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EVALUATING REGULATORY REFORMS
Lessons for Future Reforms

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Abstract

Over the decades, regulatory reforms have sought to increase agency accountability and improve the quality of regulatory analysis and decision-making, with varying success. In this paper, I draw upon previous reform experiences to identify four criteria for effective reforms: independent oversight, veto power, broad applicability, and expertise. Thus, successful reforms charge an actor independent of the executive branch with overseeing agency rulemaking. They grant the independent actor sufficient veto power to enforce agency compliance. They apply independent oversight broadly to all major regulations and allow few exceptions. Finally, reforms appoint the independent actor that has the scientific and economic expertise to peer-review agency analysis. Using these criteria, I evaluate the major reforms proposed in the 112th Congress to assess whether these reforms would limit agency discretion while improving the quality of regulatory analysis in the rulemaking process.

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Evaluating Regulatory Reforms:

Lessons for Future Reforms

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Whether they think that agencies regulate too much or not enough, critics from widely differing perspectives agree that rulemaking is all too often hijacked by special interests. Some critics claim that federal agencies are influenced too much by calls for new regulation from various activist groups.[1] Others argue that powerful industry lobbies often derail necessary regulation and leave people exposed to environmental harms and unsafe products.[2] Some critics blame presidential oversight for unnecessarily politicizing the regulatory process and delaying regulations necessary to protect public health, safety, and the environment.[3] Implicitly, they assume that left to their own devices, policy-neutral experts within federal agencies would produce better regulations to serve the public need. In contrast, other critics point to agency unaccountability as the source of excessive and often inefficient regulation.[4] They seek to improve the process by strengthening either congressional or judicial oversight. Yet all these critics can agree on the need for reforming the process.

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[1] *E.g.*, James L. Gattuso, *Reforming Regulation*, Issue Brief 3677 (Heritage Foundation, Washington, DC), July 25, 2012; Wayne Crews, *Ten Thousand Commandments 2012* (Competitive Enterprise Institute, Washington, DC), May 15, 2012; Richard Williams & Sherzod Abdukadirov, *Blueprint for Regulatory Reform*, Working Paper (Mercatus Center at George Mason University, Arlington, VA), Feb. 7, 2012.

[2] *E.g.*, Rena Steinzor & Ruth Radin, *Cozying Up*, White Paper 1211 (Center for Progressive Reform), Sept. 2012; Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy*, White Paper 1109 (Center for Progressive Reform), July 2011; Center for Effective Government, *Anti-regulatory Forces Target Agency Science to Undermine Health and Safety Standards*, 1 GOVERNMENT MATTERS, Feb. 26, 2013, at 7.

[3] Rena Steinzor et al., *Behind Closed Doors at the White House*, White Paper 1111 (Center for Progressive Reform), Nov. 2011.

[4] Christopher DeMuth, *The Regulatory State*, 12 NATIONAL AFFAIRS 70 (*in* a9h, 2012); Williams & Abdukadirov, *supra* note 1.

Both greater agency accountability and better analytical quality of regulatory decision-making could improve rulemaking and curtail special-interest politics in the process. The tension between different approaches to regulatory reform stems largely from the fact that the tasks of improving accountability and expertise in rulemaking fall on different government branches. Because economic and scientific expertise is concentrated primarily in the executive branch, efforts to improve the regulations' analytical quality generally empower the executive. In contrast, efforts to increase accountability in the rulemaking process typically aim to constrain the executive branch by shifting control toward the legislative or judicial branches.

But reforms pursuing greater accountability and those pursuing increased expertise need not be mutually exclusive. In fact, greater agency accountability provided through rigorous peer review could improve the quality of regulatory analysis. In turn, better economic analysis could expose special-interest-driven regulatory decisions. Thus, the most successful regulatory reforms would advance both accountability and analytical quality in rulemaking.

In this paper, I take no position on the expertise vs. accountability dichotomy and instead focus on identifying reforms that would improve rulemaking along both lines. I evaluate past experiences with reform in order to outline the criteria for effective regulatory reforms. As part of this survey of past reforms, I identify the primary mechanisms through which reforms have attempted to alter the rulemaking process's outcomes. In particular, I focus on the changes in relative power and incentives that each past reform brought to various actors in the regulatory process. I then apply the criteria for effective reforms to major recent reform proposals. Using the insights from past experiences, I evaluate whether these proposed reforms are likely to provide robust checks in the process and improve the analytical quality of regulations.

This paper is structured as follows: In the first part, I discuss the competing goals of accountability and expertise in rulemaking and the potential tensions that arise with reforms pursuing these goals. In the second part, I provide a brief background on regulatory reforms to date, including the goals they have pursued and their effectiveness in achieving those goals. In the third part, I use the lessons drawn from previous reform experiences to identify the criteria for successful reforms. In the fourth part, I use these criteria to evaluate major recent reform proposals. Finally, in the fifth part, I compare the proposed reforms on their potential to improve both accountability and analytical quality of regulatory decision-making. I find that two of the proposed reforms, the creation of the Congressional Office of Regulatory Affairs and particularly the Regulatory Accountability Act, score well across all criteria and are likely to be effective at improving federal rulemaking.

1. Competing Goals of the Regulatory Process

Different advocates of regulatory reform usually emphasize either the need for the regulatory process to have greater accountability to stakeholders and the general public or the need for the process to have better scientific and economic analysis to guide complex regulatory decisions.[5] Rulemaking involves a great deal of value judgments and policy-based assumptions, which call for greater accountability in the process to keep agency discretion in check; yet, in the increasingly complex modern economy, it often requires highly specialized factual knowledge and expertise.

The accountability goal emphasizes the citizens' right to ensure that their interests are taken into account during the rulemaking process, as well as their right to hold the policymakers

[5] *See supra* p. 3.

accountable for the enacted policies.[6] In the rulemaking process, accountability is ensured through two channels: through Congress and through direct public participation. Congress authorizes agencies to issue rules.[7] Agencies cannot regulate without congressional authorization, and Congress has the power to hold agencies accountable for their rulemaking. Thus, all rulemaking ultimately flows from Congress.

In contrast to congressional accountability, direct public accountability focuses on procedures that allow affected parties and public-interest groups to directly shape regulatory policy.[8] In practical terms, this approach has led to greater use of the commenting process, which allows interested parties to voice their concerns directly to the regulatory agencies.[9] Advocates of this approach have also called for greater transparency in agency decision-making and for improved access to the relevant regulatory documents to make it easier for the general public to monitor regulatory activity.[10] Should agencies fail to faithfully and impartially implement the authorizing statutes, the affected members of the public have the right to challenge the rules in court. Judicial review can enforce agency compliance with procedural rulemaking requirements. It also implies transparency in the process, since the public must be able to assess agency compliance with procedural rules in order to challenge transgressions in court.[11]

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[6] McNollgast, *The Political Economy of Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1664–65 (A. Mitchell Polinsky & Steven Shavell eds., New York, Elsevier 2007).
[7] CQ PRESS, FEDERAL REGULATORY DIRECTORY 16–18 (Washington, DC, CQ Press, 15th ed. 2011).
[8] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264–69 (2001); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441–43 (2003).
[9] Kagan, *supra* note 8, at 2265; Lisa Schultz Bressman, *Beyond Accountability*, 78 N.Y.U. L. REV. 461, 476 (2003).
[10] Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. L. REV. 924 (2009).
[11] *Id.*

The main drawback of the accountability approach is that the procedures aimed at improving the accountability of the rulemaking process can be hijacked by special interests.[12] Critics of Congress's role in rulemaking see Congress as simply a conduit for pressure groups.[13] Similarly, critics of direct public participation point out that the parties participating in the regulatory process are largely self-selected, and that organized interests commonly dominate the commenting process.[14] And while the commenting process is open to all groups, agencies are more likely to respond to comments representing businesses than private individuals.[15]

Furthermore, greater accountability does not guarantee that rules will be efficient.[16] As issues subject to government regulation grow more complex, rulemaking and regulation require greater expertise, which requires a substantial investment of time and resources to acquire. Legislators and even parties affected by the regulation may not have the necessary expertise to account for the full range of available options and trade-offs.[17] Similarly, the courts may lack the

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[12] *See* Kagan, *supra* note 8, at 2266 (describing criticism of interest-participation model as replacing reasoned administrative decision making with unmitigated interest-group bargaining); McNollgast, *supra* note 6 (describing mobilization-bias critique of democratic elections, which may allow some interests to dominate the process).

[13] *See* Kagan, *supra* note 8, at 2260 (describing the interest groups' influence through congressional committees); *see also* BURDETT A. LOOMIS & WENDY J. SCHILLER, THE CONTEMPORARY CONGRESS 148–50 (Belmont, CA, Wadsworth Publishing, 4th ed. 2004) (making a similar point).

[14] Marissa Martino Golden, *Interest Groups in the Rule-Making Process*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998); CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING (Washington, DC, CQ Press, 4th ed. 2010).

[15] Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business?*, 68 J. POL. 128 (2006); KEN GODWIN ET AL., LOBBYING AND POLICYMAKING 98–103 (Thousand Oaks, CA, CQ Press 2013) (however, the authors point out that business groups' success may be due to the type of changes they request: in contrast to citizen groups, businesses were more likely to request that agencies keep the rules the same).

[16] *See* Robert B. Reich, *Warring Critiques of Regulation*, 3 REG. 37 (1979) (describing the political responsiveness and efficiency trade-off); *see also* Coglianese et al., *supra* note 10, at 928–30 (stating that excessive regulatory participation and transparency may prevent agencies from better decision-making); Martin Shapiro, *Administrative Discretion*, 92 YALE L.J. 1487, 1495–1500 (1982) (discussing the democracy-technocracy dichotomy).

[17] *See* Kagan, *supra* note 8, at 2261 (describing the need for expertise in government as the main justification for congressional delegation of rulemaking power to administrative agencies); Morris P. Fiorina, *Legislative Choice of Regulatory Forms*, 39 PUB. CHOICE 33, 45–46 (1982) (arguing that high decision-making costs prompt legislators to delegate to agency experts); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994) (arguing that policy uncertainty increases chances of congressional delegation to agencies).

expertise to adjudicate complex regulatory issues.[18] Agencies themselves can fall short in identifying and applying the expertise necessary to regulate effectively and efficiently.

