margin of new rules. In 2010 and then again in 2012, one of the nation's leading regulatory reformers, Senator Mark Warner (D-VA), expressed general support for a kind of "regulatory pay-as-you-go," which would require executive branch and independent agencies to offset new compliance costs by cutting equivalent amounts of old ones.⁶ Although he trumpeted forthcoming legislation, more than three years later, none has materialized, and this should not come as a surprise because of the operationalization problem just discussed.

Any budget-like proposal also faces a difficult political problem, which is that defenders of regulation worry that budgets are meant to highlight costs without any comparable attention

5 Summing all direct compliance costs might well furnish a headline number that opponents of regulation could use to rally public support for reducing burdens (as Murray Weidenbaum's much-debated figure did in the late 1970s and 1980s), but the intrinsic importance of such a figure is limited. Among others, see Murray L. Weidenbaum, "On Estimating Regulatory Costs," *Regulation* (May/June 1978): 14-17 (<http://object.cato.org/sites/cato.org/files/serials/files/regulation/1978/5/v2n3-3.pdf>).

6 Mark R. Warner, "To revive the economy, pull back the red tape," *Washington Post* (December 13, 2010) (<http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html>); "Self-Replicating Regulation: How to Trim Government Overlap," *The Atlantic* (March 12, 2012) (<http://www.theatlantic.com/politics/archive/2012/03/self-replicating-regulation-how-to-trim-government-overlap/253898/>).

to benefits. They rightly wonder: if an agency is generating new rules with high overall net benefits for society, why should their total compliance costs become a binding constraint on their output?

A piece of legislation now being circulated as a discussion draft attempts to answer this last query with an openly political answer. The Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act would create a bipartisan Retrospective Regulatory Review Commission (RRRC) tasked with identifying existing rules ripe for reform.⁷ The RRRC would have extensive powers, which I explore further below. Among them would be to identify old rules ripe for repeal or reform that would be marked as eligible for regulatory “Cut-Go.” Whenever an agency has any of its existing rules so designated, it would be required to offset new rules’ compliance costs with alterations to the Cut-Go-worthy rules identified by the Commission; if the RRRC did not identify any of an agency’s rules, or if the agency had worked through its queue, the rule would no longer apply. In other words, the regime would not fix a maximum amount of socially-productive regulation from a given agency, but only require that as it went along producing new rules it would need to allocate attention to reforming problematic rules already existing.⁸ That makes some sense—although the devil is in the details, and it is an open question whether a system could be designed along these lines without simply becoming a roadblock for regulatory activity or whether the RRRC could attain enough bipartisan credibility to operate successfully.

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Proponents of a regulatory budget admirably look across the Atlantic to the United Kingdom’s “One-in, One-out” rule—now to be tightened to become “One-in, Two-out.”⁹ Several aspects of the program must be noted before the rule could be imported, though. First, all of the regulation that the UK is forced to implement as a result of EU legislation is exempt, as are several other categories of rules. Second, rules must be assessed both for their costs to business and their benefits to business; only if the costs predominate must rules to cut be identified. Determining benefits is likely to be difficult, and requires an independent presence

7 Discussion Draft, 113th Congress, H.R. ____ (http://judiciary.house.gov/_cache/files/b6673e95-cc72-4286-a3ca-082dd086cc04/df-002b-xml-020614-pm.pdf).

8 For a defense of the full SCRUB Act, see http://mercatus.org/sites/default/files/Mclaughlin_testimony_2-11-2014_v1.pdf. For an extended criticism, http://judiciary.house.gov/_cache/files/61953df7-cc3f-486a-bb27-71a8d2be42c0/levin-scrub-act-testimony.pdf

9 UK Department for Business Innovation and Skills, “The Seventh Statement of New Regulation: Better Regulation Executive” (December 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271446/bis-13-p96b-seventh-statement-of-new-regulation.pdf): 7, 54-55.

Capacity building for the purpose of enabling a serious regulatory budget might hold some promise, but, given the inherent difficulties of adapting the budgeting mindset to the regulatory environment, it would probably not be the most efficient or effective way of improving the nation's regulation.

from agencies to be credible; the UK has a Regulatory Policy Committee meant to play this part, and it would be important to consider what US entity could play a similar role. Finally, of course, the differences between our systems of government loom large: harmonizing government priorities and legislation is fairly trivial in the UK's Westminster system, but much less so in the United States. Regardless of the executive branch's desire to streamline regulation and reduce costs, in many cases it cannot do so without prodding Congress into action, and that is easier said than done.

