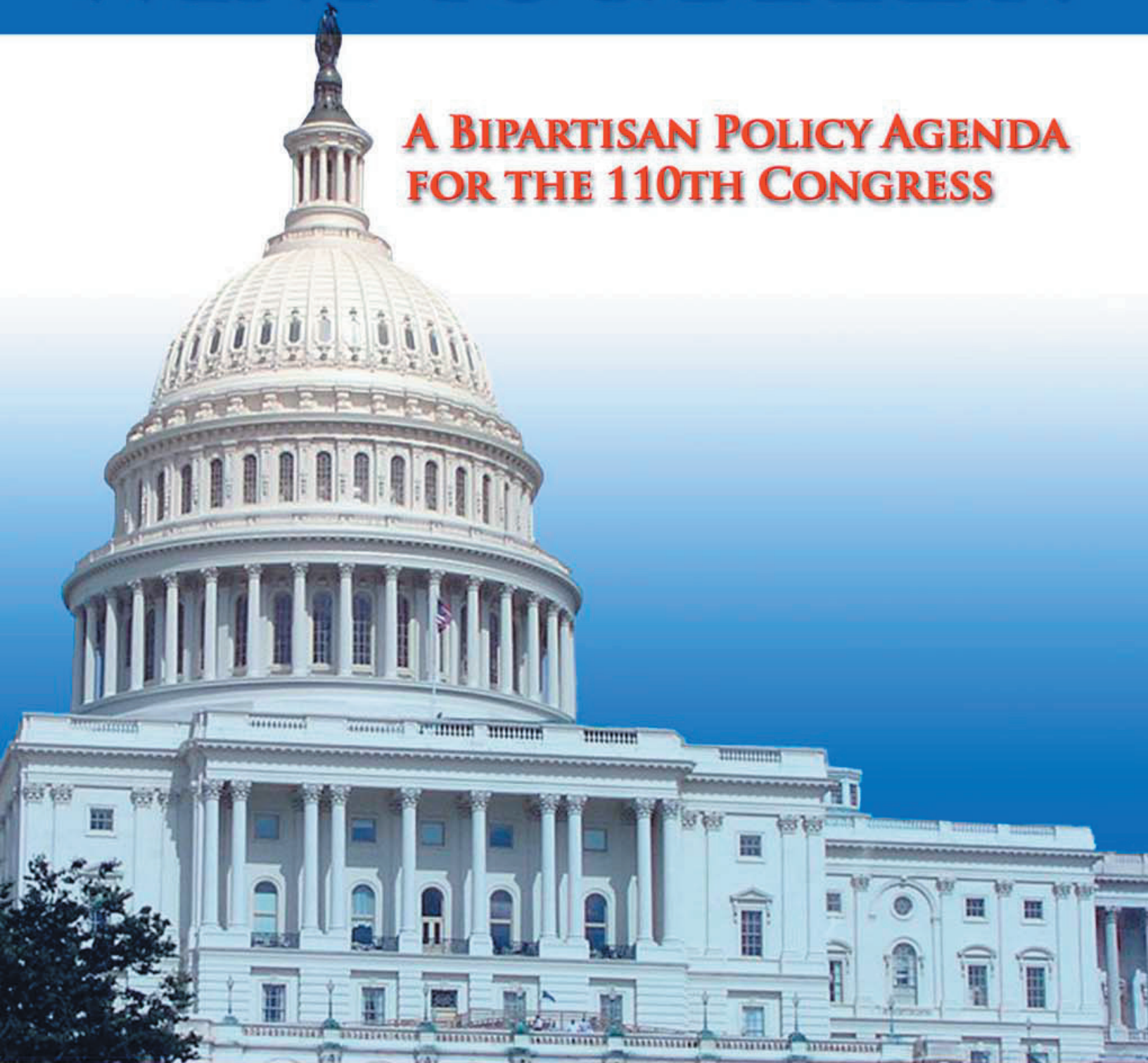


# THIS LIBERAL CONGRESS WENT TO MARKET?

**A BIPARTISAN POLICY AGENDA  
FOR THE 110TH CONGRESS**



Competitive  
Enterprise  
Institute

# **This Liberal Congress Went to Market? A Bipartisan Policy Agenda for the 110<sup>th</sup> Congress**

**Compiled by the Competitive Enterprise Institute  
Edited by Wayne Crews and Ivan Osorio**

## **Introduction**

### **Expectations for a New Congress**

#### **The Triumph of Hope over Experience?**

*by Fred L. Smith, Jr.*

The new Democratic Congress begins its first session hoping, as Speaker Nancy Pelosi said, to “drain the swamps” of pork barrel politics. We wish the new Members success in this effort. Yet effort is no guarantee of success. A Republican team roared into Washington in 1994 with an ambitious reform agenda, but became mired in the bogs of Washington. Yet this is not necessarily cause for pessimism.

America’s political system has a built-in propensity for inertia—and that’s to the good. It slows positive change, but it also slows negative trends. The Founders enshrined checks and balances into the Constitution to ensure that we would look carefully before rushing into new areas. True to that spirit, CEI hopes to work with the new Congress to advance good ideas, and to block bad ones.

The Democrats are well aware that America has changed—that top-down solutions are no longer political winners. Thus, retaining their majority on Capitol Hill will likely entail some disciplining of Leviathan.

Speaker Pelosi has suggested revising some of the more burdensome aspects of the Sarbanes-Oxley Act; we hope to work with her and others on this issue. We hope to share with the new Congress our ideas on how to jump-start the stalled economic liberalization process—hampered by botched, partial deregulations in electricity, telecommunications, airlines, and other network industries. We also hope to work with the new Congress on Food and Drug Administration (FDA) reform, to speed the process of bringing new life-saving drugs to market.

With major change comes major risks. As a Louisianan well aware of the something-for-nothing allure of populism, I see worrisome traces of it in the current political climate. Mistakes made in the name of “helping the little guy” can hurt everybody in the long run, by creating long-lasting damage to the American economy.

Proposals for one-size-fits-all mandates in areas like wages and prescription drugs threaten to undermine many of the new Democrats’ recognition of the marketplace as the best means of allocating resources. We will happily work with lawmakers of both parties to help stop bad bills such as these.

During the last Congress, Republicans massively expanded the federal government—and the voters reacted negatively. Now the Democrats have been entrusted to set aright the ship of state. In a globalized world, they will retain their majority only by eschewing the anti-market rhetoric of their party’s past. They, along with President Bush, hope to cement a legacy. There is no reason why that could not crystallize around a revitalized economic liberalization program. CEI’s agenda seeks to appeal to lawmakers, of all parties, to consider reforms to boost economic and personal liberties. It will be an interesting few years; we plan to be a part of the debate.