In contrast to the goal of accountability, the goal of expertise emphasizes a scientific approach to regulation.[19] Thus, if the government chooses to intervene in markets or private lives through regulation, it ought to ensure that its actions are informed by the best available scientific knowledge and can be reasonably expected to ameliorate the problem.[20] In the rulemaking process, the task of supplying this expertise falls to the regulatory agencies because, unlike the other branches, they have specialized knowledge on the given regulatory issues.[21] Commonly, Congress outlines its broad policy goals in the authorizing statutes and charges the regulatory agencies to issue rules based on these statutes.[22] Agencies then issue specific regulatory requirements guided by scientific and economic analysis in order to implement the congressional statutes.[23]

The earliest proponents of expertise-driven rulemaking during the Progressive and New Deal eras saw agencies as not only the carriers of expertise but also the guardians of the public interest.[24] They argued that administration and regulation should be left to agency

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[18] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 57–59 (Cambridge, MA, Harvard University Press 1995).
[19] Kagan, *supra* note 8, at 2261–63 (describing the arguments for expertise-driven rulemaking); William L. Morrow, *The Pluralist Legacy in American Public Administration*, *in* A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 161, 170–72 (Ralph C. Chandler ed., New York, Free Press 1987) (calling administration a science-based search for morality).
[20] Williams & Abdukadirov, *supra* note 1.
[21] Shapiro, *supra* note 16, at 1487 (describing the Progressive reforms establishing professionalized bureaucracy as the source of expertise within the federal government); N. Joseph Cayer, *Managing Human Resources*, *in* A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 321, 326–30 (Ralph C. Chandler ed., New York, Free Press 1987) (describing the marriage of personnel reform and Scientific Management leading to a creation of professional bureaucracy with specialized expertise).
[22] CQ PRESS, *supra* note 7, at 16–17.
[23] GARY C. BRYNER, BUREAUCRATIC DISCRETION 41–42 (New York, Pergamon Press 1987).
[24] Morrow, *supra* note 19, at 172 (describing the Progressive belief that neutral agency experts would be better able to represent public needs); Kagan, *supra* note 8, at 2261 (summarizing New Deal advocate James Landis's argument that expertise imposes its own standards that guard against abuse of discretion).

experts.[25] Criticizing traditional Congress-dominated rulemaking, which they saw as driven by parochial interests, they believed that trained agency experts, insulated from electoral politics, would better represent the public interest.[26] The advocates of this technocratic view of rulemaking tended to see politics as completely separate from administration and discounted the importance of value judgments in policy.[27] To them, politics involved making broad decisions, while administration and policy implementation could be pursued through scientific discovery of a single best solution to a problem, making politics irrelevant.[28]

The expertise-driven model rested on the unrealistic assumptions that agency experts would be entirely immune to the pressures of interest-group politics and that agencies would have no preferences or regulatory agendas of their own.[29] In fact, pressure groups quickly learned that they could achieve their ends by bypassing Congress and capturing agencies directly.[30] They could staff agencies with their loyalists or offer lucrative positions to agency staff in exchange for favorable regulation through the revolving-door mechanism.[31]

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[25] The leading New Deal advocate James Landis argues that "the administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes." JAMES MCCAULEY LANDIS, THE ADMINISTRATIVE PROCESS 14 (New Haven, CT, Yale University Press 1966).

[26] *See supra* note 24 and accompanying text.

[27] *See* Laurence J. O'Toole Jr., *Doctrines and Developments*, *in* THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 35, 38–40 (Richard Joseph Stillman ed., Lanham, MD, University Press of America 1989) (describing the Progressive conception of politics/administration dichotomy); *see also* Louis C. Gawthrop, *Toward an Ethical Convergence of Democratic Theory and Administrative Politics*, *in* A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 189, 195–96 (Ralph C. Chandler ed., New York, Free Press 1987) (describing Woodrow Wilson's seminal article "The Study of Administration," which posited the politics/administration dichotomy).

[28] Cayer, *supra* note 21, at 328; Morrow, *supra* note 19, at 170.

[29] *See, e.g.*, Kagan, *supra* note 8, at 2261–62 (summarizing criticism of technocratic view of administration); James P. Pfiffner, *Political Appointees and Career Executives*, *in* THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 141, 148 (Richard Joseph Stillman ed., Lanham, MD, University Press of America 1989) (summarizing criticism of simple politics/administration dichotomy).

[30] *See* Samuel P. Huntington, *Marasmus of the ICC*, 61 YALE L.J. 467 (1952) (describing the regulatory capture of Interstate Commerce Commission by the railroad industry it was created to supervise); *see also* MARC ALLEN EISNER, CONTEMPORARY REGULATORY POLICY 9–10 (Boulder, CO, Lynne Rienner Publishers, Inc. 2006) (summarizing the regulatory capture theory).

[31] Ernesto Dal Bó, *Regulatory Capture*, 22 OXF. REV. ECON. POLICY 203 (2006).

In addition, agencies, like other organizations, frequently seek to increase their power and budgets.[32] Thus, an agency's actions commonly promote its own, rather than the public's, interest. Moreover, mission-driven agencies often suffer from "tunnel vision," which leads them to focus on their narrow regulatory area to the exclusion of broader policy impacts.[33] This may lead them to pursue costly regulation even if society's resources could be spent more efficiently and with greater benefit on other policy goals.

Advocates of regulatory reform often see the goals of accountability and expertise as being in competition with each other. Some advocates bemoan executive overreach and lack of agency accountability in the rulemaking process; they typically call for more constraints on agency discretion and for greater oversight of regulatory activity.[34] Others believe that agencies are best positioned to produce rules in the public interest and see greater oversight as needlessly politicizing and ossifying the rulemaking process, increasing the costs of regulation and leading agencies to underregulate.[35] Advocates of this latter kind typically call for greater rulemaking powers for agencies.

Yet the goals of accountability and expertise are not mutually exclusive. In fact, greater accountability may improve the analytical quality of rulemaking through peer review and stakeholder input.[36] Stakeholder input often serves informational goals.[37] Agencies may not realize the impact a proposed regulation might have on some groups. Testimonies by the affected parties can fill those gaps in knowledge and lead to more efficient regulation. In addition, external peer review may limit the agencies' ability to subordinate their analysis to political

[32] WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (Transaction Publishers 1974).
[33] BREYER, *supra* note 18.
[34] *See supra* note 1.
[35] *See supra* note 2.
[36] Coglianese et al., *supra* note 10, at 926–30.
[37] *Id.*

goals.[38] Peer review may also shield agency experts from political pressure and free them to focus on producing better analysis.[39]

Similarly, better economic analysis may improve accountability by informing the public about the specific impacts of a proposed rule.[40] In their analyses, agencies have to examine a wide range of regulatory options, estimate the costs and benefits of each alternative, and select the option that has the highest net benefits (unless explicitly prohibited by law).[41] Thus, if a rule were to provide concentrated benefits to a pressure group while leaving the public to pick up the tab, a good economic analysis would make that immediately apparent. Consequently, improved analysis may act as a check on the excessive influence of pressure groups.

The tension between these goals often arises from disagreements over the extent of the powers that agencies should be given to shape regulations. Greater accountability typically implies more stringent legislative and judicial checks on agency rulemaking powers. Congress can reduce agency discretion by making policy directly through legislation rather than delegating policy creation to agencies. This would improve agency accountability but might also preclude agencies from considering more efficient and effective alternatives.[42] On the other hand, broader congressional delegation would allow agencies the flexibility to consider a wider range of alternatives and to select the one that improves social welfare the most, but it would also leave agencies considerable discretion to pursue their own policy agendas.

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[38] *See, e.g.*, PHILIP G. JOYCE, THE CONGRESSIONAL BUDGET OFFICE 208–10 (Washington, DC, Georgetown University Press 2011) (arguing that the Congressional Budget Office, by breaking the Office of Management and Budget's monopoly on budgetary analysis, allowed Congress to assert its independence from the president).
[39] *Id.* at 210–12.
[40] Kenneth J. Arrow et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, 2 ENVIRONMENT AND DEVELOPMENT ECONOMICS 195 (1997).
[41] Office of Management and Budget, *Circular A-4* (Office of Management and Budget, Washington, DC, 2003).
[42] For a discussion on trade-off between legislative policymaking and delegation, *see* John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON & ORG. 1 (1990); Fiorina, *supra* note 17; Epstein & O'Halloran, *supra* note 17.

To balance these goals, Congress and other branches have developed an approach that allows agencies considerable discretion in rulemaking through broad delegation but provides ex post external checks on their regulatory activity.[43] Yet, as the following section demonstrates, developing efficient checks on agency rulemaking has proved to be a considerable challenge.

2. Regulatory Reforms to Date

The modern regulatory state is intrinsically linked to the Progressive movement.[44] The regulatory state's origins on the federal level can be traced to two major reforms in the 1880s: the Pendleton Civil Service Reform Act of 1883[45] and the Interstate Commerce Act of 1887, which created the first regulatory agency—the Interstate Commerce Commission (ICC).[46] Together, these two reforms significantly empowered the bureaucracy, increasing its role in the rulemaking process, and established agencies as the main repository of expert knowledge within the federal government.

The Pendleton Act, while not directly related to the regulatory system, had a major impact on the system's development. The decades before the Act were characterized by the extensive politicization of government.[47] The "spoils system" that developed during the Andrew

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[43] For an overview of congressional ex post and ex ante controls, *see* McNollgast, *supra* note 6, at 1705–15; *see also* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007).

[44] For an overview of the Progressive movement's impact on the foundation of the modern administrative state, *see* THOMAS K. MCCRAW, PROPHETS OF REGULATION (Cambridge, MA, Belknap Press of Harvard University Press 1984); RICHARD JOSEPH STILLMAN, CREATING THE AMERICAN STATE (Tuscaloosa, AL, University of Alabama Press 1998); Paul P. Van Riper, *The American Administrative State*, *in* A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 3 (Ralph C. Chandler ed., New York, Free Press 1987).

[45] Civil Service Reform (Pendleton) Act of 1883, ch. 27, 22 Stat. 403 (1883).

[46] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

[47] Gawthrop, *supra* note 27, at 193–94; Van Riper, *supra* note 44, at 13–14; STILLMAN, *supra* note 44, at 26–28; O'Toole, *supra* note 27, at 40–42.

Jackson administration gave politicians, and especially the party machinery that supported them, complete control over appointments within the administration.[48] Parties traded office appointments in exchange for political support, and appointments were based on party loyalty rather than merit or expertise.[49] A new crop of office seekers rode each newly elected president's coattails to replace the current officeholders.[50] As a result, corruption was rife and quality of administration low within the federal government.[51]

The Pendleton Act empowered agencies to select and promote employees based on expertise and merit.[52] Thus, it opened up employment opportunities to all applicants regardless of their political loyalties and required applicants to pass job-related exams to assess their fitness for public service. Most importantly, the reform took the power to make most administrative appointments away from the president and entrusted it to the Civil Service Commission.[53] In addition, it took away the political appointees' power to remove civil-service employees in order to prevent retaliatory firings.[54] Thus, the reform insulated the appointment process from political pressures and increased the professionalism of the federal workforce.