Sam Batkins of the American Action Forum has proposed a reconfiguration of the regulatory budget idea, which would probably eschew the need for congressional involvement: a cut-go principle could be applied wholly to paperwork requirements.

Acknowledging the difficulties in a comprehensive regulatory budget, his proposal is designed to “give

teeth to” the Paperwork Reduction Act by capping total paperwork burdens for each agency—a modest and sensible goal.¹⁰ It is plausible that agencies currently underinvest in minimizing compliance costs for regulated firms, and a paperwork-cut-go regime would change their incentives.

But what Batkins leaves out is that agencies with sequester-constrained budgets will understandably oppose such a requirement as limiting their ability to pursue their core missions. Here, as in so many other policy areas, reaping cost savings for society as a whole may mean a willingness to modestly invest in government capacity. Nor is this vision of bureaucrats-devoted-to-cost-savings a pipe dream: in the Netherlands, two specially-created boards successfully met their charge of reducing administrative burdens on business by 25 percent over four years.¹¹ Conservative opponents of regulation are often reluctant to create “yet another government agency,” even one charged with reducing the overall burden of government intervention; they say that given the nation's overall fiscal condition, there is

10 Sam Batkins, “Can a Regulatory Budget Trim Red Tape?” *American Action Forum Research* (August 19, 2013) (<http://americanactionforum.org/research/can-a-regulatory-budget-trim-red-tape>). It should be noted that firms will only be better off if steps are taken to ensure that a paperwork reduction does not disproportionately increase their litigation risk.

11 Christian Rice, “Lessons From Dutch Regulatory Reform: How the U.S. Could Save \$450 billion Per Year,” *Openmarket.org* (blog) (April 4, 2013) (<http://www.openmarket.org/2013/04/04/lessons-on-regulatory-reform-from-the-netherlands/>). A number of U.S. states also perform various kinds of regulatory reviews and could therefore act as models; see Robert W. Hahn, “State and Federal Regulatory Reform: A Comparative Analysis,” AEI-Brookings Joint Center for Regulatory Studies White Paper (November 1998) (http://localgov.fsu.edu/papers/archive/Hahn_001.pdf).

simply not money for such projects. This is almost the quintessence of being penny wise and pound foolish. Congress can make such bodies self-extinguishing, or the President could delegate a heavy-hitter to undertake the task (as Vice Presidents George H.W. Bush and Al Gore did during the 1980s and 1990s, respectively).

Capacity building for the purpose of enabling a serious regulatory budget might hold some promise, but, given the inherent difficulties of adapting the budgeting mindset to the regulatory environment, it would probably not be the most efficient or effective way of improving the nation's regulation. The next three sections offer more promising alternatives.

REFINING AND EXPANDING COST-BENEFIT ANALYSIS

A second category of potential reforms would look to refine, improve, or expand the reach of cost-benefit analysis. Notwithstanding its critics on the left who denounce the whole enterprise, CBA has been theoretically refined and incrementally improved in practice for many years now, its place in America's regulatory system cemented by a series of executive orders and long habit. Its defenders have staked out an appropriately modest role for it: rather than a "superprocedure" meant to replace all other decision-making, it is "an imperfect but practicable tool by which governmental decision-makers implement the criterion of overall welfare."¹² Smart critics of how CBA is practiced on the left concede its permanence, and urge reforms to remove various anti-regulatory biases they believe are currently embedded.¹³ For the moment, those who believe CBA systematically underestimates costs and those who believe CBA systematically underestimates benefits are likely to cancel each other out: the academic debate (and the reigning political configuration) would need to produce more clarity before any congressional action is likely.

Somewhat more likely to be raised as live options are two Republican priorities. The first is extending CBA requirements to independent agencies. The Independent Agency Regulatory Analysis Act, proposed in the 112th Congress and now again in the 113th, would give the President the discretionary authority to require independent agencies to follow the same requirements as executive branch ones, including submitting their proposed rules to the Office of Information and Regulatory Affairs (OIRA).¹⁴ President Obama sought to advance a very similar objective through a 2011 executive order, which extended to independent agencies many of the same regulatory imperatives covering those under cabinet supervision.¹⁵ The non-partisan

¹² Matthew D. Adler and Eric A. Posner, *New Foundations of Cost-Benefit Analysis* (Cambridge, MA: Harvard University Press, 2006), 156, 25. This isn't to say that the way CBA is viewed is now perfect, or that there are no interesting disagreements about how it is reckoned. For insights into one live debate, see Ted Gayer and W. Kip Viscusi, "Overriding Consumer Preferences with Energy Regulations," Mercatus Center Working Paper No. 12-21 (July 2012) (http://mercatus.org/sites/default/files/Energy_regulations_GayerViscusi_WP1221_1.pdf).