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## SECURING THE ECONOMY

### Rein in the \$1 Trillion Regulatory State

From transportation to trade, from communications to banking and technology policy, policy makers of both parties have successfully challenged the moral legitimacy, intellectual underpinnings, and economic rationality of federal regulatory intervention. Democrats helped spearhead transportation deregulation; both parties rolled back unfunded mandates a decade ago.

Regulations are frequently anti-competitive and anti-consumer, annually costing consumers hundreds of billions of dollars. Policy makers still largely do not know the full benefits and costs of the regulatory enterprise. Meanwhile, regulatory agencies grow in power and budget like feudal baronies. Cost-benefit analysis, however informative, is politically unpopular; nor does it actually bring the largely unaccountable regulatory state under congressional control. Rather, greater congressional accountability and cost disclosure matter most in regulatory reform efforts. A congressional vote on major or controversial agency rules before they take effect—along with regulatory cost transparency through such tools as improved annual cost and trend reporting—would help voters to hold Congress responsible for the costs of the regulatory state. That would help close the breach between lawmaking and accountability stemming from excessive delegation of power to federal agency employees, while forcing Congress to internalize the need to demonstrate regulatory benefits. Among its reforms, Congress should:

- Establish a bipartisan Regulatory Reduction Commission to survey and pare existing rules.
- Develop a review and sunset schedule for new regulations and agencies.
- Explicitly approve major agency regulations.
- Publish an annual Regulatory Report Card to accompany the Federal Budget.
- Require that agencies report costs (Congress itself must assess relative benefits and compare agency effectiveness).
- Have agencies and the Office of Management and Budget (OMB) recommend rules for elimination, and rank rules' effectiveness.

- Wayne Crews

### Reform U.S. Agriculture Programs

The 2002 Farm Bill expanded U.S. agriculture support programs significantly. Farm subsidies in 2005 totaled \$21 billion. Those payments are concentrated; a small number of large farm operators received the greatest share. According to U.S. Department of Agriculture (USDA) data, the top 1 percent of farmers received 20 percent of all 2005 subsidy payments, and the average payment per these recipients totaled \$275,000.

*Regulations are frequently anti-competitive and anti-consumer, yet annually cost consumers hundreds of billions of dollars.*

In addition to subsidies, many agricultural producers enjoy the benefits of price supports, which increase food costs and disproportionately impact low-income consumers who pay a larger percentage of their income for food.

*Congress should reform existing programs that waste taxpayers' money, increase consumers' costs, threaten U.S. credibility in promoting open trade, and harm developing countries' ability to compete in the world market.*

Many government agricultural programs also restrict imports of needed products, such as sugar and ethanol; this leads to higher costs for food and fuel.

With the imminent expiration of the 2002 Farm Bill, debate on the 2007 Farm Bill is already fierce. Some agricultural interests, nervous about the deficit and possible cuts in spending, are hedging their bets and pushing for an extension of the costly 2002 bill. Others are trying to figure out how to transform their support programs to ones that would be more politically appealing—such as payments for conservation set-asides and “incentives” for alternative energy production from crops. Even some farm sectors that have not been feeding at the public trough, such as specialty crop producers of fruits, vegetables, and nuts, are now asking for their “fair share” of the government’s largesse.

The 110<sup>th</sup> Congress should reform existing programs that waste taxpayers’ money, increase consumers’ costs, threaten U.S. credibility in promoting open trade, and harm developing countries’ ability to compete in the world market.

**U.S. sugar program.** Congress should reform the egregious system of price supports, import restrictions, and subsidized-rate loans that raise the cost of U.S. sugar to two to three times the world price, cause food industry job losses, damage the environment by encouraging overproduction in ecologically sensitive areas, and prevent developing countries that are efficient producers from being able to compete.

**U.S. dairy program.** Congress should reform the complex system of price supports, milk marketing orders, import restrictions, and export subsidies that raise prices for consumers and interfere with producers’ ability to respond to consumer demand. For example, the U.S. should abolish the federal milk marketing order system that sets varying minimum prices for milk in different regions of the country. This bizarre system means that consumers living in states far from Eau Claire, Wisconsin, pay higher prices for milk and dairy products than consumers living in closer states.

- Fran Smith

### **Roll Back Burdensome Sarbanes-Oxley Accounting Rules**

Corporations, like all human institutions, must be constrained to reduce the risks of fraud and error. Mostly, competition can better discipline these tendencies than can bureaucratic one-size-fits-all rules. Calamities are often the unintended result of past political interference in the market rather than of any inherent market failure. Fraud must be punished, but there can be no error-free economy. Yet our first challenge

when such errors—or crimes—occur should be to carefully examine whether existing government regulatory policies may have weakened the disciplinary forces of competition—and, if so, we should move to repeal such policies. House Speaker Nancy Pelosi has criticized some aspects of the Sarbanes-Oxley Act—which was rushed through Congress in 2002 following the Enron and WorldCom scandals—and has said that she supports revising the law, to mitigate its “unintended consequences.”

Congress should heed this call. The Act’s Section 404’s requirement for accountants to sign off on vaguely defined “internal controls” is costing American companies \$35 billion a year in direct compliance costs, according to the American Electronics Association. And it adds 35,000 extra man-hours for the average public firm, according to Financial Executive International. Congress should relieve this heavy regulatory burden by doing the following:

- Adopt the Securities and Exchange Commission’s (SEC) advisory committee recommendation that smaller public companies be exempt from Sarbanes-Oxley’s Section 404 and other SEC rules. A letter from seven Democratic members of the House Small Business Committee, including now-Chairman Nydia Velazquez, notes that senior managers at these smaller companies “now have to choose between spending their time on vital business development functions of Section 404 compliance.”
- Repeal the “internal control” rules of Section 404 or make them voluntary. The term “internal controls” is undefined in the statute and has been broadly defined by regulators. And the SEC has found that internal control practices are seldom a tip-off to fraud.
- Abolish the unaccountable Public Company Accounting Oversight Board (PCAOB). Sarbanes-Oxley created this agency to enforce its accounting rule. Congress designated the board as a private non-profit corporation appointed by the SEC—a structure that violates the Constitution’s Appointments Clause, which reserves such appointment power to the President or to the head of a cabinet department. The PCAOB wields tremendous power without accountability. It levies taxes on all public companies, it can discipline and fine auditors, and it is responsible for the broad interpretation of Section 404’s “internal control” provision. And the PCAOB wields this power without any presidential supervision and minimal SEC oversight. The PCAOB’s constitutionality now faces a court challenge, but regardless of that case’s outcome, Congress should abolish the Board—giving authority over accounting back to the SEC, as it was before Sarbanes-Oxley.