The second reform, which marked the birth of the federal regulatory system, created the ICC to regulate railroads.[55] Rapid industrialization during the nineteenth century brought with it increasingly complex issues that demanded legislators' attention—none more crucial than "the

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[48] Van Riper, *supra* note 44, at 13; STILLMAN, *supra* note 44, at 24.
[49] Cayer, *supra* note 21, at 326; STILLMAN, *supra* note 44, at 26–27.
[50] *See* Gawthrop, *supra* note 27, at 194–95 (quoting the Nation editorial, which denounced the practice of rotating civil service employees and called it a "quadrennial terror").
[51] Cayer, *supra* note 21, at 326; Van Riper, *supra* note 44, at 13; STILLMAN, *supra* note 44, at 26.
[52] STILLMAN, *supra* note 44, at 36–37.
[53] O'Toole, *supra* note 27, at 41–42.
[54] Van Riper, *supra* note 44, at 18–19.
[55] Richard Joseph Stillman, *The Constitutional Bicentennial and the Centenial of the American Administrative State*, *in* THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 1, 5–8 (Richard Joseph Stillman ed., Lanham, MD, University Press of America 1989).

railroad problem," a set of issues related to railroad rates and safety.[56] Railroad critics, particularly farmers in the Midwest, vocally objected to monopolistic and discriminatory rates charged to shippers.[57] As a result, legislatures in several midwestern states passed the so-called "Granger Laws," which set the maximum rates that railroad companies could charge consumers.[58] But the fear that the laws would hinder investment in railroad infrastructure led the "Granger" states to soften or repeal the laws.[59]

Eastern states, led by Massachusetts, adopted a less intrusive approach.[60] Massachusetts established a Board of Railroad Commissioners to supervise the industry. The Board functioned as a "sunshine commission" investigating and publicizing the industry's activities.[61] In contrast to the "Granger Laws" in midwestern states, which established legal restrictions on rail rates, the Massachusetts Commission did not have regulatory powers to set rates. It relied on publicity and an implicit threat of legislative or judicial action to convince railroad companies to take corrective actions voluntarily.[62] The Commission's most critical features were independence and expertise.[63] Charles Francis Adams Jr., the mastermind behind the Commission, distrusted the legislature's ability to supervise the railroads: he saw the legislature's high turnover rate as an impediment to acquiring the expertise necessary to make sense of the growing industry.[64] His solution was to

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[56] *See, e.g.*, STILLMAN, *supra* note 44, at 51–52 (discussing the railroad industry's transformative impact on the national economy); *see also* JAMES W. ELY, RAILROADS AND AMERICAN LAW 84 (Lawrence, KS, University Press of Kansas 2001) (describing how the railroad industry, as the first big business, became the obvious target for the public anxieties caused by rapid industrialization).
[57] ELY, *supra* note 56, at 86–87.
[58] *Id.*
[59] The most stringent of these laws, the Potter law in Wisconsin, was repealed two years after it passed. *See id.*
[60] STILLMAN, *supra* note 44, at 53–62; MCCRAW, *supra* note 44, at 17–44; ELY, *supra* note 56, at 85.
[61] STILLMAN, *supra* note 44, at 54.
[62] ELY, *supra* note 56, at 85–87 (contrasting eastern and midwestern approaches to railroad regulation).
[63] STILLMAN, *supra* note 44, at 55.
[64] Adams argued that "[k]nowledge cannot possibly creep into the legislature, because no one remains in the legislature long enough to learn." *Id.*; *see also* LANDIS, *supra* note 25, at 23–24 (arguing that long tenures in civil service were necessary to developing expertise).

vest the investigative responsibility in the Board of Railroad Commissioners as a permanent advisory commission.[65]

When the federal government joined the states' efforts to regulate railroads, Congress modeled the ICC after the Massachusetts Board.[66] During the Commission's earliest years, it acted primarily as a sunshine commission, relying on publicity and its influence with the congressional committees to prompt railroad companies' cooperation.[67] Over the following decades, Congress issued several statutes empowering the Commission to set the rates and adjudicate complaints, thus transforming its role from an advisory into a regulatory one.[68] The ICC served as a model for other independent regulatory commissions.[69]

The following decades saw a continuing trend toward empowering federal agencies. On the analytical-capacity side, successive administrations expanded the Pendleton Act, which originally covered only a small portion of the federal workforce, to apply to virtually all federal employees, effectively ending the spoils system.[70] In addition, Progressive reformers enthusiastically adopted in government administration the "scientific management" principles first developed in the private sector.[71] In particular, they pushed through the Budget and Accounting Act of 1921, which charged the Treasury Department with drafting a federal budget.[72] Before the Act, individual agencies requested funds directly from the relevant

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[65] STILLMAN, *supra* note 44, at 55.
[66] *Id.* at 60–61.
[67] While the statute charged the Commission with ensuring reasonable and fair rates, it did not explicitly delegate the rate-setting power to the Commission. The Court interpreted the statute's ambiguous wording against the agency, leaving it with only investigative powers. JOSHUA BERNHARDT, THE INTERSTATE COMMERCE COMMISSION 14–15 (Baltimore, MD, John Hopkins Press 1923).
[68] *Id.* at 20–42.
[69] EISNER, *supra* note 30, at 34–35.
[70] Van Riper, *supra* note 44, at 19; Cayer, *supra* note 21, at 326–27.
[71] STILLMAN, *supra* note 44, at 111–20 (describing the Progressives' adoption and implementation of Taylorism in both local and federal administration).
[72] *Id.* at 116–17; *see also* O'Toole, *supra* note 27, at 42–45.

congressional committees in a process that critics said lacked transparency, coordination, and accountability. The reformers saw the federal budget as a tool to advance administrative efficiency and professionalism within the federal agencies. On the policymaking side, Congress continued to delegate rulemaking powers to the existing and newly created agencies through broad, open-ended statutes. The process culminated in the "alphabet soup" of agencies created during the New Deal.[73]

The New Deal marked the high point of an almost-blind trust in the experts' ability to solve the nation's social and economic ills. The reforms that followed reflected the growing unease with the unconstrained policymaking powers of the bureaucracy. In their efforts to rein in the greatly expanded bureaucracy, the reforms either procedurally constrained agency discretion or empowered other parts of the federal government to oversee and control the policymaking process.

The earliest attempts to check the bureaucracy's policymaking powers came during the New Deal. In response to increasingly vocal criticism of the "headless fourth branch," the Franklin Roosevelt administration commissioned the Brownlow report to address agency oversight.[74] While the report's suggestions did not pass as a single legislation, most of the suggestions found their way into law in piecemeal fashion through legislation and executive orders.[75] The report advocated administrative reforms that increased presidential control over agencies.[76] In particular, the reforms created the Executive Office of the President (EOP) to increase the president's oversight capacity; they also transferred the Bureau of Budget (later the

[73] Stewart, *supra* note 8, at 440.
[74] STILLMAN, *supra* note 44, at 155 (describing FDR commissioning the report in order to ward off potential criticism by his political opponents of his administration's lack of control over the agencies).
[75] *Id.* at 157–58.
[76] *Id.* at 157.

Office of Management and Budget, or OMB) from the Treasury to the EOP, providing the president with a major lever of control over agencies.[77]

The next major regulatory reform came from the congressional attempt to reassert its control over the process. In 1946, Congress passed the Administrative Procedures Act (APA), which prescribed in some detail the process that agencies must follow when issuing regulations. This law laid the foundation for the current regulatory system.[78] The reform increased congressional control over the regulatory process in several ways. First, it reduced agency discretion in rulemaking; agencies would now have to follow a standardized set of procedures in order to issue rules.[79] Second, the Act increased the process's transparency by requiring agencies to (among other things) open their meetings to the public and to issue advance notice of their intent to regulate. This requirement made it easier for Congress and other stakeholders to follow regulatory activity.[80] Third, the Act empowered the courts to enforce statutory requirements by setting out judicial-review standards and authorizing the courts to set aside rules that were "arbitrary, capricious," or "an abuse of discretion."[81]

Through the APA reforms, Congress pursued a dual goal of increasing agency accountability in the rulemaking process while ensuring that policies were still informed by the best available science. Congress had two potential strategies to reassert its powers in the policymaking process.[82] The first strategy would have been for Congress to write very detailed

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[77] Jerry L. McCaffery, *The Development of Public Budgeting in the United States*, *in* A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 345, 366 (Ralph C. Chandler ed., New York, Free Press 1987); STILLMAN, *supra* note 44, at 157–58.
[78] Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–6 (2000).
[79] McCubbins et al., *supra* note 43; Bressman, *supra* note 43.
[80] McCubbins et al., *supra* note 43; Bressman, *supra* note 43.
[81] BRYNER, *supra* note 23, at 21; McNollgast, *supra* note 6, at 263.
[82] *See, e.g.*, McNollgast, *supra* note 6, at 1705–15; McCubbins & Schwartz, *supra* note 43; Bressman, *supra* note 43; McCubbins et al., *supra* note 43.

and highly prescriptive statutes, similar to agency regulations, which would have substantially reduced agency discretion. In other words, Congress could have stopped delegating legislative powers to the executive branch. Agencies would then have been reduced to implementing congressional statutes and would have had few policymaking powers. That strategy's main drawback was that writing detailed statutes required substantial expertise and investigative resources that Congress did not have. Lack of expertise was the reason that Congress chose to delegate some policymaking powers to agencies in the first place.

Instead, Congress opted for a second strategy that involved setting up ex post controls. The APA's transparency requirements made it easier for stakeholders and other interested parties to keep an eye on regulatory activities. These groups would use their resources to monitor regulations and alert Congress should proposed regulations deviate from congressional intent. Furthermore, by making rules subject to judicial review, Congress delegated the enforcement of the APA prescriptions to the courts. Congress did not have to spend its own time and resources to monitor agency compliance. Instead, it relied on the courts' expertise in statutory interpretation to ensure that agencies did not abuse their delegated powers. It also relied on the regulated entities to monitor the regulatory agencies and to challenge agency decision-making in court. Given the high costs of litigation and the courts' limited time and resources, the courts reviewed only a fraction of all rules.[83]

The ex post controls established under the APA were strengthened in the 1970s as a result of statutes and court cases.[84] In particular, the courts extended to public-interest groups the legal standing to challenge regulations in court. This change was made to ensure meaningful

[83] BREYER, *supra* note 18, at 58–59.
[84] Stewart, *supra* note 8, at 441–43; Bressman, *supra* note 9, at 475–78; Kagan, *supra* note 8, at 2265.

participation in the regulatory process for all affected groups.[85] Similarly, Congress passed provisions within some environmental and safety statutes that increased public participatory opportunities.[86] These changes empowered the public by giving affected parties wider access to the regulatory process. This also empowered the courts, because the reforms relied on the courts for enforcement.