¹³ Richard L. Revesz and Michal A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (New York: Oxford University Press, 2008).

¹⁴ 112th Congress, S. 3468; 113th Congress, S. 1173.

¹⁵ Executive Order 13579, "Regulation and Independent Regulatory Agencies" (July 11, 2011).

Administrative Conference of the United States has investigated the issue and recommended legislation to clarify independent agencies' responsibilities.¹⁶ Though foes-of-all-CBA will denounce such efforts, there should be ample overlap between the mainstream of both parties to facilitate a deal here.

The second Republican objective is to create a blanket CBA requirement that is always subject to substantive (not merely procedure-enforcing) judicial review. The unfortunately-flawed vessel for this ambition is the Regulatory Accountability Act, passed by the House in 2011 and proposed again in the 113th Congress. The law would first require all agencies to perform CBAs for rules they promulgate; then require CBAs for viable alternatives; and then explicitly require that agency choose the "least costly rule considered during the rule making" unless it separately showed that extra costs were more than outweighed by extra benefits.

The law would also require formal, adjudicatory hearings allowing citizens to contest factual matters crucial to final rules and make it easier to pursue such questions through challenges in court.¹⁷ Opponents say that the law would effectively paralyze the rulemaking process, preventing regulators from doing crucial work to protect the public by forcing them to invest time in analyzing any halfway-coherent alternative foisted upon them, even when those alternatives are clearly inferior.¹⁸ They have a point. Creating a free-for-all at the rule-review stage effectively forces agencies to replay their notice-and-comment procedures at a later date, only more formally. The problem would only be compounded by allowing all disappointed fact-disputers to pursue their cases in court. It is hard to avoid the impression that this is principally meant to ensure regulatory delay, lengthening a process that already frequently drags out over many years.

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Nonetheless, the Regulatory Accountability Act contains two important ideas that reformers should look to repackage in a less procedurally unwieldy manner. First, in those cases in which

16 Curtis W. Copeland, "Economic Analysis and Independent Regulatory Agencies," Paper prepared for Administrative Conference of the United States (April 30, 2013): 114 (<http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>).

17 112th Congress, H.R. 3010 (passed House, 253-167) (<http://clerk.house.gov/evs/2011/roll888.xml>) and S. 1606; 113th Congress, H.R. 2122 and S. 1029. For quotation, see H.R. 2122, § 3(e)(4).

18 Celia Wexler, "Don't Be Fooled by the 'Moderate' Rag: The Regulatory accountability Act Threatens Federal Scientific Integrity," *The Equation* (blog of Union of Concerned Scientists) (May 30, 2013) (<http://blog.ucsusa.org/regulatory-accountability-act-threatens-federal-scientific-integrity-142>); David Goldston, "'Regulatory Accountability Act' would make it harder to safeguard the public," *Switchboard* (blog of NRDC) (July 11, 2013) (http://switchboard.nrdc.org/blogs/dgoldston/regulatory_accountability_act.html).

an agency can sensibly isolate 2-4 viable regulatory alternatives, it makes sense to ensure that they conduct rigorous, well-substantiated CBAs for each of them. While agencies might informally do this now, they can easily manipulate the process by choosing alternatives that make their favored policy a clear winner. It would be far better to create a situation in which evaluations could be established and certified at the front end, and reformers should think about ways to make this possible. One of the clearest paths would be creating mechanisms for involving OIRA in the proposal stage before a rule is finalized, perhaps by having the agency enforce checklist requirements of empirical best practices.¹⁹

Of course...and perhaps the reader will discern a theme here...OIRA is not currently very well positioned to provide such a service. Over the three decades of the office's existence, its budget has shrunk by a quarter in inflation-adjusted terms and its staff has been halved—while spending on federal regulatory activity has more than tripled.²⁰ Without increasing its