- John Berlau

## **Make Stock Options Available to More Workers**

The House Democrats’ “Innovation Agenda,” which was folded into the campaign policy document “A New Direction for America,” backs

*A letter from seven Democratic members of the House Small Business Committee, including now-Chairman Nydia Velazquez, notes that senior managers at smaller public companies “now have to choose between spending their time on vital business development functions of Section 404 compliance.”*

legislation to “reward risk-taking and entrepreneurship by promoting broad-based stock options for rank-and-file employees.” For three decades, there had been a bipartisan recognition that stock options benefit workers and the economy by allowing workers to grow wealthy with their companies and allowing new, cash-strapped companies to attract and reward top talent. But in recent years stock options have been tarred with a broad brush by corporate scandals and saddled with punitive policies. Today, the Financial Accounting Standards Board (FASB) requires companies to “expense” future-based stock options against current earnings, even though stock options never result in a cash outflow. This policy has had little effect on levels of executive compensation, but has caused companies to greatly reduce stock options for rank-and-file workers. It has also resulted in misleading financial reports for investors of companies that utilize stock options. Congress should:

*Hedge funds and private equity are vehicles for wealthy investors to take risks. But the benefits of these types of funds, and funds that combine features of both, extend beyond their investors to all entrepreneurs and shareholders.*

- Reject any further attempt to tax or punitively regulate the issuing of stock options.
- Reverse the options expensing standard through legislation similar to previous bills that had bipartisan support, including that of Senate Majority Leader Harry Reid and Speaker Pelosi.
- Hold hearings examining FASB’s process of setting accounting standards and whether the agency should have a de facto monopoly on setting these standards.

- John Berlau

### **Recognize the Value of Hedge Funds and Private Equity for Entrepreneurs and Shareholders**

Hedge funds and private equity are vehicles for wealthy investors to take risks. But the benefits of these types of funds, and funds that combine features of both, extend beyond their investors to all entrepreneurs and shareholders. Private equity funds build wealth in distressed and startup companies. Hedge funds have forced public companies to create more wealth for shareholders through streamlining and selling off divisions. Both provide liquidity and have reduced risks of disruptions to capital markets. Cumbersome restrictions would impede their ability to perform in these vital roles. Rather than curtailing these vehicles, Congress should be looking at how to make their benefits available to more investors. Congress should:

- Reject attempts to subject these vehicles to the SEC’s registration process. They are already subject to securities fraud statutes, and this is more than sufficient.
- Stop the SEC from raising the minimum capital requirements. The SEC is proposing to raise the minimum net worth needed to invest in the funds from \$1 million to \$2.5 million. Obviously, the SEC doesn’t need to protect “poor” millionaires. And this increase will further drain the pool of capital for innovative new businesses.
- Revise the Investment Company Act of 1940. This would allow mutual funds more freedom to pursue some of the strategies of

hedge funds and private equity, such as short-selling, and give some of the hedge fund benefits to ordinary investors with minimal risk.

- John Berlau

### **Encourage Innovation in Credit Availability**

Because of innovations in mortgages, credit cards, and unsecured loans such as payday advances, more people today are able to borrow cash that they can use for a variety of purposes, whether to start businesses or get more education. Muhammad Yunus won the 2006 Nobel Peace Prize for expanding “microcredit” in Bangladesh, but too often providers of “microcredit” in America are lumped together as “predatory lenders.” Government certainly has a role in preventing fraudulent lending practices, but should leave payment terms and interest rates up to consenting adults to negotiate. It should also reduce the paperwork burden of traditional lending institutions to spur competition among credit providers. Congress should:

- Reject attempts to put interest rate or price controls on credit vehicles.
- Repeal a variety of regulations—from Sarbanes-Oxley provisions to the Internet gambling ban—that impose myriad paperwork requirements on banks that, by adding to a bank’s overall costs, indirectly make services more expensive to borrowers and depositors at all income levels.
- Reduce “know your customer” requirements on banks and other financial institutions to investigate their customers’ backgrounds. These rules often overwhelm law enforcement with useless reports from the financial institutions and have adverse impacts on the low-income “unbanked” population.

- John Berlau

### **Facilitate Further Telecommunications Liberalization**

Public interest arguments and airwave scarcity have long been used to justify telecommunications regulation. But in today’s world, policy makers starting from a clean slate likely would not create a Federal Communications Commission (FCC) with command over prices, entry, and service delivery. Internet-based technologies, among mankind’s most liberating, have helped erase distance, allowing millions to become their own broadcasters. Today’s communications landscape has given individuals a power to exercise their freedom of speech that the Framers hardly could have imagined.

But a pro-regulatory bias dominates. Application and content companies seek “Net neutrality” legislation that would effectively impose price and access regulation on network providers and inhibit infrastructure development. The entertainment industries want a “broadcast flag” to deflect piracy. Some groups want the FCC to regulate “indecent” content

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on new services. Others want to limit the size of media companies. In the latest *Unified Agenda of Federal Regulations*, 146 rules originate in the FCC, an agency whose budget has increased by 24 percent over five years.

*Competition, or even the threat of it, disciplines the behaviors of companies in efficient and consumer-friendly ways.*

Competing cable, telephone, and wireless companies are revolutionizing the telecommunications industry. Cable companies provide local phone service; wireless phones have effectively replaced long distance wireline; satellite competes with cable video programming, while phone companies challenge both satellite and cable video.

Reform should advance such competitive discipline and citizen empowerment, and avoid the costs of centralized bureaucracy. The FCC should be radically reformed, and accorded a minimal regulatory role. Rollback of government regulation does not mean that communications remains “unregulated.” Competition, or even the threat of it, disciplines the behaviors of companies in efficient and consumer-friendly ways. It is also important to keep in mind that the Federal Trade Commission (FTC) would continue to enforce general unfair competition rules, states would retain consumer protection authority, and federal antitrust rules would remain in force. Congress should:

- Eliminate economic regulation of telecommunications. Rules regulating price and access should be phased out entirely. Policy makers should view lightly regulated Internet communications as a baseline and bring legacy communications into “deregulatory” parity. Congress should not legislate in new areas, such as by imposing price and access controls in the name of “Net neutrality.”
- Restructure the FCC. Eliminate FCC functions that could be covered by the FTC, provide a clear legislative mandate to get the broadcast spectrum into the market, and create a “firewall” to prevent FCC regulation of new communications services, such as Voice over Internet Protocol or digital recorders.
- Analyze which governmental authority, federal or state, is best suited to regulate—or if government regulation is even required. In some cases, Congress should prevent state interference with communications services.
- Revisit rationales for economic and social policy regulation. Social welfare initiatives and goals—such as the universal service tax—should be disentangled from industry-specific taxes, price controls, and technological mandates.

- Wayne Crews

### **Improve Access to Affordable Energy**

Congress will continue its long debate over federal energy policy, but what we really need from Washington is an end to its current *anti*-energy policy. The government operates on the assumption that energy use is a bad thing that needs to be reduced as much as possible by being saddled with a host of burdensome laws and regulations. However,

plentiful energy is vital to the health of the economy and indispensable to our standard of living. We need a policy that allows the market to provide consumers with affordable energy.

**Expand Access to New Reserves.** Securing the nation's energy future will require allowing energy companies access to new sources of energy, such as oil reserves on the outer continental shelves (OCS) and in part of the Arctic National Wildlife Refuge (ANWR).