In the following decades, Congress pursued a different strategy of regulatory reform. Rather than focus on the overall process, congressional reforms aimed at constraining agency discretion in specific areas of regulation by reducing the bureaucracy's monopoly on expertise. For example, the 1977 amendments to the Clean Air Act called for the creation of the Clean Air Scientific Advisory Committee (CASAC) to advise the Environmental Protection Agency (EPA) on its National Ambient Air Quality Standards (NAAQS).[87] The 1977 amendment required the EPA to review its NAAQS criteria for air pollutants every five years. To ensure the quality of the scientific analysis that formed the basis of the EPA's NAAQS criteria, Congress also charged the CASAC with reviewing the EPA's analysis.[88] The committee, appointed by the EPA administrator, was to consist of subject-matter experts with no apparent conflicts of interest.[89] Congress established a similar peer-review process to be conducted by the Scientific Advisory Panel (SAP) for the EPA's pesticide regulations under 1975 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act.[90]

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[85] Kagan, *supra* note 8, at 2265 n.69; Bressman, *supra* note 9, at 477 n.68.
[86] Kagan, *supra* note 8, at 2265 n.70.
[87] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 691 § 106 (1977).
[88] *Id.*; *see also* SHEILA JASANOFF, THE FIFTH BRANCH 101–22 (Cambridge, MA, Harvard University Press 1990) (reviewing the EPA's relationship with the CASAC).
[89] Clean Air Act Amendments of 1977, § 106 ("The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.").
[90] Federal Insecticide, Fungicide, and Rodenticide Act of 1975, Pub. L. No. 94-140, 89 Stat. 751, 753 § 7 (1975); *see also* JASANOFF, *supra* note 88, at 123–51 (reviewing the EPA's relationship with the SAP).

These environmental statutes attempted to reduce the EPA's discretion and monopoly on scientific analysis by subjecting the agency's analysis to peer review by independent scientists. These reforms' overall outcome on constraining the agency was mixed. On some issues, the advisory panels exerted their influence and forced the agency to improve its analysis.[91] However, the panels played only an advisory role and had no veto power over the agency's final decisions.[92] In addition, given that the EPA controlled the appointment process, critics charged that the EPA captured advisory panels by ensuring that the committee members generally supported the agency's policy positions.[93]

Congress also looked for ways to alleviate regulatory burdens on select groups. The Regulatory Flexibility Act (RFA) of 1980 required agencies to consider the impact of their rules on small entities (businesses, governments, or organizations).[94] For each rule that had a significant economic impact on a substantial number of small entities, agencies had to produce a regulatory flexibility analysis, which examined the rule's overall impact on small entities and described the steps the agency took to minimize the rule's costs to small entities.[95] The RFA attempted to force agencies to tailor their rules in order to limit regulatory burdens on small entities; however, it left interpretation of the Act's key terms up to the agencies and provided for

[91] *See* JASANOFF, *supra* note 88, at 180–207 (describing the Scientific Advisory Board (SAB) helping the EPA to incorporate the new scientific knowledge into its regulatory analysis); *see also* BRUCE L. R. SMITH, THE ADVISERS 92–100 (Washington, DC, Brookings Institution 1992) (discussing the SAB's success in its advisory role).
[92] JASANOFF, *supra* note 88, at 98.
[93] *See id.* at 87–93 (describing the EPA's efforts to manipulate SAB's appointments to suit its political needs); *see also* Nicholas A. Ashford, *Advisory Committees in OSHA and EPA*, 9 SCIENCE, TECHNOLOGY & HUMAN VALUES 72, 76–77 (1984); Sidney A. Shapiro, *Public Accountability of Advisory Committees*, 1 RISK 189, 192 (1990) (discussing the EPA administrator's ability to "stack the deck" and appoint members that will rubber stamp the agency's decisions).
[94] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified in scattered sections of 5 U.S.C.).
[95] *Id.*

no oversight of agency compliance with the Act's requirements.[96] Consequently, agency interpretation and compliance with the RFA's requirements varied widely across agencies.[97]

In a similar attempt, Congress passed the Unfunded Mandates Reform Act (UMRA) in 1995 to limit the degree to which federal legislation and regulations imposed duties on state and local governments and the private sector without providing commensurate federal funding.[98] For regulations imposing unfunded mandates in excess of $100 million, the Act required agencies to estimate the regulatory costs and benefits.[99] In many ways, the UMRA's requirements significantly overlapped with those of President Clinton's Executive Order 12866 (discussed later in this paper). However, due to the numerous exceptions to the Act's requirements, only a small fraction of regulations ever triggered the UMRA's procedures.[100] And while the Act provided for judicial review of agency compliance, it gave the courts only limited enforcement powers. The courts could not invalidate a rule even if the agency failed to produce the required analysis.[101] Thus, the UMRA's limited coverage and enforcement provisions substantially constrained its impact.[102]

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[96] For example, the RFA never defined what qualified as a "significant impact" or "substantial number of small entities." Government Accountability Office, *Regulatory Flexibility Act*, GGD-94-105 1 (Government Printing Office, Washington, DC), Apr. 27, 1994.

[97] Government Accountability Office, *Regulatory Flexibility Act*, *supra* note 96.

[98] While the UMRA focused on both congressional legislation and federal regulation, in this paper I discuss only the regulatory portion of the act. The UMRA's impact on the legislative process in Congress is outside the scope of this article. Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

[99] Unfunded Mandates Reform Act, 2 U.S.C. § 1532 (1995).

[100] Government Accountability Office, *Federal Mandates*, GAO-11-385T (Government Printing Office, Washington, DC), Feb. 15, 2011.

[101] Unfunded Mandates Reform Act, § 1571 ("In any judicial review under any other Federal law of an agency rule for which a written statement or plan is required under sections 202 and 203(a) (1) and (2), the inadequacy or failure to prepare such statement (including the inadequacy or failure to prepare any estimate, analysis, statement or description) or written plan shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule.").

[102] Government Accountability Office, *Unfunded Mandates*, GAO-05-454 (Government Printing Office, Washington, DC), Mar. 31, 2005; Government Accountability Office, *Federal Mandates*, *supra* note 100.

In 1996, Congress attempted to correct the reforms' shortcomings by passing the Small Business Regulatory Enforcement Fairness Act (SBREFA).[103] The Act contained two key provisions. First, it gave the Small Business Administration a greater role in overseeing agency compliance and made compliance with the RFA requirements judicially reviewable. Thus, it corrected the RFA's major weakness by providing for the statute's oversight and enforcement. As a result, small businesses successfully challenged agency regulations in court for noncompliance with the RFA.[104] On the other hand, ambiguity in the RFA's key definitions, which the SBREFA left unchanged, and the courts' deference to agency interpretation of these terms has continued to hamper the statute's effectiveness.[105]

The second key provision passed in the SBREFA, often referred to as the Congressional Review Act (CRA), was the most recent major reform focused on the regulatory process.[106] This reform requires agencies to submit to Congress a copy of each final regulation before it can become effective. Congress then has 60 days to review the regulation.[107] If it decides to block the regulation, Congress can disapprove it in a joint resolution through an expedited procedure without invalidating the authorizing statute.[108] However, the president can still veto the joint

[103] Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C.).
[104] Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act*, 41 WM. & MARY L. REV. 1425 (2000) (concluding that the SBREFA offers small businesses some protection but does not shield them from every disparate impact of federal regulation).
[105] *See* Government Accountability Office, *Regulatory Flexibility Act*, GAO-06-998T (Government Printing Office, Washington, DC), July 20, 2006 (stating that ambiguity in key RFA terms leads to wide variation in agency compliance with the Act); Eric D. Phelps, *Cunning of Clever Bureaucrats*, 31 PUB. CONT. L.J. 123, 136 (2001) (describing the court's deference to the EPA's certification, which claimed the Clean Air Act rule was not subject to the RFA).
[106] The CRA was included as Subtitle E of the SBREFA. Congressional Review Act, 5 U.S.C. §§ 801–8 (2006).
[107] *Id.* § 801.
[108] *Id.* § 802.

resolution, bringing congressional efforts to naught.[109] Overcoming the presidential veto would require a two-thirds majority in both chambers of Congress, making the odds of congressional success under the CRA very slim. Unsurprisingly, Congress has successfully applied the CRA to disapprove a rule only once in the last seventeen years.[110]

Finally, the Information Quality Act[111] (IQA, also known as the Data Quality Act)[112] was passed in 2001, but it does not explicitly focus on regulations. It requires agencies to develop guidelines that ensure the quality of information that they disseminate.[113] In addition, it requires agencies to provide a mechanism allowing affected parties to request corrections to agency-disseminated information.[114] The IQA affects rulemaking because agency regulations and much of the supporting material are subject to its requirements. Thus, if interested parties disagree with scientific evidence used by agencies in regulatory analysis, they can petition agencies to correct such information under the IQA.[115]

Despite some critics' assertions that the IQA would be used by business groups to stall the regulatory process,[116] the Act had relatively limited impact. The number of IQA requests for

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[109] Morton Rosenberg, *Congressional Review of Agency Rulemaking*, CRS Reports RL30116 22 (Congressional Research Service, Washington, DC), May 8, 2008 (describing the detrimental effect the need for supermajority had on the CRA's effectiveness).
[110] Morton Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules* (Administrative Conference of the United States, Washington, DC), July 18, 2012; Rosenberg, *Congressional Review of Agency Rulemaking*, *supra* note 109.
[111] Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 144 Stat. 2763 § 515 (2001).
[112] Curtis W. Copeland, *The Information Quality Act*, CRS Reports RL32532 1 (Congressional Research Service, Washington, DC), Sept. 19, 2006.
[113] Treasury and General Government Appropriations Act for Fiscal Year 2001, § 515.
[114] *Id.*
[115] Copeland, *supra* note 112, at 3–5.
[116] *See, e.g.*, Thomas O. McGarity et al., *Truth and Science Betrayed*, White Paper 502 (Center for Progressive Reform), Mar. 2005; Sidney A. Shapiro, *Information Quality Act and Environmental Protection*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339 (2004); *see also* Copeland, *supra* note 112, at 3.

correction declined steadily from the high of 48 in 2003 to only 16 in 2011.[117] While some requests resulted in full or partial corrections, many requests were denied.[118] Petitioners' attempts to challenge agency decisions in court have yielded little success. The courts dismissed most IQA challenges on various grounds,[119] including several cases in which the courts found that the IQA did not provide for judicial review.[120] In the absence of an external enforcement mechanism, agencies' compliance with the IQA remains subject to their discretion.

In parallel with congressional efforts to rein in the regulatory agencies, successive administrations moved to increase their control over the rulemaking process. Starting with the Nixon administration, presidents issued executive orders asking agencies to account for the economic impacts of regulation.[121] These efforts culminated in President Reagan's Executive Order 12291, which required agencies to produce regulatory impact analysis for all major regulations.[122] In addition, the executive order charged the Office of Information and Regulatory Affairs (OIRA) within the OMB with reviewing the quality of agency analysis.[123] All successive administrations, regardless of their party affiliation, have essentially kept the reform in place.[124] In its current form, the regulatory-analysis requirement is outlined in

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[117] Office of Management and Budget, *2012 Report to Congress* (Office of Management and Budget, Washington, DC), Apr. 2013, 91.
[118] *Id.* at 91–92.
[119] *Id.* at 93.
[120] Copeland, *supra* note 112, at 18–21; Office of Management and Budget, *2012 Report to Congress*, *supra* note 117, at 93.
[121] Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 37–42 (1994) (tracing the attempts by successive administrations to control agencies through the regulatory review process); *see also* Kagan, *supra* note 8, at 2276–81.
[122] Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981) (The Executive Order defines "major rule" as a regulation that results in "(1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.").
[123] *Id.*
[124] Susan E. Dudley, *Observations on OIRA's Thirteenth Anniversary*, 63 ADMIN. L. REV. 113, 114–15 (2011).