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capacity, putting more demands on it is likely to result only in a backlog of work and delays. Although many progressives are generally suspicious of OIRA's work (mostly for the same reasons that they are suspicious of CBA), they would probably be willing to allow its capacity to be expanded if, in doing so, Congress ensured that it does not become the source of regulatory delays—a frequent complaint from the left.²¹

The second important idea is that CBAs ought to be open to challenge in courts if they fall short of the standards of solid evidence. Here Republicans ought to simply be more modest. It makes good sense to clarify and expand regulated firms' ability to raise legal challenges based on faulty CBAs, though doing so is not without difficulties: unless we want the courts transformed into an OIRA doppelganger, there must be some limiting principle preventing every CBA from being litigated as a matter of course in order to cause

19 Ted Gayer, "A Better Approach to Environmental Regulation: Getting the Costs and Benefits Right," *Hamilton Project Policy Brief* 2011-06 (May 2011) (http://www.hamiltonproject.org/files/downloads_and_links/05_environment_regulation_gayer_brief.pdf): 4-5.

20 Jerry Ellig and James Broughel, "OIRA Spending Falls as Agency Spending Swells," *Mercatus Center* (October 17, 2013) (<http://mercatus.org/publication/oira-spending-falls-agency-spending-swells>); Jerry Ellig and Rosemarie Fike, "More Resources for Regulatory Review Would Benefit Consumers," *Roll Call* (September 6, 2013) (http://www.rollcall.com/news/more_resources_for_regulatory_review_would_benefit_consumers_commentary-227408-1.html).

21 E.g., Katie Weatherford, "Senate Briefing Highlights Causes of Regulatory Delays," *Center for Effective Government* (October 25, 2013) (<http://www.foreffectivegov.org/blog/senate-briefing-highlights-causes-regulatory-delays>).

delays. But attempting to throw the courts open to any citizen at all who takes issue with a CBA is a step too far.

Especially if Republicans are willing to think about ways of cutting down on regulatory delays, there ought to be real room for compromise in improving the practice of cost-benefit analysis. It would be a shame if the party passes up the opportunity merely for the sake of anti-regulatory posturing.

EMPOWERING CONGRESS AND DEMANDING LEGISLATIVE ACCOUNTABILITY

One of the right's longest-standing complaints about the regulatory state is that it has facilitated the rise of an unaccountable fourth branch of government in charge of making an ever-increasing portion of our policy decisions. Proposals for counteracting this trend have sometimes been radical—for example, some have suggested putting an end to delegation to the executive branch altogether.²² More often Congress has tried various devices to ensure that it can inject itself into the policymaking process before rules made by agencies take final effect. The most common device in the 1970s was the legislative veto: a law would charge an agency with making a particular policy choice, but allow either (or sometimes both) houses of Congress to reject that choice through a majority vote. But the Supreme Court struck those arrangements down as inconsistent with the Constitution's requirements of bicameralism and presentment (requiring the President's signature) in *INS v. Chadha* (1983).

Since then Congress has attempted to work around the Court's objection in various ways. Most notably, it passed the Congressional Review Act of 1996, which established a mechanism allowing Congress to pass a joint resolution of disapproval for a newly promulgated rule and thereby block it.²³ The law's only real effect comes from procedural streamlining, ensuring that a challenged rule will have to face a floor vote in a timely manner—but for the objection to have any effect, it must receive the President's signature (unlikely, since he allowed the rule to emerge from an agency formally under his control) or override his veto. In the nearly two decades of its existence, the CRA process has led to exactly one rule being overturned (the controversial ergonomics rule in 2000).²⁴ While it is possible that it

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22 David Schoenbrod, *Power Without Responsibility* (Yale University Press, 1995).

23 § 251 of the Contract with America Advancement Act of 1996, Pub. L. 104-121.

24 The ergonomics rule was promulgated by the Department of Labor in 2000, and was disapproved and nullified through the CRA in early 2001; 107th Congress, S.J.Res. 6.

The often-ridiculous idea that legislators should “read the bill” would be completely exploded by the REINS Act; giving anything like a careful reading to even the summaries of 150 major rules per Congress would require a huge investment of time, not to mention an extremely broad base of knowledge.

has had an important deterrent effect, it is generally thought of as a disappointment—if it is thought of at all.