The Interior Department estimates that the U.S. federal outer continental shelves contain 76 billion barrels of technically recoverable oil—the equivalent of about 135 years of Saudi oil imports—and about 406.1 trillion cubic feet of technically recoverable natural gas.

The U.S. Geological Survey's estimate of economically recoverable oil and gas reserves under the coastal plain of ANWR is 10.4 billion barrels of crude oil—an amount that would increase proven U.S. crude oil reserves by 50 percent and is equivalent to about a quarter century's worth of current imports from Saudi Arabia.

Contrary to environmental activists' claims, oil and gas production on ANWR's coastal plain can be conducted in a manner compatible with protecting the environmental quality of the refuge and the wildlife that depend on it. Oil has been pumped at Prudhoe Bay just to the west of ANWR for three decades without major environmental mishap, and during that period the caribou herd has grown from 6,000 to 32,000. Exploration and production in ANWR would be accomplished with much more advanced technology than was used at Prudhoe Bay, which leaves a much smaller footprint on the land. And the vast majority of ANWR would be left undisturbed; exploration would be restricted to 2,000 acres of the 1.5 million-acre coastal plain.

**Repeal the Ethanol Mandate.** The market should be allowed to work to help bring energy prices down. To do so, it needs to be unburdened from wasteful and distorting government interventions such as subsidies for ethanol production.

The 2005 Energy Policy Act created a quota system requiring refiners, blenders, distributors, and importers of petroleum products to increase the amount of alcohol from corn and other plant materials in the nation's motor fuel supply by 700 million gallons per year, reaching 7.5 billion gallons in 2012. After 2012, the system ossifies into a permanent corporate welfare entitlement.

Ethanol enjoys a raft of other state and federal policy privileges. The most important of these is the 5.1 cent reduction in the 18.4 cent-per-gallon federal gas tax for E10—gasoline blended with 10 percent ethanol. The effect is to reduce the federal excise tax by 51 cents for each gallon of ethanol used. Without this tax break, a national market for ethanol fuel would not even exist.

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Another important policy prop is the 54 cents-per-gallon tariff on imported ethanol. This effectively prevents consumers from buying lower-cost Brazilian ethanol, made from sugarcane. Congress should repeal these subsidies, which benefit large agribusiness firms, and let consumers decide the role of ethanol in the nation's energy future.

- Marlo Lewis, Jr.

### **Allow American Workers to Work Without Labor Regulation**

One of America's greatest economic strengths is individuals' and businesses' ability to adapt to changing conditions. However, in the case of labor markets, many workers and employers remain subject to an array of obsolete New Deal-era labor regulations. The old adversarial model of labor relations has little to offer to the 21st century workforce, which is characterized by horizontal corporate structures and significant job mobility. However, rather than adapt to the changing economy, many unions are turning to government for help.

One major item on organized labor's agenda is an increase in the federal minimum wage, from \$5.15 to \$7.25 an hour. This is bad policy, a feel-good measure that politicians can sell as a mandate for higher wages for everyone, but in fact eliminates entry-level jobs—and thus makes entry into the job market more difficult for workers with few or no skills.

Another labor agenda item is automatic recognition of "card check" organizing whenever a union requests it (currently, a card-check procedure requires employer approval). Under card check, the National Labor Relations Board (NLRB) will recognize a union if a majority of employees sign cards requesting union representation, without holding a secret-ballot election. Because cards are signed openly, card check exposes employees to high-pressure tactics that secret ballot elections are intended to avoid.

With two seats on the NLRB opening in 2007, some unions may seek to inappropriately politicize the nomination process for their replacements. The NLRB is the main federal labor law adjudicating body. Favorable treatment from it will give unions a wholly arbitrary advantage in their organizing efforts. Members of Congress should resist efforts to politicize this process, and consider nominees solely on their qualifications.

As the examples of France and Germany show, inflexible labor markets can drag a nation's economy down. America should avoid such a fate.

- Ivan Osorio

### **Avoid Extension of Antitrust Regulation into New Competitive Realms**

For more than two decades, the willingness of policy makers

to rethink the presumption that economic regulation automatically benefits consumers has driven the deregulation of the transportation, telecommunications, banking, and electricity sectors. Yet antitrust regulation enjoys continued support in both the business and popular press. High-profile antitrust enforcement actions increasingly constitute a business hazard for aggressive, successful firms, and threaten to disrupt innovation and economic growth.

Because economic regulations—including antitrust—transfer wealth, they inevitably attract rent-seeking political “entrepreneurs” seeking entry or price regulation to hobble or preempt competition. Antitrust enforcement for competitive advantage generally harms consumers by increasing prices and decreasing output by undermining little-understood efficiencies. Rethinking the true impact of these practices, from “collusion” to “predatory pricing” to “discrimination,” should be a goal of policy makers in today’s competitive, global marketplace.  
- Wayne Crews

### **Avoid Privacy Regulation that Worsens Personal Security**

There are two great ironies in calls by lawmakers and consumer advocates to protect consumer privacy by regulating businesses that handle sensitive personal data. The first is that the most egregious violations of privacy have historically been perpetrated by governments on their own citizens, not by business engaged in consumer transactions. Second, those violations of privacy that *do* result from business and consumer transactions are vastly facilitated by the government’s own efforts to collect personal information on citizens. Social Security numbers, names, and birth dates—the holy trinity of information for identity thieves—are all kept in government databases, and the federal government itself has recommended their use by financial institutions as identity verification.

Now some lawmakers want to gather even more information, with federally controlled information databases on all citizens. Others have proposed requiring either national ID cards or that state ID cards meet certain federal standards—which would make state IDs into de facto national IDs. But that isn’t all; as homeland security becomes increasingly important in the national policy arena, there is a growing impetus to gather still more data on citizens, suggesting incorporating new technologies like biometrics and radio frequency ID tags into proposals for ID cards. The key to securing data and privacy is not to give government ever more personal information, but to give it less.

One-size-fits-all regulations are an inefficient means of maximizing privacy and security. The diverse uses for digital devices and networked communications have resulted in privacy and security needs that could not possibly be met by static laws or distant bureaucrats. The need for privacy and data safety varies depending on the type of information; what is an appropriate level of security for an online transaction between a buyer and a seller on eBay is certainly not so for a computer system that operates

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a facet of critical infrastructure, such as a chemical or power plant. Similarly, the data transmitted between an individual and his local bank, although sensitive, may be far less sensitive than the data transmitted by a mutual fund manager.

With technologies to secure privacy constantly improving, companies are developing ways to ensure that sensitive data and networks are protected according to user preferences and needs. The market forces of competition and innovation are constantly helping businesses and consumers devise solutions to new problems. No federal regulation could ever anticipate and respond to the ever-changing threats to digital information, nor is regulation likely to encourage robust and competitive markets for privacy-enhancing products. Legislative mandates in computer security are likely to stifle innovation and ossify technology standards.