President Clinton's Executive Order 12866[125] and the OMB *Circular A-4*[126] and applies to economically significant rules.[127]

The executive orders substantially increased the president's role in the rulemaking process. First, they established presidential oversight of agency rulemaking.[128] OIRA's position within the OMB and the fact that it represented presidential policy positions added weight to its criticism.[129] Second, the executive orders built analytical capacity within the presidential apparatus, reducing the bureaucracy's monopoly on expertise when it came to regulatory economic analysis.[130] Note, however, that OIRA's expertise goals were secondary to the goal of coordinating policy among agencies and ensuring that agency regulations conform to presidential policy priorities.[131]

3. Effectiveness of Regulatory Reforms

As one can see from the brief overview of past regulatory reforms, the reforms generally fell into two categories. In the first category, the reforms aimed at improving the analytical quality of policymaking. Toward that goal, they empowered a given branch by building up its analytical capacity. In the second category, the reforms' primary goal was to provide a system of robust

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[125] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993); reaffirmed by President Obama in Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).
[126] Office of Management and Budget, *Circular A-4*, *supra* note 41.
[127] Like Executive Order 12291, Executive Order 12866 defines economically significant regulations as regulations that "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." *See* Exec. Order No. 12,866, 58 Fed. Reg.
[128] Moe & Wilson, *supra* note 121, at 37–42; Kagan, *supra* note 8, at 2276–81.
[129] *See* BREYER, *supra* note 18, at 69 (pointing to OIRA's connection to the White House through the OMB as its chief source of authority, which allows it to wield undue political influence).
[130] *See* Kagan, *supra* note 8, at 2276–81 (describing presidential attempts to exert control over agencies by building up the OMB).
[131] Stuart Shapiro, *Politics and Regulatory Policy Analysis*, 29 REG. 40, 41–43 (2006); *see also* Susan E. Dudley, *supra* note 124, at 127–28 (describing OIRA's political constraints).

checks and balances in rulemaking to increase accountability and to ensure that policies served the general public. Thus, they procedurally empowered different branches to influence policy.

The earliest reforms, starting with the Progressives and culminating with the New Deal, attempted to do both through broad, open-ended delegation of policymaking powers to an increasingly professionalized bureaucracy. These reforms largely succeeded in improving the analytical capacity for policymaking. The federal agencies are now staffed with experts who have in-depth knowledge of the areas they regulate.[132] When they lack specific knowledge or data, they generally can rely on a network of outside experts to aid their efforts.[133] In other words, the federal agencies today are fully capable of producing high-quality analysis when they choose to do so. On the other hand, the earliest reforms assumed that politically insulated bureaucracies would reduce the pressure groups' influence in policy and, consequently, failed to impose any checks on agencies. Broad delegation of policymaking powers to bureaucracies simply shifted the problem of confronting special interests from Congress to agencies.[134]

Once the bureaucracies' susceptibility to political influences (and the importance of political value judgments in policymaking) became clear, reforms followed that aimed primarily at constraining the bureaucracy by procedurally empowering the other branches within the rulemaking process. The least successful reforms imposed procedural requirements on agencies but provided for no independent oversight of agency compliance. For example, the RFA failed to

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[132] TED GREENWOOD, KNOWLEDGE AND DISCRETION IN GOVERNMENT REGULATION 71–105 (New York, Praeger 1984) (concluding upon evaluation of the scientific and engineering competence at the EPA and OSHA that both agencies had a high level of competence); *see also* Ted Greenwood, *The Myth of Scientific Incompetence of Regulatory Agencies*, 9 SCI., TECH. & HUM. VALUES 83 (1984) (evaluating the scientific competence at the EPA and OSHA); MARK R. POWELL, SCIENCE AT EPA 111–46 (Washington, DC, Resources for the Future 1999) (describing the EPA's substantial budgetary and workforce investment in high-quality scientific research).

[133] *See* JASANOFF, *supra* note 88; SMITH, *supra* note 91 (describing the federal agencies' use of external scientific advisory panels).

[134] Cayer, *supra* note 21, at 334–35.

produce any meaningful improvement in either the analytical quality or the accountability of the rulemaking process, largely due to lack of external-oversight or enforcement provisions.

More successful reforms generally empowered an external actor to check the bureaucracy's compliance with congressional requirements. Some of these requirements were procedural. For example, with the APA and the statutes that expanded on the APA's requirements, Congress attempted to shine a light on regulatory activity by forcing agencies to keep a better rulemaking record and to provide affected parties with opportunities to participate in the process. Through judicial-review provisions, Congress empowered the courts to enforce these requirements. The judicial review was not meant to substitute the court's opinions for an agency's analysis; rather its goal was to ensure that agency actions were reasonable and followed congressional intent.[135]

These reforms limited agency discretion in policymaking. Agencies now had to defend their policy choices in court and in front of Congress as greater transparency made it easier for legislators to monitor the regulatory activity. In some cases, the reforms may have improved the analytical quality of regulations as well, because public participation allowed interested parties to alert agencies to potential flaws in analysis or to provide agencies with better data. However, the courts have shown little appetite for second-guessing agency analyses, because they lack the necessary expertise.[136] Consequently, the reforms' impact on the analytical quality of regulations has been marginal.

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[135] *See* McCubbins et al., *supra* note 43; McCubbins & Schwartz, *supra* note 43 (arguing that Congress established judicial review as an ex post control on agency discretion); *but see* Bressman, *supra* note 43 (examining the court's interpretation of judicial review requirements, which may not strictly fit into the political model of ex post controls).

[136] *See* Alan Charles Raul & Julie Zampa Dwyer, *Regulatory Daubert*, 66 LAW & CONTEMP. PROBS. 7 (2003) (concluding that with few exceptions, the courts generally defer to agencies on issues framed as science); *see also* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011) (describing the courts as most deferential when reviewing agencies' scientific determinations); *see also* Sara A. Clark, *Taking a Hard Look at Agency Science*, 36 ECOLOGY L.Q. 317, 326–28 (2009) (describing judicial deference to agency science).

Similar reforms focusing mostly on procedural requirements were less successful. In some cases, the oversight power given to the other branches to challenge agency rulemaking was too narrow to be effective. With the SBREFA, Congress sought to correct the RFA's shortcomings by providing for judicial review of agency compliance. But the SBREFA left some RFA provisions outside the scope of judicial review and failed to precisely define the key terms, leaving compliance with these provisions largely up to agency discretion. The courts chose to defer to agency interpretations of statutory requirements, limiting the impact of external oversight. Similarly, the UMRA provided so many exceptions to the law's coverage and gave the courts such limited veto powers that it applied to only a small number of regulations.

In contrast, the CRA placed oversight in Congress's hands. The statute applied to all rules and allowed Congress to disapprove any rule for any reason through a simple vote. The reform's failure stemmed from the fact that it did not account for Congress's institutional weaknesses. In effect, the CRA required Congress to gain a veto-proof majority in both chambers in order to disapprove a rule. Thus, while it gave Congress sufficient powers to oversee regulations, it set an extremely high bar for Congress to exercise those powers.

In a different approach, some reforms advanced peer review instead of basic oversight. They focused on empowering actors that had the necessary expertise to double-check agency analysis. Thus, they went beyond reducing agency discretion through procedural requirements to strike at the heart of the bureaucracy's power—its monopoly on expertise within the federal government. Presidential executive orders charged OIRA with reviewing regulatory analysis for all major regulations. Unlike the courts' enforcement of compliance with procedural requirements, OIRA reviewers prompted agencies to defend their actual economic analysis. Staffed with professional economists, OIRA had the capacity to identify shoddy analysis and

point out the shortcomings to the agencies. Thus, agencies were required not only to produce regulatory analysis but also to ensure its quality. As a result, regulations produced by the executive-branch agencies, which were subject to OIRA review, had considerably higher quality of analysis compared to regulations issued by the independent agencies not subject to external peer review.[137]

Two factors limited OIRA's impact. First, OIRA was not fully independent. Though outside regulatory agencies, OIRA was still part of the executive branch. Thus, it was politically difficult for OIRA to directly conflict with other executive-branch agencies, especially on regulations that reflected presidential priorities. Second, its oversight did not extend to independent agencies. While OIRA could provide feedback to independent agencies, the agencies could override OIRA's decisions and proceed with their rules.

Congressional statutes that forced the EPA to subject the scientific analysis underlying Clean Air and pesticide regulations to external peer review by scientific advisory panels went even further. These reforms put scientific analysis, rather than its economic implications, under the scrutiny of independent scientists. As with most peer review, this had some positive impact on the regulations' analytical quality. Distinguished experts serving on advisory panels alerted the agency to the latest advances in science and pointed out potential methodological shortcomings. Yet, as with OIRA review, the panels' limited independence and lack of enforcement powers undermined the reform's effectiveness. Scientists serving on the panels

[137] *See* Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, Discussion Paper RFF DP 11–16 (Resources for the Future), Apr. 7, 2011 (finding that the analysis conducted by the independent agencies falls short of the analysis routinely expected from the executive agencies under the Executive Order 12866); *see also* Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis*, 63 ADMIN. L. REV. 179 (2011); Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis*, Working Paper 13–13 (Mercatus Center, George Mason University, Arlington VA), July 30, 2013 (suggesting that OIRA's external review improves the quality of agency analysis).

came from academia and were thus independent of the agency, but the EPA administrators controlled the selection process. Given the wide range of opinions on most scientific issues, the EPA could strategically select panel members whose policy positions were similar to those held by the agency. Furthermore, even when the panels disagreed with the agency's analysis, they had no way to push the agency to revise its analysis; the panels were limited to advisory roles, and the EPA could proceed with regulation over the panels' objections.

Similarly, the IQA attempted to harness stakeholders' expertise to act as at least a partial check on agencies' scientific and economic analyses. It procedurally empowered the general public to question the validity of agency-disseminated information. But it left compliance with the statute at the discretion of agencies and provided for no external enforcement. Consequently, the reform had limited impact on the quality of regulatory analysis.