Congressional Republicans in recent years have sought to resurrect the legislative veto in a far more ambitious form through the vehicle of the Regulations from the Executive In Need of Scrutiny (REINS) Act, which the House passed on party-line votes in 2011 and 2013.²⁵ The REINS Act would avoid constitutional difficulties by effectively changing the mode by which all significant regulations become law: rather than promulgating rules into effect, agencies would more or less have to propose them to Congress, which would be required to give them expedited consideration and votes. Veto would become the effective default; bicameral legislative action on the record would be required for the creation of all new rules with estimated costs exceeding \$100 million per year.

Though it has been little noted, then-professor Stephen Breyer outlined a very similar plan back in 1984 as one option for replacing the struck-down legislative veto, calling it a “confirmatory law procedure.”²⁶ While such a law could destroy executive branch effectiveness if badly designed, Breyer thought this wasn’t a necessary effect. If Congress could design procedural requirements so that regulations were certain to receive prompt legislative attention, the net effect could be quite similar to the constitutionally-impermissible veto. As to whether resurrecting some form of the veto is good policy, Breyer was more ambivalent, seeing a high likelihood of procedural morass or of effectively creating a legislative *staff* veto. He also wondered whether it would distract Congress from the more effective remedy of directly altering troublesome statutes.²⁷

Thirty years later, these concerns are the right ones to raise about the REINS Act, which as currently configured would effect a huge change in the way Congress operates. That might well sound like a welcome change, given the body’s recent performance, and there is a very strong case to be made that Congress needs to be held responsible for the outputs of our regulatory processes.

25 112th Congress, H.R. 10 (passed House on December 7, 2011, 241-184) (<http://clerk.house.gov/evs/2011/roll901.xml>); 113th Congress, H.R. 367 (passed House on August 2, 2013, 232-183) (<http://clerk.house.gov/evs/2013/roll445.xml>).

26 Stephen Breyer, “The Legislative Veto after *Chadha*,” *Georgetown Law Journal* 72 (1984): 793.

27 *Id.*, 797-8.

But the shift that the REINS Act offers is not a good one. To see why not, we need to pay attention to what Congress currently gets done and what the REINS Act would demand of it. The 112th Congress (2011-2012) passed 283 laws, 242 of which were less than 10 pages long.²⁸ During that same time, agencies promulgated 148 major rules—nearly all of which are (at least) dozens of pages long and dense.²⁹

Forcing Congress to evaluate this body of regulatory work would require legislators to either shift their focus to regulatory agencies almost entirely, or give barely-even-cursory attention to nearly all votes, rendering the whole process perfunctory except in the few exceptional cases where rules become politically sensitive. The latter is far more likely, and indeed, the REINS Act's most thoughtful defender, Jonathan Adler, argues that the law "enhances transparency and accountability without creating a significant new procedural obstacle to the adoption of needed regulatory measures."³⁰ By forcing legislators to at least consider the possibility of having opponents use their votes against them in future campaigns, the whole process would be required to reflect democratic sensibilities at least marginally more than is currently the case. Adler reckons this would rarely result in political fireworks.

This isn't crazy, but the numbers are still daunting, and the implicit view of democracy is a dim one. The often-ridiculous idea that legislators should "read the bill" would be completely exploded by the REINS Act; giving anything like a careful reading to even the summaries of 150 major rules per Congress would require a huge investment of time, not to mention an extremely broad base of knowledge.³¹ In practice, Breyer's warning that specialized congressional committee staff would come to wield a veto seems likely to be correct, and it's not clear how democracy-enhancing that would be.

The REINS Act could be turned into a deliberation-enhancing device if, rather than assigning Congress the task of reviewing some 75 or so major regulations per year, it forced extended consideration of 10 or 20 of the most important rules each year.

28 Author's calculations based on <http://www.archives.gov/federal-register/laws/past/>.

29 This number is derived from the following search: http://www.gao.gov/legal/congressact/fedrule.html?fedRuleSearch=&report=&agency=All&type=Major&priority=All&begin_date=01%2F03%2F2011&end_date=1%2F2%2F2013&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2015&begin_gao_date=mm%2Fdd%2Fyyyy&end_gao_date=02%2F20%2F2014&searched=1&Submit=Search.

30 Jonathan H. Adler, "Placing 'REINS' on Regulations: Assessing the Proposed REINS Act," *NYU Journal of Law & Public Policy* 16 (2013): 23.