Consumers today demand security in addition to functionality when it comes to online transactions and new gadgetry. As that demand grows, market institutions will evolve to produce even higher standards; insurance, company reputation, and third party watchdog groups are one possible combination of market institutions that could negate the need for heavy-handed regulation. As technology becomes potentially more invasive, governments must constrain their own excesses by:

- Avoiding mandatory databases.
- Ensuring Fourth Amendment protections for public surveillance.
- Avoiding mixing public and private databases.

Beyond that, government involvement in private sector privacy and data security issues should be limited to:

- Enforcing the contractual obligations of both businesses and consumers with respect to information security procedures.
- Tracking and punishing the cyber-criminals responsible for data breaches and identity theft, rather than the companies victimized by such criminals.

- Wayne Crews and Brooke Oberwetter

### **Forge a Bipartisan Alliance against Corporate Welfare**

One of government's biggest current undertakings is the wealth-transfer business; direct subsidies to agribusiness and other favored enterprises are well known. But regulation can also indirectly transfer wealth, benefiting some economic actors at the expense of competitors and consumers. Price and entry regulations are obvious examples of corporate welfare. Antitrust regulation is another less well-known one. But even regulations meant to address health and safety can benefit some firms at the expense of rivals. Corporate welfare, whether in the form of subsidies or regulations that hamper competitors, creates distortions and inefficiencies, injuring consumers and undermining the evolving, competitive marketplace. Congress should keep a watchful eye on the

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businesses that set up lobbying shops in Washington, D.C.—are they seeking to reduce burdens on entrepreneurship and employment or to add burdens that, although costly, benefit them at the expense of competitors? Such a critical assessment of political appeals should be a major goal of the hearing process in the new Congress.

- Wayne Crews

## **Liberalize Insurance Markets**

### **Extending the Benefits of Competitive Federalism.**

Congress should strive to reverse the federalization of corporate governance, by allowing the states to experiment with different approaches. The market for corporate chartering and credit card policies illustrates the power of competitive federalism in the corporate governance area. Congress should examine how best to extend the benefits of competitive federalism to the insurance sector, considering the comparative benefits of optional federal chartering, mutual recognition among the states, and other measures to allow insurance firms to better handle a growing array of modern risks. Allowing competition between state and federal regulators akin to that now existing in the banking sector—where the Federal Reserve and the Federal Deposit Insurance Corporation create effective dual-regulatory structures—would improve the viability and scope of a wider array of insurance risk management products.

**Freeing Capital for Real Insurance Needs.** Congress should also examine current Treasury Department policies regarding the tax treatment of reserves held by risk management institutions to offset the costs of high-cost, low-probability events. It should also reconsider federally subsidized home insurance in risky areas, such as those especially prone to earthquakes and floods. The urgency of these steps has become ever more obvious in the wake of the September 11, 2001 terrorist attacks and hurricanes Katrina and Rita. Few policy goals are more important than ensuring that humanity's scarce "seed corn"—its always scarce capital resources—are allocated prudently to best advance human progress. Insurance can—and should—play a much more constructive role in discouraging construction in such high-risk areas and in ensuring that construction that does move forward is designed more appropriately.

Competitively disciplined financial institutions perform this task best. Political regulation too often misallocates capital to politically preferred regions, increasing societal risks and producing unfunded liabilities for future generations. Often these subsidies benefit the wealthy—for example, beachfront developments—and burden *all* taxpayers. Political rigidities imposed on private risk-management institutions increase the likelihood of risks being under-priced and of monies flowing into inappropriate investments. Capitalism works best when capital investment decisions are made by those who will gain if those decisions are prudent—and will lose if those decisions are misguided.

- Fred Smith

*Congress should keep a watchful eye on the businesses that set up lobbying shops in Washington, D.C.—are they seeking to reduce burdens on entrepreneurship and employment or to add burdens that, although costly, benefit them at the expense of competitors?*

## Keep Government's Hands off the Net and E-Commerce

*“Governance” need not invoke government—spam, spyware, and other nefarious activities are best addressed by private solutions that authenticate and filter content in ways consistent with free speech and individual choice.*

As a network of networks, the Internet transcends political boundaries, making it difficult for any government to regulate. So far, Internet “governance” has been decentralized and its functions distributed among various organizations. “Governance” need not invoke government—spam, spyware, and other nefarious activities are best addressed by private solutions that authenticate and filter content in ways consistent with free speech and individual choice.

The Internet also makes economic transactions more efficient and less costly, and increases consumer choice, seriously challenging earlier (perfectly appropriate) business models involving intermediaries, high commissions, and controlled information flow. Many old regulatory models simply do not translate to new business models that bypass such intermediaries and techniques. When the attempt is made, regulators often end up skewing the regulatory process in favor of established, “traditional” off-line companies. Examples have included rules banning the direct online purchase of cars, contact lenses, wine, and even caskets. But the rationale of protecting consumers via such prohibitions does not withstand scrutiny. Congress should resist such appeals, and maintain a skeptical attitude toward economic regulation of electronic commerce.

- Wayne Crews

## Clarify the Role of Not-So-Intellectual Property in the Economy

Copyright and patent laws protect the expression of an artistic work and the formulation of an idea. Intellectual property rights are the basis for privately funded innovation, allowing companies that succeed in the marketplace to recoup their research, development, and marketing costs. But digital technologies and the Internet have revolutionized the debate over the fundamental role of intellectual property rights. Peer-to-peer file sharing, CD burning, and other forms of digital distribution and reproduction threaten industry business models that are holdovers from an earlier, analog era. Congress should not rush to change copyright laws, ban devices capable of recording, or impose secondary liability on networks or technology developers in ways that could decrease innovation. Congress should also resist well-meaning attempts to make federally funded research publicly available, which would rob scientific journals of the proprietary content that they publish and effectively nationalize scientific publication.

- Wayne Crews

## Understanding Corporate Social Responsibility

“Corporate social responsibility” (CSR) has become the new rationale for old policies intended to transform private firms into public utilities—and force them to perform whatever duties are politically attractive at the moment. The corporation is an extremely valuable way of organizing large numbers of people to produce goods and services efficiently—that

is, to create wealth. That wealth then flows into the hands of shareholders, workers, customers, and suppliers, who are then empowered to advance their own individual goals and values. To “socialize” this process is to reduce the ability of individuals to advance their goals, placing the values of politicians as paramount. Nothing would do more to reduce the world’s ability to address poverty and pollution than to force CSR onto the world economy.

- Fred Smith

## **Protect and Enhance Federalism**

The Framers intended federalism to act as a check on the power of the national government, but they also imposed restraints on the ability of groups of states to gang up on other states or on the rest of the country. Both of these restraints have been severely weakened. There has long been a growing federal intrusion into state and local issues. More recently, however, states themselves have begun to create a new form of national regulation through the machinations of state attorneys general (AGs). The first trend is obvious. The second, because it is too new to be widely recognized, or open to public scrutiny, could well be more dangerous.