The experience with previous reforms provides several criteria for an effective regulatory reform:

- *Independent oversight.* Successful reforms empowered external actors to provide a robust check on regulatory agencies. In contrast, reforms that left compliance with statutory requirements to agencies generally failed to produce any meaningful change. Similarly, when the actors charged with oversight were not fully independent, as in the case of OIRA or advisory panels, they were less effective in constraining agency discretion.
- *Veto power.* Effective reforms gave the actors charged with overseeing agency rulemaking sufficient enforcement powers. The strongest veto powers included the courts' power to invalidate rules that did not comply with statutory requirements. Less effective was peer review by the scientific advisory panels, since the agencies could

choose to ignore the panels' comments. The least effective reforms either made it very difficult to exercise veto powers, as in the CRA's case, or made statutory requirements so vague that they effectively left compliance up to agencies, as was the case with the RFA and the SBREFA.

- *Broad applicability.* The most effective reforms applied broadly to all rules. For example, the APA established the standardized rulemaking process that all agencies must follow. Similarly, OIRA oversight applied to all rules that had significant impact on the economy; even though it excluded the rules issued by independent agencies. In contrast, the UMRA and the RFA either applied to very few rules or provided so many exclusions that they triggered statutory requirements for only a small fraction of rules.
- *Expert oversight.* Successful reforms provided for peer review of economic or scientific analysis in order to break down the bureaucracy's monopoly on expertise. OIRA and scientific advisory panels forced agencies to defend the quality of their analysis. In addition, these expert overseers had the capacity to question the policy assumptions and value judgments that were often embedded within regulatory analysis. In contrast, the courts, lacking scientific and economic expertise, generally limited their oversight to procedural requirements. Thus, procedural reforms improved transparency and accountability but had less impact on the analytical quality of regulations.

Despite the improvements in the regulatory process that have been brought on by reforms over the years, agencies continue to enjoy a near monopoly on scientific and economic expertise within the federal government, because neither Congress nor the courts have the expertise to conduct or review the scientific analysis required to make regulatory decisions on technically

complex issues.[138] In the absence of effective external oversight, agencies can get away with poor-quality analysis and politically motivated rules that promote their own political agendas.[139] In addition, broad congressional delegation of policymaking powers gives agencies the first-mover advantage in the process.[140] In many cases, agencies do not need to seek congressional approval in order to regulate; they can point to existing statutes as the sources of their authority.[141] Thus, rather than initiating policy, Congress ends up reacting to the bureaucracy's regulatory actions.[142] Because oversight is costly, the bureaucracy's ability to initiate policy puts Congress at a disadvantage in the rulemaking process.[143]

4. Evaluating Reform Proposals

Applying the lessons of previous reforms, I now examine some common regulatory-reform proposals made in the recent past. I focus on the reforms proposed during the 112th Congress, given the prominence that reforms achieved on the congressional agenda during that session.[144]

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[138] *See* Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, 10 FORUM 1, 7–8 (2012) (arguing that the bureaucracy's expertise advantage makes it difficult for Congress to control it); Epstein & O'Halloran, *supra* note 17 (arguing that Congress leaves agencies considerable discretion when policy outcomes are uncertain and require subject-matter expertise).

[139] Ferejohn & Shipan, *supra* note 42; Fiorina, *supra* note 17; Epstein & O'Halloran, *supra* note 17.

[140] Ferejohn & Shipan, *supra* note 42, at 2 (arguing that congressional delegation allows agencies to make the first move and establish a policy that prevails unless preempted by Congress); McNollgast, *supra* note 6, at 1703–5 (pointing out that Congress through delegation cedes agenda control to agencies, which allows agencies to act without seeking Congress's approval in advance).

[141] McNollgast, *supra* note 6, at 1705 (observing that Congress may face a fait accompli due to agencies' first-mover advantage).

[142] *Id.*

[143] McCubbins & Schwartz, *supra* note 43 (arguing that the high costs of ongoing agency oversight pushes Congress toward less costly ex post controls); *see also* Moe, *supra* note 138, at 7–8 (criticizing the congressional control model's presumption that ex post controls are always effective and arguing that agencies maintain considerable discretion in the process).

[144] RegBlog, *Regulatory Reform in the 112th Congress*, REGBLOG (Jan. 17, 2012), http://www.regblog.org/2012/01/regulatory-reform-in-the-112th-congress.html; *see also* Curtis W. Copeland, *Regulatory Reform Legislation in the 112th Congress*, CRS Reports R41834 1 (Congressional Research Service, Washington, DC), Aug. 31, 2011 (stating that 112th Congress considered at least 22 bills dealing with the rulemaking process).

Many of these proposals have been considered in previous sessions,[145] and some have been reintroduced in the following session.[146] The reforms are grouped together based on the branch each one seeks to empower and the mechanism it employs to empower that branch. I exclude proposals that would simply delay rules through moratoria, since the effects of such proposals would be temporary. In addition, I exclude proposals that focus on retrospective rather than prospective analysis or ask an agency or commission to estimate the total regulatory burden, since these fall outside the scope of this paper. Similarly, I exclude the reforms that do not directly impact the rulemaking process, e.g., those focusing on departmental reorganization or reduced penalties for small businesses.

4.1. *Congressional Approval for Major Regulations* (*REINS Act*)

One of the more prominent regulatory reforms proposed in the 112th Congress was the Regulations from the Executive in Need of Scrutiny (REINS) Act,[147] which required congressional approval for all major regulations.[148] Its proponents argued that the reform would make agencies more accountable to Congress.[149] It would also make Congress more accountable to voters, because the Act would create a legislative record of congressional

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[145] *See* Copeland, *supra* note 144 (noting which reforms have been considered in previous sessions).

[146] *E.g.*, REINS Act and Regulatory Accountability Act introduced in both 112th and 113th Congress Regulations from the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. (1st Sess. 2011); Regulations from the Executive in Need of Scrutiny Act of 2013, H.R. 367, 113th Cong. (1st Sess. 2013); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (1st Sess. 2011); Regulatory Accountability Act of 2013, H.R. 2122, 113th Cong. (1st Sess. 2013).

[147] Regulations from the Executive in Need of Scrutiny Act of 2011.

[148] Similar provisions were included in other reform proposals, e.g., Sunset Act of 2012, H.R. 6333, 112th Cong. (2d Sess. 2012); Regulatory Accountability and Economic Freedom Act of 2012, H.R. 4116, 112th Cong. (2d Sess. 2012).

[149] Wayne Crews, *It's Time to Regulate the State*, FORBES (Nov. 2, 2010), http://www.forbes.com/2010/11/02/regulation-congress-reins-act-opinions-columnists-wayne-crews.html; Phil Kerpen, *The REINS Act Ends Unchecked Bureaucratic Power*, THE HILL'S CONGRESS BLOG (Dec. 2, 2011), http://thehill.com/blogs/congress-blog/politics/196821-the-reins-act-ends-unchecked-bureaucratic-power.

support or disapproval for major regulations. The reform's critics argued that it would needlessly politicize regulations and erect additional roadblocks in the already-cumbersome regulatory process.[150]

The REINS Act attempts to correct the CRA's shortcomings by changing its default option. As described above, the CRA requires Congress to garner veto-proof majorities in both chambers to disapprove a rule. In contrast, under the REINS Act, Congress would have to vote to *approve* a final regulation. If it failed to do so, the regulation would not take effect. The new default option would make it easier for legislators to stop regulations that they do not support. In addition, the REINS Act applies only to major rules and leaves the CRA's procedures intact for non-major rules.[151] Thus, it would considerably narrow the number of rules that Congress has to examine and approve,[152] reducing the demands on congressional time and resources to manageable levels.

This proposed reform would alleviate Congress's greatest weakness in the rulemaking process—its inertia. Prior to the REINS Act, the legislature's failure to act favored the executive branch. Agencies could get away with passing rules that deviated from congressional priorities, and the president could veto congressional attempts to reassert influence. By changing the default option, the REINS Act would make agencies more likely to stick closely to congressional policy preferences in order to ensure their regulations' approval.

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[150] Sidney A. Shapiro, *The REINS Act*, CPRBLOG (Jan. 14, 2011), http://www.cprblog.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F.

[151] The REINS Act classifies rules as major if they result in "(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States–based enterprises to compete with foreign-based enterprises in domestic and export markets." Regulations from the Executive in Need of Scrutiny Act of 2011.

[152] According to the GAO database, agencies issued 1,977 rules in 2013, of which only 77 were classified as major. *See* http://www.gao.gov/legal/congressact/fedrule.html.

Similarly to other effective reforms, the REINS Act provides for a robust independent check on the executive branch's regulatory activity by placing oversight with Congress. In addition, it eliminates the extremely high bar required to exercise veto powers under the CRA. Consequently, it grants Congress substantial veto powers to override agency rulemaking. Finally, the reform applies to all major rules with only a few exceptions. Its impact will not be limited by narrow coverage.

The reform's main shortcoming is that it does not address the quality of regulatory analysis. Like the APA, the reform's impact would be primarily procedural. The REINS Act would reduce agency discretion in rulemaking and make agencies more responsive to the political process, especially when it comes to value judgments and policy assumptions. On the other hand, congressional oversight would not provide substantive peer review for scientific or economic analysis. Furthermore, it would not address value judgments and policy assumptions embedded within analyses. Such in-depth review requires subject-matter expertise that Congress does not currently have.

Another potential drawback of the REINS Act is that it could make the courts reluctant to review and challenge regulations. As Chris DeMuth points out, if a regulation were "passed by majorities of both Houses and signed by the president—no court would hold that it was arbitrary or capricious, an abuse of discretion, not in accord with the agency's authorizing statutes, or insufficiently justified by a demonstration of benefits and costs."[153] The courts would likely treat the rule as statutory law subject only to constitutional review. They would be less likely to apply a more rigorous judicial-review standard to regulations.

[153] DeMuth, *supra* note 4, at 89.

4.2. *Creation of Congressional Oversight of Agency Analysis* (*CORA*)

The Congressional Office of Regulatory Analysis Creation and Sunset Review Act provided a less forceful alternative for increasing congressional control over the rulemaking process.[154] The reform called for creation of the Congressional Office of Regulatory Analysis (CORA), which would be charged with independent evaluation of agency economic analysis. Despite its long history,[155] the proposed reform received considerably less attention in the 112th Congress than the REINS Act.[156] However, proposals for the creation of CORA continue to elicit support among advocates of regulatory reform.[157]

The reform calls for the creation of a congressional agency similar to the Congressional Budget Office (CBO) in structure, with the agency's head to be jointly appointed by the Speaker of the House and the Senate Majority Leader. Its duties would largely mirror those of OIRA. For each major rule, CORA would provide Congress a report assessing the promulgating agency's compliance with statutory requirements and evaluating its economic analysis. In addition to overseeing major rules, CORA could provide similar analysis for non-major rules upon request from congressional leaders or individual senators and representatives.

Similarly to the REINS Act, this reform attempts to correct the CRA's deficiency. In addition to pointing out the high bar for disapproving a rule, the CRA's critics often point to the

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[154] Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011, H.R. 214, 112th Cong. (1st Sess. 2011).

[155] Earlier bills advocating CORA date back to 105th Congress. *See* Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules*, *supra* note 110, at 18.