31 To give a sense of just how unrealistic this is, consider the following anecdote. The Office of Technology Assessment used to publish not only stand-alone executive summaries of its long reports, but also one-page summaries-of-summaries—and found that legislators asked for a further abridgement to index-card size! See Adam Keiper, "Science and Congress," *The New Atlantis* 7 (2005): 37 (<http://www.thenewatlantis.com/publications/science-and-congress>).

The REINS Act could be turned into a deliberation-enhancing device if, rather than assigning Congress the task of reviewing some 75 or so major regulations per year, it forced extended consideration of 10 or 20 of the most important rules each year. That would mean that blockbuster rules like the forthcoming greenhouse gas emission controls for existing power plants would be forced to receive congressional scrutiny, potentially increasing the democratic legitimacy of our regulatory system and forcing Congress to confront the outputs of our most important regulatory statutes, while avoiding overwhelming our legislature with regulatory review.³²

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This would enhance our democracy even more if the law simultaneously improved Congress's capacity for understanding and evaluating the rules. Members of Congress cannot be expected to speak fluent regulator-ese; and so if they are to play a more meaningful role in the regulatory process, they need help from translators. The GAO currently provides this service to a limited extent, and one option would be to expand its role.

Another attractive option would be to restore the Office of Technology Assessment (OTA), albeit hopefully with a better name. The OTA was created in 1972 and rather unceremoniously killed off in 1995, as just about the only office to fall victim to

the Republican Revolution's government-shrinking ambitions. For around \$20 million per year, it provided members of Congress (mostly committee chairmen and ranking members) with detailed studies on a huge range of subjects. It did a commendable job maintaining its objectivity by presenting members with a menu of options based on the facts, but ultimately was branded as Democrat-friendly and defunded when Republicans took control.³³ This was an unfortunate loss, and ever since its demise, a few members have sought to restore it.³⁴ GAO has absorbed some of what OTA did, but if we want a Congress that is truly up to the task of evaluating complicated regulatory outputs, it makes sense to give it the capacity to do so.

32 This exercise could be even healthier if the updated REINS contained procedures designed to facilitate amendments to the underlying regulatory statute. If an executive branch agency feels it is compelled by law to produce a rule, only to find that Congress says the rule should not be promulgated, Congress should take responsibility for clarifying the underlying law. "No" votes should thus be followed by mandatory consideration of updating amendments that give agencies (and the firms they regulate) certainty about what to expect in the future.

33 For a first-rate critical history, see Keiper, "Science and Congress," 19-50.

34 Especially noteworthy for their efforts are Senator Jeff Bingaman (D-NM) and Representative Rush Holt (D-NJ); see Genevieve J. Knezo, "Technology Assessment in Congress: History and Legislative Options," CRS (2005) (<http://www.fas.org/sqp/crs/misc/RS21586.pdf>), 3-4.

The Congressional Budget Office (CBO) (born alongside the OTA in the early 1970s) should be the relevant model: an agency that undoubtedly enriches and disciplines our political discourse by bringing to bear nonpartisan, objective evidence. It would be extremely difficult to argue that CBO fails to justify its modest cost (just \$45.6 million in FY2014).³⁵ CBO's history provides a number of lessons for potential institution-builders. First, CBO has endured and thrived by providing responsible estimates of policies' effects while eschewing policy recommendations. Although many have sought to coax it into the advice-giving business over the years, the agency has always defended its neutrality by declining. A new Congressional Regulatory Office would be well-served by being statutorily constrained to the world of analysis rather than policy decision-making. Second, CBO's nonpartisan identity is indispensable to its credibility. This is only slightly attributable to its statutory design, which merely requires that its director be appointed without regard to party. Rather, it is the result of a conscious effort to avoid partisanship that began in the CBO's infancy under its first director, Alice Rivlin. Rivlin (a Brookings colleague) shrewdly realized that if the CBO could ever be attacked as merely a partisan tool, its days would be numbered. She and her successors achieved what the OTA could not—they consistently earned criticism from both sides of the aisle, and thus avoided vulnerability when the political winds shifted (especially in 1995).³⁶ Designers of a new Congressional Regulatory Office would do well to follow the CBO's model of nonpartisan, technical excellence, rather than merely assuring bipartisan membership and rotation of the two parties' leadership.