In areas ranging from financial regulation and tobacco control to global warming and fuel economy mandates, state attorneys general are entering into new alliances aimed at imposing national regulatory schemes via litigation. These joint litigation activities are often fueled by lucrative deals between state AGs and private lawyers, and many states join simply because such lawsuits have the potential to generate huge sums of money. Under the Constitution’s Compact Clause, however, such joint ventures between states require congressional approval in advance. Congress should actively review such joint state activities, rather than sit on the sidelines while new national regulations are imposed by default.

- Sam Kazman

## **Protect Free Speech by Rejecting Content Regulation**

In recent years, the First Amendment’s protections have been increasingly extended to commercial speech, such as product advertisements. However, significant gaps still exist; in areas such as the health benefits of moderate alcohol consumption, federal prohibitions still restrict the public’s ability to learn about well-documented scientific findings.

As new technologies provide an ever-growing array of media, Congress will face increasing pressure to impose content regulations—including regulations on video games and on social networking websites like MySpace. As portable devices such as iPods and cell phones become increasingly equipped for video and multimedia playback, regulation advocates will begin to push for laws governing what can and cannot be viewed in public areas. Most of these regulations will initially arise under the guise of protecting children from harmful material, but regardless

*Congress should resist well-meaning attempts to make federally funded research publicly available, which would rob scientific journals of the proprietary content that they publish and effectively nationalize scientific publication.*



*Armchair environmentalism is a luxury. Increasing wealth—via liberalized trade—is a key to raising both labor standards and environmental protection in the developing world.*

of the reasoning, all such regulations should be avoided. Parents, not government regulators, are best equipped to determine what content is appropriate for their children, and all such regulatory ventures pose a threat to free speech.

- Peter Suderman

### **Promote Globalization's Benefits by Further Liberalizing Trade**

Increasing liberalization of world trade is one engine behind the dramatic increase in global prosperity since the 1950s. The efforts of the World Trade Organization (WTO) to lower international trade barriers have particularly benefited poor countries seeking prosperity. The current impasse in advancing the WTO's Doha Round mainly hinges on rich countries' reluctance to reduce their extensive agricultural support programs, which distort the world market and harm developing countries' ability to compete.

In addition, the progress that more open trade can bring is increasingly threatened by involving the WTO in setting environmental and labor standards—a form of disguised protectionism. Imposing uniform American- or European-level environmental and labor standards on developing countries would deprive poor people of jobs and harm the environment in those countries by undermining their economies' varying competitive advantages. Armchair environmentalism is a luxury. Increasing wealth—via liberalized trade—is a key to raising both labor standards and environmental protection in the developing world.

For some constituencies, this disguised protectionism is desirable. In the United States, organized labor would like to restrict labor market competition for its members by thwarting international trade liberalization. Thankfully, many Democratic lawmakers today understand the benefits of free trade—witness President Clinton's break with Big Labor over the North American Free Trade Agreement. The new Democratic Congress should build on this legacy.

On July 1, 2007, Trade Promotion Authority (TPA) expires. TPA or "fast track" authorizes the President to negotiate and sign trade agreements and have them voted up or down by Congress without amendments. Enacted as part of the Trade Act of 2002, TPA was extremely controversial, with labor unions and environmental groups opposed and insisting that labor and environmental mandates be included in future trade agreements. Today, TPA's requirements have burdened trade agreements with developing countries with U.S.-style environmental and labor provisions. Already some special interests insist that a 2007 TPA must include greater enforcement of even more stringent labor and environmental mandates. If successful, this will further harm developing countries' sovereignty—their ability to set their own policies to deal with their own urgent needs and priorities—and stifle their economic growth through more open trade.

At the same time, international treaties (such as the Law of the Sea Treaty and other international agreements, particularly environmental ones) pose significant threats to American sovereignty and to the constitutional rights of American citizens. Treaties require only a presidential signature and ratification by a two-thirds Senate vote to become law. Vigilance will be required to avert these threats.  
- Ivan Osorio and Fran Smith

### **Counteract Politicization of Federal Science Policy**

The federal politicization of science in many areas is harming science itself. Ethics rules and advisory panel guidelines are having the effect of isolating the market from the marketplace of ideas as commercial interests are frozen out of the science policy debate. With industry R&D investment now double federal funding for the same, this is a significant problem. Moreover, government patronage today threatens to distort science in several areas. If science is to be insulated from the risks associated with patronage, a new, innovative system of federal funding needs to be adopted. One option is the replacement of the current grant system with one based on prizes, lotteries, and loans—a system that would reduce the influence of the politician and grant officer and increase the freedom of the scientist.  
- Iain Murray

### **Resist New Burdens on the Transportation Sector**

The transportation industries—airline, railroad, shipping, and trucking—are networks involving both a flow and a grid. The flow element relates to what is being transported—e.g. airplanes and trains—and the grid is the physical infrastructure used to manage the flow—e.g. airports and air traffic control. Some transportation industries have been freed of extensive federal regulation, including railroads and trucking. However, air travel had only its flow element—the airlines—economically liberalized under the 1978 Airline Deregulation Act. The Federal Aviation Administration (FAA) remains a command-and-control government agency that poorly manages air transport infrastructure to the detriment of consumers. Air traffic control services should be privatized, and landing slots and airport space should be allocated using market prices and new technology rather than through administrative fiat. As air travel is a global industry, the U.S. must continue to open up international markets, especially an “open aviation” area with the European Union, and remove laws that restrict foreign investment in American airline companies.

**Freight Rail.** Attempts to roll back the successful 1980 Staggers Act and re-regulate America’s freight railroads must be resisted. Staggers has enabled a genuine market to operate in which the railroads are finally able to make a sustainable rate of return and invest in badly-needed new infrastructure. Re-regulation would suffocate new infrastructure investment and lead to greater highway congestion.

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**Passenger Rail.** Amtrak is an inefficient waste of taxpayer money. Options for the privatization of Amtrak's routes and infrastructure must be explored, which may well include the break-up of the network. Competition in passenger rail can only benefit travelers.

**Aviation.** Attempts to tax airlines to raise revenue on environmental grounds will be extremely harmful to the industry and should be resisted. Outdated rules that forbid industry consolidation or foreign ownership should be revised. Policy makers also need to take advantage of 2007's FAA reauthorization to restructure America's air traffic control system which can be done at no risk to national security and should also secure efficiency benefits by allowing such innovations as free flight. And there is no need to reinvent the wheel. Canada's successful air traffic control privatization offers a useful model.

- Iain Murray

### **Facilitate Electricity Competition**

A fully responsive electricity industry would use active demand and distributed generation to better meet customer needs. Digital technologies and flexible pricing can enable consumers, rather than centralized producers, to make decisions about supply. Laws that restrict this flexibility in the name of fairness increase the power of suppliers and contribute to energy waste.