[156] While numerous regulatory reform bills introduced in the 112th Congress included provisions for congressional approval of major regulations (e.g., REINS Act, Sunset Act, Regulatory Accountability and Economic Freedom Act), only one bill advocated CORA.

[157] *E.g.*, Robert E. Moffit, *Why Congress Must Confront the Administrative State*, CPI Lecture 5 (Heritage Foundation, Washington, DC), Jan. 26, 2012; Susan Dudley, *Congress Needs Its Own Regulatory Review Office*, REGBLOG (Aug. 10, 2011), https://www.law.upenn.edu/blogs/regblog/2011/08/congress-needs-its-own-regulatory-review-office.html.

executive branch's virtual monopoly on analysis as a source of the CRA's inefficiency.[158] As Representative Sue Kelly stated in her testimony, agency-provided economic analysis "is often unreliable because agencies have a vested interest in downplaying any negative aspects of the regulation they have proposed."[159] At present, Congress has little choice but to rely on the agency-provided information to determine whether to disapprove a rule under the CRA.[160] A trusted source providing an independent evaluation of agency analyses would redress Congress's informational disadvantage and diminish the agency monopoly on economic analysis. In addition, CORA would act as a screening mechanism advising Congress on which regulations call for additional scrutiny.

This proposed reform would charge an independent actor outside the executive branch with rulemaking oversight. In addition, it would apply to all major rules, ensuring broad applicability. However, the reform would afford CORA only an advisory role. CORA would have no veto power over rulemaking and would not be in a position to force agencies to revise or correct their analysis. It would primarily function as a sunshine commission to alert Congress and the general public to the potential flaws and shortcomings of regulatory analysis. It would rely on the implicit threat of legislative or judicial action for enforcement. Yet, given its limited veto powers, CORA would likely be less effective than the REINS Act at changing the agencies' incentives.

The CORA reform's primary advantage is that it provides for independent peer review in the rulemaking process. As an alternative to OIRA, CORA would break the executive branch's

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[158] Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules*, *supra* note 110.
[159] *Congressional Office of Regulatory Analysis Creation Act of 1998: Hearing on 1704 Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform and Oversight*, 105th Cong. 6 (1998) (statement of Representative Sue Kelly).
[160] *Id.*

monopoly on analysis.[161] Given its expertise, CORA would be able to go beyond procedural requirements to question the policy assumptions and value judgments buried within regulatory analysis. Thus, it would bring the advantages of the peer-review process without the political limitation currently faced by OIRA.

In addition, CORA's independent assessment would put OIRA's own oversight under closer scrutiny. It may even provide cover for OIRA to challenge agency analysis more aggressively. CORA's impact on OIRA could be similar to that of the CBO breaking the OMB's monopoly on budget projections. According to accounts from some OMB analysts, the fact that the CBO provides alternative estimates puts pressure on OMB analysts to do a better job with their estimates and also allows them to push back against political pressure from agencies to adopt less rigorous analytical methods.[162]

4.3. *Extending Presidential Oversight to Independent Agencies (Statutory Executive Order 12866)*

Several reform proposals have focused on making regulatory impact analysis a statutory requirement for all agencies. The crucial component on which these proposals differ is oversight. The reforms making agency analysis subject to judicial review are discussed in the following section. In this section, I discuss reforms making agency analysis subject to review within the executive branch. The Clearing Unnecessary Regulatory Burdens (CURB) Act[163] and the Independent Agency Regulatory Analysis Act[164] essentially attempt to replicate Executive Order 12866 by placing analytical oversight in OIRA. In addition, the Regulatory Accountability Act

[161] *See supra* note 38 and accompanying text.
[162] *Id.* at 210–12.
[163] Clearing Unnecessary Regulatory Burdens Act, S. 602, 112th Cong. (1st Sess. 2011).
[164] Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. (2d Sess. 2012).

(RAA) would employ both judicial and executive oversight mechanisms by expanding judicial oversight and authorizing OIRA to review all regulations; it would also impose additional procedural and analytical requirements.[165] The RAA's OIRA-oversight provisions will be discussed in this section, while its judicial-oversight provisions will be examined in the following section.

These reforms would mainly extend to independent agencies the analytical requirements that currently apply only to executive agencies. Currently, independent agencies are encouraged but not required to provide economic justification for their regulations. While individual independent agencies may be subject to additional analytical requirements, they face little external oversight and produce lower-quality regulations as a result.[166] Note that even though the CURB Act and the RAA apply to all agencies, they would have little impact on the executive agencies already complying with the proposed analytical requirements under the existing executive orders. Similarly to the Independent Agency Regulatory Analysis Act, the CURB Act and the RAA would impact primarily the independent agencies.

These reforms would likely produce only moderate improvements and only for the subset of regulations that originate with independent agencies. On the one hand, extending expert oversight to independent agencies would allow OIRA to push for economic efficiency and policy cohesion in independent-agency rulemaking, improving its quality as a result. On the other hand, this reform would be undermined by the same shortcomings that haunt OIRA's oversight of executive-branch agencies. As part of the executive branch, OIRA lacks full independence to aggressively challenge agency analyses.

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[165] Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (1st Sess. 2011).
[166] *See supra* note 137.

The RAA's provisions go further than the other reforms by extending to all regulations the requirements for economic analysis and OIRA oversight, which currently apply to only major regulations. What impact such a requirement would have is unclear: the RAA instructs OIRA to issue guidance on how to evaluate costs and benefits but also allows for the rigor of a benefit-cost analysis to be commensurate with the regulation's economic impact.[167] In other words, the RAA would leave it up to the OIRA administrator to determine what additional analysis, if any, agencies would need to provide for non-major regulations. If the OIRA administrator determines that analytical requirements for non-major rules should be similar to those for major rules, the RAA could dramatically increase the rulemaking burdens for both the agencies and OIRA and as a consequence considerably slow down the process. Whatever improvements greater analytical requirements would bring for non-major regulations may be offset by OIRA's diminishing capacity to effectively oversee the drastically increased workload of regulations. If, on the other hand, the OIRA administrator imposes few additional requirements on non-major rules, the process will likely remain unchanged.

4.4. *Judicial Oversight of Agency Analysis* (*UMRA Reforms*)

In contrast to proposals that put agency analysis under presidential control, some reforms propose to make economic analysis judicially reviewable. The proposals in this category attempt to expand the judicial review of rulemaking by strengthening the UMRA, which already requires agencies to produce economic analysis for major regulations. The Unfunded Mandates Accountability Act[168] and the Unfunded Mandates Information and Transparency

[167] Vanessa Burrows & Maeve Carey, *An Overview and Analysis of H.R. 3010*, CRS Reports R42104 14–15, 28–29 (Congressional Research Service, Washington, DC), Nov. 29, 2011.
[168] Unfunded Mandates Accountability Act of 2011, S. 1189, 112th Cong. (1st Sess. 2011).

Act[169] would impose more stringent analytical requirements, expanded applicability, and strengthened judicial-review standards.

These proposals attempt to correct the UMRA's main weaknesses. In particular, they broaden its applicability by closing down the Act's loopholes and exceptions and expanding the economic-analysis requirements to include indirect costs in addition to mandated expenditures. Broadly speaking, the reforms attempt to match the UMRA's economic-analysis requirements with those imposed by Executive Order 12866. In addition, the reforms expand the UMRA's requirements to independent agencies. Beyond expanding the UMRA's applicability, the reforms also increase the judiciary's veto powers in reviewing agency analysis: they would allow the courts to invalidate rules that fail to comply with the UMRA's provisions.

In contrast to Executive Order 12866, which placed oversight with OIRA, the UMRA provides for independent oversight by entrusting the courts with enforcement of its provisions. Independent of the executive, the courts would be less constrained than OIRA in checking the executive branch's rulemaking. On the other hand, the courts lack OIRA's economic expertise and may be less effective at pushing for better quality of analysis. To date, the courts have afforded agencies a great degree of deference on issues pertaining to agency expertise and have shown little appetite for challenging agencies over the quality of regulatory analysis.[170] Thus, the courts may limit their oversight to procedural compliance. In addition, the courts' limited resources to adjudicate cases may further hamper the reforms' potential impact.[171] Unlike OIRA, which reviews all major rules, the courts would likely review only a fraction of major rules issued each year, limiting oversight to the most egregious cases.

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[169] Unfunded Mandates Information and Transparency Act of 2011, H.R. 373, 112th Cong. (1st Sess. 2011).
[170] *See supra* note 136 and accompanying text.
[171] BREYER, *supra* note 18, at 58–59.

Like the expanded-OIRA-oversight reforms, the UMRA reforms would have the strongest impact on independent-agency rulemaking. Independent agencies would be required to justify their regulatory decisions for all major regulations through extensive economic analysis. The reforms' impact on executive agencies may be more limited, since those agencies already produce similar economic analyses under the requirements of Executive Order 12866.

4.5. *Formal Hearings and Judicial Oversight of Agency Analysis* (*RAA*)

In contrast to the UMRA reforms, the RAA seeks to reform the rulemaking standards defined under the APA. First, as discussed in the previous section, the RAA would statutorily require economic analysis and OIRA review. While it would leave interpretation at OIRA's discretion, the RAA could potentially expand the analytical and oversight requirements to all rules in contrast to only the major rules currently covered by provisions in Executive Order 12866.

Second, the RAA would impose additional requirements for agencies to produce better rulemaking records. For the high-impact rules whose effect on the economy exceeds one billion dollars, the reform would require agencies to hold formal hearings. For major rules, it would give stakeholders an option to request hearings under the IQA's provisions. Formal hearings, presided over by an agency official or an administrative law judge, are similar to court trial procedures; they give affected parties a chance to challenge the agency's evidence and analysis and to cross-examine the agency's witnesses, forcing agencies to defend their policy choices on the record.[172]

[172] Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability*, 60 CALIF. L. REV. 1276 (1972); BRYNER, *supra* note 23, at 21–22.

Consequently, they could generate a better evidentiary record than the typical notice-and-comment rulemaking.[173]

Third, the RAA would expand judicial review to cover agency compliance with the IQA hearing petitions. In addition, by requiring formal rulemaking for high-impact rules, the RAA would increase judicial-oversight stringency for such rules, making them subject to substantial evidence judicial review.[174] The RAA explicitly defines the term "substantial evidence" to further reduce uncertainty about the stringency of judicial review. Importantly, the RAA addresses the issue of judicial deference to agency expertise, which has often limited the effectiveness of judicial oversight. The Act instructs the courts to not defer to agency interpretation of a rule if the agency failed to comply with procedures for issuing such interpretation. Similarly, it asks the courts to not defer to agency benefit-cost analysis and risk assessment if the agency failed to comply with OIRA guidelines for such analyses. In contrast to Executive Order 12866, which charges OIRA with overseeing agency compliance with the Executive Order's analytical requirements, the RAA situates enforcement in both OIRA and the courts. Thus, the courts conceivably could end up conducting their own economic analyses when agencies fail to follow OIRA guidelines.[175]

This reform would allow the courts to challenge agency decisions based on the quality of analysis. First, statutory requirements for economic analysis combined with the threat of judicial

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[173] Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1816 (1978) (contending that unlike formal adjudicatory rulemaking, the notice-and-comment process does not produce the evidentiary record sufficient for later judicial review); William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60–61 (1975) (arguing that judicial review of rulemaking is undermined by the lack of formal hearings that used to generate the evidentiary record that the courts relied on in their decisions); Hamilton, *Procedures for the Adoption of Rules of General Applicability*, *supra* note 172, at 1333–36 (suggesting that formal hearing procedures may aid in creating a record that would permit more rigorous judicial review).