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LEARNING FROM EXPERIENCE

Finally, perhaps the most promising area for reform is promoting what is often called “regulatory lookback”—which can be fairly summarized as institutionalizing a process of government learning.³⁷ Prospective CBA has been a wonderful development in forcing agencies to think carefully and objectively about the effects of their rules, but it generally

35 Douglas W. Elmendorf, “CBO's Appropriation Request for Fiscal Year 2015,” Testimony before the Subcommittee on the Legislative Branch, Committee on Appropriations, U.S. Senate (March 11, 2014) (<http://www.cbo.gov/sites/default/files/cbofiles/attachments/45162-BudgetRequest2015.pdf>).

36 For a thorough look at the factors contributing to CBO's success, see Philip G. Joyce, *The Congressional Budget Office: Honest Numbers, Power, and Policymaking* (Georgetown University Press, 2011), especially 24-47, 57, 212-214.

37 For an influential development of the idea, see Michael Greenstone, “Toward a Culture of Persistent Regulatory Experimentation and Evaluation,” in David Moss and John Cisternino, eds., *New Perspectives on Regulation* (Tobin Project, 2009) (http://tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf).

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takes place at the moment when we have the least information. After a regulation has been in place 5 or 10 years, both regulated interests and their regulators can assess a rule's impacts much more concretely, relying on experience rather than modeled estimations. This ought to create an ideal moment for evidence-based, incremental improvements. And yet the process as it exists right now does very little to utilize that information beyond various ad hoc or statute-specific mechanisms. Given the size and scope of our regulatory apparatus, and our growing experience with it, this represents one of the great missed opportunities in modern policymaking, which proponents of smarter regulation in both parties ought to be eager to seize.

In theory, we might imagine that Congress is the institution positioned to play the learning-and-adjusting role just outlined; in practice, it is hard to offer this suggestion with a straight face. The discrepancy between the growing mass of policies needing attention and Congress's apparently diminishing capacity to work through small-bore issues is too glaring. Congress actually made an attempt to routinize this function in the 1990s by instituting an annual "Corrections Day," in which legislators were to put aside partisan differences and address only those small-but-important regulatory fixes that might otherwise be neglected. Not surprisingly, the experiment was a failure: very few proposed fixes struck both parties as obviously non-controversial, and little was accomplished.³⁸

Lookback efforts in the executive branch have been met with greater success: President Clinton tasked Vice President Gore with a government-wide review; Bush 43's OIRA conducted a similar wide-scale effort; and President Obama has asked for the same. But, in the words of lookback proponent Cary Coglianese, these efforts have always remained "ad hoc, unsystematic, and fleeting."³⁹ President Obama (and his former OIRA chief, Cass Sunstein) pushed for more systemization, including through an executive order, but only Congress is in a position to take the several steps needed to realize the full potential of regulatory lookback.⁴⁰ First, Congress ought to pass a blanket requirement that agencies promulgating costly new rules explicitly build in methods for evaluating whether those rules are succeeding. This should

38 John Copeland Nagle, "Corrections Day," *UCLA Law Review* 43 (1996): 1267-1320.

39 Cary Coglianese, "Institutionalizing Regulatory Lookback," *RegBlog* (June 10, 2013) (<https://www.law.upenn.edu/blogs/regblog/2013/06/10-coglianese-regulatory-lookback.html>); also see his "Moving Forward with Regulatory Lookback," *Yale Journal on Regulation* 30 (2013): 57-66, (<http://jreg.commons.yale.edu/files/2013/06/Moving-Forward-with-Regulatory-Look-Back-final.pdf>).

40 Executive Order 13563, "Improving Regulation and Regulatory Review" (January 18, 2011) (<http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>); see Cass R. Sunstein, "The Regulatory Lookback," forthcoming in *Boston University Law Review* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360277).

include explicit methodological attention to questions of measurement, data collection, and benchmarks for success, thus facilitating the kind of “rigorous post-adoption analysis” we mostly lack today.⁴¹ Agencies should have few objections to thinking about and investing in the long-term success of their regulations.

Second, returning to this paper’s incessant theme, a full commitment to regulatory lookback would require building governmental capacity to see it through. As discussed above, although OIRA might be considered a natural place to centralize retrospective CBA (or at least quality control for such efforts conducted within agencies), neither its budget nor its staff have even kept pace with the growth in new regulations being issued every year. To ask it to take on the additional work of retrospective review would be unreasonable without significantly expanding its workforce and budget.