In further electricity restructuring efforts, Congress must deregulate not just the flows—generation—but the grid itself. It must guard against a knee-jerk defense of either the utilities' "go slow" position or that of large industrial power users who demand forced open access to (somebody else's) grid. Neither of these parties has advocated free, voluntary markets. As in the "Net neutrality" debate, mandatory access to the power grid is being sold as a model of liberalization, though it is far from that. Forced open access to the grid, by further institutionalizing central price and entry regulation, will actually delay the genuine competition that would emerge if reformers would instead target the government-granted exclusive franchises that utilities enjoy.

Properly, there is no right of new electric generators to force utilities to transport their power to customers; only the right to figure out how to do it themselves. At the same time, states have no legitimate authority to prevent electricity customers within their borders from purchasing power from one of those competitive generators, *if the generator or someone else is willing to transport that power voluntarily*. The issue is straightforward: If incumbent utilities do not offer competitive service—which is certainly their right—then others must be free to provide competitive delivery if they can figure out a way. Cross-industry consortia could exploit the many rights of way to consumers that now exist. Yet the states generally do not permit delivery competition. There is no state "right" to violate the rights of individuals who attempt to execute voluntary trades. Thus, reformers can unite around the Commerce Clause's injunction against states' erecting artificial barriers to

competition, a position that violates no principles of federalism. Federal action—but not forced access legislation—will be needed in those instances in which states remain in the business of restraining voluntary trade through the continued use of the exclusive franchise. Federal action should *not* be used to induce *involuntary* trade, the essence of forced access.

- Wayne Crews and Iain Murray

## PROTECTING THE ENVIRONMENT

### Restore the Constitutional Right to Property

The right to property is an essential part of a free society, and widespread private property ownership is a chief limitation on government power and growth. Property rights have traditionally been more secure in the United States than in any other country. However, this is being severely eroded with respect to ownership of real property, as the Supreme Court dramatically underscored in its 2005 *Kelo* decision, which deprived homeowners of their right to private property to allow commercial development. Private property has also been undermined by the Endangered Species Act (ESA), wetlands regulation under the Clean Water Act, and other environmental laws and treaties.

- Lawmakers should advance the constitutional principle of private property by reforming laws that adversely impact landowners to at least demand that government provide compensation when property values are decreased by regulatory measures.
- Lawmakers should ensure that governments—at all levels—do not have the right to seize private property for the purposes of commercial development. When the Framers of the Constitution established eminent domain, they did not intend it to be used to allow one private party to benefit at the expense of others. Public policies should ensure that use of eminent domain be restricted to cases of legitimate public use.

- Angela Logomasini

### Embrace Private Conservation of Land and Natural Resources

Private stewardship and markets play a critical role in land and natural resource conservation. Much of America's lands and other natural resources have suffered because government ownership encourages mismanagement and overuse because no individual has a long-term stake in protecting resources owned in common. In addition, public lands are managed based on political priorities that often produce misguided political management decisions. Examples include the devastation caused by uncontrolled forest fires, overgrazing, and destruction of species and habitat.

- Lawmakers should further explore marketplace incentives and private property-based approaches to encourage land and natural resource conservation.

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*The Endangered Species Act's threat of regulatory "takings" creates perverse incentives, inducing property owners to ensure that their land never becomes habitat or potential habitat for an endangered species.*

- Existing laws that impede private conservation should be reformed. These include punitive measures in the Endangered Species Act, wetlands regulations, and potential invasive species laws.
- Lawmakers should look for ways to privatize resources owned in common to allow private conservation. Areas in which this has already been done successfully but could be expanded include the establishment of fishing rights, privatization of coral reefs, and privatization of species and their habitats in private wildlife refuges.

- Angela Logomasini and other CEI Staff

### **Protect Endangered Species**

The Endangered Species Act (ESA) of 1973 is bad for wildlife, because it is bad for people. It has largely failed to protect endangered plants and animals because the threat of regulatory "takings" creates perverse incentives, inducing property owners to ensure that their land never becomes habitat or potential habitat for an endangered species.

- Congress should replace the ESA with a non-regulatory, incentive-based conservation program to encourage private landowners to protect and provide habitat. Property owners' natural incentive to be good stewards of their land can work in concert with effective species protection.
- Absent reforms that eliminate the ESA's punitive land use regulations, policies should require just compensation for landowners who are deprived of the right to use their land and whose lands are devalued by government regulation.
- Another policy change that would help species would be elimination of the estate tax. The costs of these taxes often forces families to sell off estate properties to developers to pay for the estate taxes on the property. In many cases, individuals would rather keep the properties free from development, but the taxes make that impossible.

- Angela Logomasini and Robert J. Smith

### **Clarify the Role of Invasive Species**

In the past, policies addressing problem plants and animals followed a rational path: They focused on controlling organisms that posed serious threats to agricultural crops and other valued American plants and animals as well as public health. However, the issue associated with so-called invasive species is moving in a new direction, leading to an almost religious crusade to rid the nation of all "non-native" plants and animals. Despite claims to the contrary, many non-native species provide valuable public benefits. Wholesale eradication, instead of management, promises to cause more problems than it would solve. It would result in wasted taxpayer dollars and reduced access to many valuable plant and animal

products. In addition, these policies are likely to expand federal land use regulations, undermining the constitutional right to property.

- Policy makers in Congress and the administration should focus on a scientifically sound definition of invasive species—one that focuses on harmful and noxious characteristics rather than on country of origin.
- In addition, lawmakers should include language in all legislation involving this issue stating that all affected landowners will receive compensation for any economic costs placed on them to meet any invasive species regulations.

- Angela Logomasini and Robert J. Smith

### **Develop New Approaches to Preserve Ocean Resources**

The world's fisheries face severe decline. Indeed, because much of the world's ocean resources are not "owned," these resources tend to be overexploited—as everyone attempts to fish out of the ocean as much as possible before competitors can consume the resources. Several governments actively subsidize such destructive practices in attempts to protect traditional industries. However, where tradable rights have been assigned to ocean resources, owners of these rights help ensure long-term conservation. Similarly, private establishment and ownership of artificial reefs have helped preserve habitat, while government attempts to create artificial reefs have been catastrophic failures. Many of these manmade structures provide critical habitat and ensure plentiful fish supplies. Such promising policies hold the key to ensuring long-term sustainability of the world's fishery resources.

- Iain Murray

*Where tradable rights have been assigned to ocean resources, owners of these rights help ensure long-term conservation.*

### **Recognize the Risks of Global Warming Policies**

Although global warming has been described as the greatest threat facing mankind, the policies designed to address global warming actually pose a greater threat. The Kyoto Protocol and similar domestic programs to ration carbon-based energy use would do little to slow carbon dioxide emissions, but would have enormous costs. These costs would fall most heavily on the world's poorest nations. The correct approach is not energy rationing, but rather long-term technological transformation and building resiliency in developing societies by increasing their wealth.