[174] Under notice-and-comment rulemaking, which most agencies currently use, the courts can invalidate rules if they find agency actions to be "arbitrary and capricious." In contrast, under formal rulemaking, the courts can invalidate rules that are not supported by substantial evidence. Administrative Procedure Act, 5 U.S.C. § 706 (2000).

[175] Burrows & Carey, *supra* note 167, at 37.

scrutiny may prompt agencies to adhere closely to OIRA's guidelines and produce more complete analyses. Currently, political constraints prevent OIRA from effectively enforcing the Executive Order 12866 analytical requirements.[176] For example, agencies often fail to estimate both costs and benefits for major regulations or to consider regulatory alternatives, despite being required to do so under the Executive Order.[177] The threat of independent external oversight may lead agencies to provide such estimates in their analyses.

Second, the better record generated during the formal hearings would allow the courts to provide more effective rulemaking oversight. Even if the courts lack the subject-matter expertise, they would have substantial information readily available to them through the hearing records and more complete agency analyses. In a sense, formal hearings would allow the courts to use the stakeholders' expertise instead of building up their own. The reform would allow the courts to go beyond procedural requirements and delve into the substance of regulatory analysis and justification. While still falling short of peer review, substantial evidence judicial review of formal rulemaking could go beyond the typical procedural enforcement and approach the quality of expert oversight.

The RAA's primary drawback is its potential cost. Agencies would have to spend additional time and resources to prepare for and conduct formal hearings, which involve setting up trial-type procedures.[178] Another common criticism of formal rulemaking is that it could be hijacked by special interests that could turn it into a drawn-out process, leading to considerable

[176] Stuart Shapiro, *supra* note 131, at 41–43; Susan E. Dudley, *supra* note 124, at 127–28.
[177] Richard Williams, *Comment on OMB's Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations* 8–9 (Mercatus Center, George Mason University, Arlington VA), July 29, 2013.
[178] Hamilton, *supra* note 172, at 1286.

delays.[179] Parties opposed to regulation could abuse the process by presenting voluminous and repetitive or irrelevant evidence. In comparison to notice-and-comment rulemaking, which allows multiple interested parties to submit written comments, formal rulemaking may be less suited to accommodate a large number of commenters, because it would require that each interested party receive a chance to present its evidence at a hearing or to cross-examine witnesses.[180] The more rigorous judicial review may have a similar impact by delaying the rulemaking process and increasing its costs.[181]

The RAA addressed some of this criticism by limiting the formal rulemaking requirement to only a small fraction of rules, those whose costs exceed one billion dollars. In addition, the RAA would limit the scope of the hearings to specific issues of fact, limiting the possibility that some parties might use the hearings as a way to obstruct the rulemaking process. For other rules, the RAA would similarly limit hearings to rules' compliance with IQA requirements. And while formal hearings and judicial review might make the rulemaking process more adversarial, advocates of formal rulemaking argue that the greater transparency and ability to publicly debate costly or controversial rules may lend greater legitimacy to the rulemaking process.[182] Even formal rulemaking's critics generally admit that the heightened scrutiny afforded by the procedure may be appropriate in cases involving considerable regulatory burdens or scientifically complex issues.[183]

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[179] Richard J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 64–65 (1995) (describing administrative costs and the ability of well-funded interests to hijack the hearing process as obstacles to effective rulemaking); Pedersen, *supra* note 173, at 44 (describing the excessive administrative burdens of formal hearings as the reason behind the considerably reduced use of formal rulemaking procedures).

[180] Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1288 (1972).

[181] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412–26 (1992); Pierce, *supra* note 179, at 65–66.

[182] Aaron Nielson, *In Defense of Formal Rulemaking*, OHIO ST. L. (forthcoming).

[183] *See, e.g.*, Administrative Conference of the United States, *Administrative Conference Recommendation 76-3* 3 (Administrative Conference of the United States, Washington, DC), June 4, 1976; *Report of the Section of Administrative Law Section of Corporation, Banking and Business Law*, 106 ABA ANN. REP. 785 (1981).

4.6. *Judicial Oversight of Regulatory Flexibility Analysis* (*RFA Reforms*)

Several reforms focus on further improving the RFA by fixing the shortcomings that the SBREFA missed. These proposals include the Regulatory Flexibility Improvements Act,[184] the Small Business Regulatory Freedom Act,[185] and the Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act.[186] These proposals attempt to clarify and expand the RFA's applicability and to make it easier for small business to seek judicial review of agency actions.

While they would be an improvement on the current process, these proposed reforms still fall short of substantively altering the incentives for agencies. With the previous reform under SBREFA, Congress placed oversight in the hands of the judiciary. Thus, agency compliance with the RFA requirements was subject to independent external oversight. What hampered the oversight's effectiveness was the lack of clarity in the Act's key terms. Both the RFA and the SBREFA left the interpretation of key terms, and consequently compliance with the Act's requirements, to the agencies, while the courts deferred to agency interpretations.

The proposed reforms do little to improve the process. While they clarify some definitions, they still leave key terms untouched. Consequently, interpretation and compliance with the RFA would still be subject to agency discretion. Even though the courts have the power to invalidate agency rules, the RFA's very narrow and ambiguous applicability would continue to handicap its effectiveness. In addition, the reforms would not impact the quality of analysis produced under the RFA's requirements, because the courts generally defer to agency expertise.

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[184] Regulatory Flexibility Improvements Act of 2011, H.R. 527, 112th Cong. (1st Sess. 2011).
[185] Small Business Regulatory Freedom Act of 2011, S. 474, 112th Cong. (1st Sess. 2011).
[186] Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act of 2011, S. 1030, 112th Cong. (1st Sess. 2011).

5. Comparing the Proposed Reforms

The reforms discussed in the previous sections aimed at either reducing the bureaucracy's first-mover advantage through ex post controls or limiting its monopoly on analysis through more effective expert oversight. I summarize the effectiveness of these reforms in table 1 below, with "+" indicating the least and "+++" the most effective alternatives among the reforms considered in this paper. I evaluate each proposed reform based on the four criteria for effective reforms: independence, veto power, applicability, and expertise. Thus, effective regulatory reforms must charge an actor independent of the executive branch with overseeing agency rulemaking. The independent actor must have broad veto powers to force agencies to produce high-quality regulations. Its oversight powers must be broadly applicable to all major rules. Finally, the independent actor must have the economic and scientific expertise necessary to understand and effectively oversee the quality of regulatory analysis.

Table 1. Reform Effectiveness

	Reform	Primary actor	Independence	Veto power	Applicability	Expertise
1	Congressional Approval (REINS)	Congress	+++	+++	+++	+
2	Creation of CORA	Congress	+++	+	+++	+++
3	Statutory Executive Order 12866	OIRA	+	++	+++	+++
4	UMRA reforms	Court	+++	+++	++	+
5	Formal Rulemaking (RAA)	Court	+++	+++	+++	++
6	RFA reforms	Court	+++	++	+	+

Note: "+" indicates the least effective reforms and "+++" the most effective reforms.

In order for it to be effective, one would expect a reform that aims at limiting agency discretion through ex post controls to score well on the criteria of independence, veto power, and broad applicability. The most forceful reform in this category, the REINS Act, would effectively put the policy-initiation power back in Congress by forcing agencies to seek congressional

approval for new rules. Less drastic alternatives, the UMRA and the RFA reforms, would delegate oversight to the judiciary. Although the proposed oversight reforms typically would give the courts sufficient veto powers, the fact that only a fraction of major rules would likely be challenged in court limits these reforms' applicability. Neither approach addresses the bureaucracy's monopoly on expertise.

In contrast, the efficiency of reforms seeking to reduce the bureaucracy's monopoly on expertise should be judged largely by the criteria of independence, veto power, and expert oversight. The most successful reform in this category, the creation of CORA, would authorize an expert congressional agency to peer review the regulatory analysis. However, it would give the congressional agency only limited veto powers and would rely on Congress and the courts for enforcement. In contrast, the reform expanding peer review by OIRA to independent agencies would likely produce only limited improvement, given OIRA's political constraints as an executive-branch agency.

Finally, one proposed reform scored relatively well on all criteria. The RAA included two of the alternatives listed in table 1: formal rulemaking and the statutory requirement for OIRA oversight. The RAA would expand OIRA oversight to independent agencies and strengthen analytical requirements, which would force agencies to provide better records for their rulemaking decisions. To counter OIRA's political constraints, it would supplement OIRA oversight with a combination of formal hearings and greater judicial oversight. The formal hearings process would greatly enhance the courts' ability to check the agencies' economic and scientific analyses. Since formal hearings would require agencies to defend their analyses on the record, they would expose the value-based policy assumptions and potential methodological and

data-quality shortcomings in the analysis. Consequently, they would considerably reduce the bureaucracy's monopoly on expertise.

Conclusions

Critics of the administrative state charge that the rulemaking process is commonly hijacked by lobbies and made to benefit concentrated interests. The widespread distrust of the regulatory process undermines public support for the administrative state and fuels frequent calls for regulatory moratoriums or deregulation. Over decades, regulatory reforms have sought to increase agency accountability and to improve the quality of regulatory analysis and decision-making, with varying success.

Drawing upon the experience with previous reforms, I identify four criteria for effective reforms. To improve both accountability and expertise in the rulemaking process, the reforms must charge an actor independent of the executive branch to oversee agency rulemaking. Congress must grant the independent actor sufficient veto power to enforce agency compliance. The oversight must apply broadly to all major regulations and allow few exceptions. Finally, the independent actor should have the scientific and economic expertise to peer review agency analysis.

Using these criteria, I evaluate the major reforms proposed in the 112th Congress. I assess whether the reforms would limit agency discretion while improving the quality of regulatory analysis in the rulemaking process. I find that several reforms provide for strong independent oversight by Congress or the courts, yet fail to provide for the peer review of agency analysis. Others call for greater expert oversight by OIRA, which still leaves oversight within the executive branch. Finally, two reforms combine independent oversight with capacity for peer

review. The reform calling for the creation of CORA to oversee agency analysis would put expert oversight outside the executive branch and thus provide more credible peer review. Similarly, the RAA, which combines formal hearings with stronger judicial review, would allow the courts to offer substantive review of agency analysis.