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There are also good reasons to locate regulatory lookback analysts outside of the executive branch, and so once again the GAO and CBO provide the best models. Various Republicans have proposed creating a “Congressional Office of Regulatory Analysis” over the years, most recently in 2011, but none of these bills has ever gotten any traction.⁴² Alternatively, the Progressive Policy Institute recommends creating a fully independent Regulatory Improvement Commission charged with identifying improvements to existing rules. Like the Base Closure and Realignment Commission (BRAC) that previously navigated choppy political waters, the Regulatory Improvement Commission’s recommendations would be guaranteed an up-or-down vote in Congress, and the body would need to be reauthorized for each new round of review.⁴³ Title III of the aforementioned SCRUB Act also provides the germ of good proposal in this respect, but needs to be developed significantly.

Proposals to build institutional capacity for retrospective reviews cannot succeed, either as a matter of politics or policy, if they merely seek to create a fancy device for regulatory roll-back.

41 Ralph S. Tyler, “Does Regulation Work?” *RegBlog* (August 14, 2013) (<https://www.law.upenn.edu/blogs/regblog/2013/08/14-tyler-does-regulation-work.html>).

42 Sam Batkins and Ike Brannon, “Toward a New and Improved Regulatory Apparatus,” *Regulation* (Spring 2013): 17 (<http://object.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-6.pdf>); the most recent bill, sponsored by Don Young (R-AK), was H.R. 214 in the 112th Congress.

43 Michael Mandel and Diana G. Carew, “Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform,” Progressive Policy Institute Policy Memo (May 2013) (http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf): 14.

Unfortunately, the main section of the SCRUB Act, which would create a Retrospective Regulatory Review Commission (RRRC) with nine members, answers to this description rather well. The RRRC would conduct its studies solely for the purpose of finding rules to axe, and in fact would have the power to do so given passive congressional acquiescence. To conduct its rule-cutting mission, it would draw its funding from the budgets of existing agencies, taking up to \$25 million or 1 percent of “unobligated amounts made available” from each—which could represent a sum that would dwarf the CBO’s budget. Far from mimicking the CBO’s studied neutrality, then, the RRRC would be a powerful force for regulated firms to mobilize against any rules they found inconvenient.

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Far better would be an institution that had the freedom to conduct studies without automatic consequences: a facilitator of learning and incremental improvement, rather than a professional second-guesser of agency judgment. Not only would an objective approach be more likely to win bipartisan approval, it would also be more likely to win the cooperation of agencies rather than engendering adversarial suspicion and resistance. This would open the door to many opportunities for experimentation, including helping to devise randomized control tests for policy interventions and

acting as a central clearinghouse for decentralized information collection, perhaps including prediction markets.⁴⁴

THE BOTTOM LINE: BOTH PARTIES SHOULD SUPPORT BUILDING CAPACITY FOR BETTER REGULATION

Presumably, everyone is in favor of “better,” “smarter,” “more efficient” regulation. These phrases can easily become empty slogans used to mask important philosophical differences about the right way to determine our administrative state’s regulatory outputs; true radicals on both the left and right may have serious reasons for disliking our current usage of CBA. And yet these deep (and perhaps timeless) issues should not prevent a bipartisan center—which continues to exist in a fully respectable form on this issue—from improving on our current regime. Those who wish for CBA to be applied more broadly, with better information, and with an eye toward ensuring accountability ought to seize existing opportunities for reform. In most cases, doing this sensibly requires building up some amount of institutional capacity, either in the executive branch (through expansion of OIRA) or in Congress (through beefing up the GAO or creating a neutral, CBO-like body devoted to studying regulatory

⁴⁴ Two right-leaning theorists have described some such possibilities in recent books: Jim Manzi, *Uncontrolled: The Surprising Payoff of Trial-and-Error for Business, Politics, and Society* (New York: Basic Books, 2012); and John O. McGinnis, *Accelerating Democracy: Transforming Governance through Technology* (Princeton, NJ: Princeton University Press, 2013), especially 48-59, 109-120.

impacts). Notwithstanding inevitable gripes about “not needing yet another government agency,” prudent and far-sighted legislators in both parties ought to understand the likely returns on such investments.

If would-be regulatory reformers allow their issue to be turned into just another midterm-campaign talking point, they risk promoting the long-term politicization of what should be a point of bipartisan agreement. They need to focus on enacting realistic reforms. To state the obvious: the benefits of this approach far outweigh the costs.

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