**Global mean temperatures have been rising modestly.** The satellite record, which covers the whole globe and is therefore more reliable than the surface record, shows that the Earth has been warming at 0.13° Celsius per decade since the mid-1970s.

**The scientific and policy implications of global warming are open to debate.** While scientific debate continues (see below), of more importance to policy makers are debates on the economic and political aspects of global warming.

**Proposed solutions to potential global warming will do more harm than good.** Restricting greenhouse gas (GHG) emissions will seriously harm the American and global economies while having no effect on global warming. Kyoto would have cost America \$100 to 400 billion *in a single year* (2010), according to the Energy Information Administration, while it would only avert 0.07°C of warming by 2050 if fully adopted worldwide.

**Current congressional proposals are even less effective than Kyoto.** Here are the figures for the most recent initiatives proposed in Congress. All measures represent economic pain—job losses, hunger, and ill-health—for no discernable climate gain:

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Policy	Tons GHG Reduced by 2050	Global warming Avoided by 2050	Cumulative GDP Loss to 2025
S. 139	31,299	0.04	\$1,354 billion
S. 1151	21,275	0.029	\$776 billion
Bingaman	5,830	0.008	\$331 billion

(GHG reductions are in million metric tons carbon equivalent; Warming avoided is in degrees Celsius.)

**Global energy restrictions will keep billions in poverty.** The peoples of China, India, and other developing countries are finally emerging from poverty through massively increased use of hydrocarbon energy. The International Energy Agency predicts that China will overtake the United States as the world's leading emitter of greenhouse gases by 2009. China is exempt from emission restrictions under Kyoto, and its government has stated that it will not accept any such restrictions in the future. American restrictions on emissions will be meaningless if global restrictions are not adopted. If that happens, billions in Africa, Asia and the developing world will be kept in poverty, having been deprived of an essential means of escaping—abundant, affordable energy.

**Ongoing scientific debate.** Despite the hype about “consensus,” many aspects of global warming are still being actively debated in the scientific community. Research must be allowed to continue in these areas. These include:

- Whether current warming is unprecedented.
- The role of other factors beyond greenhouse gases in the recent warming, including land-use changes, solar variability, and aerosol particulates.
- The likely effects of warming on cyclones and hurricanes.
- The likely effects of warming on the spread of infectious diseases.
- The likely effects of warming on sea levels.
- The reliability of global climate models.

- Iain Murray

## Trash Counterproductive Waste Disposal Policies

**Solid waste.** Much of the nation's current solid waste policies follow an outdated, politicized, and government-centered model. State and local regulators focus on deciding how much waste should be recycled, placed in landfills, or burned in incinerators. This approach fails to discover the most environmentally and economically sound mix of options. Government decision makers lack the necessary information and inevitably focus on misplaced perceptions about the various disposal options. As a result, they produce recycling programs that cost more than they save and use more resources than they save. In contrast, private sector competition between recycling, landfilling, and incineration produces a market that reduces costs and saves resources.

- Federal policy makers should resist attempts to increase federal regulation in solid waste disposal.
- Local governments should seek ways to increase private markets in the waste disposal industry.
- They should change waste policies to allow market-driven competition between the various disposal options: allowing recycling, landfilling, and incineration companies to compete so that the most environmentally and economically sound mixture of disposal options results.

**Electronic waste.** Increasingly, news reports and environmental activists are claiming that we are facing a new solid waste crisis. As a result of such rhetoric, Europe has passed several “e-waste” laws, U.S. states have begun looking into their own regulations, and members of Congress have proposed federal legislation. Unfortunately, misinformation and the naïve belief that government is positioned to improve electronic waste disposal is leading to misguided policies and legislation.

- Despite claims to the contrary, there is no “e-waste crisis.” E-waste risks and costs are manageable by allowing private recycling and disposal efforts to continue.
- Manufacturers should not be forced to take back electronic equipment, since they are in the manufacturing—not disposal—business. Some firms have voluntary programs for recycling computers, which offer a market-based approach for some products.
- The creation of new government e-waste programs—especially at the federal level—should be avoided, as they promise to promote inefficiencies, increase environmental problems, and hinder market solutions.
- Consumers should not be taxed when they purchase computers or other electronics, but they should be responsible for disposing of discarded products in a safe and legal fashion. Disposal may include paying somebody to dispose of the product via a voluntary private party agreement or disposal through local government trash collection.

*Despite the hype about “consensus,” many aspects of global warming are still being actively debated in the scientific community.*



*Federal hazardous waste policy has long been governed by federal mismanagement, perverse incentives, unjust liability schemes, and misuse of science.*

**Hazardous waste.** Federal hazardous waste policy—as embodied in the Superfund law and the Resource Conservation and Recovery Act—has long been governed by federal mismanagement, perverse incentives, unjust liability schemes, and misuse of science. The Superfund regime of randomly taxing and suing parties not actually responsible for hazardous waste contamination needs reform. Policies should target those who have produced harm—an approach that rewards good behavior and discourages bad.

- Hazardous waste sites are exclusively a state and local concern. Given the demonstrated successes of states in managing such sites locally, there is little reason for the federal government to manage such sites. Thus, Congress should seek ways to further devolve the program to the states.
- Absent devolution, hazardous waste programs should be reformed to provide regulatory relief by setting standards that consider the use of the land and that are not needlessly onerous.
- Liability schemes should be reformed to ensure that only the parties directly responsible for contaminating property should be held liable. Currently, the federal Superfund law holds anybody remotely connected to a disposal site liable even if they did not have any control over the site or the contamination. Parties unfairly held liable include generators of waste that was eventually disposed of at a site, parties that hauled waste to a site, and parties that gained ownership of contaminated property.

- Angela Logomasini

### **Recognize the Elitist Nature of “Anti-Sprawl” Measures**

For the greater part of the last century, many people have realized the American Dream by pursuing home ownership in suburbs. But today anti-sprawl activists blame the suburbs for a host of environmental and social ills, and push initiatives to limit housing growth to high-density patterns. Such initiatives often end up raising housing prices while exacerbating the very problems they claim to fix, such as traffic and pollution. Federal programs that subsidize suburban development should be restricted or eliminated, but the same should be done to programs that boost urban development, whether via subsidies or outright coercion.

- Sam Kazman

### **Resist the Urge to Play the Fuel Economy Mandate Game**

Higher federal fuel economy mandates for new vehicles are touted as the answer to a host of pressing issues, from global warming to energy security to higher gas prices. In fact, higher standards would have practically no impact on any of these issues; what they would do is harm people through their downsizing effect on new vehicles. According to a 2002 National Academy of Sciences study, this downsizing effect contributes to approximately 2,000 additional traffic deaths per year. Given that the program, popularly known as CAFE—for Corporate

Average Fuel Economy—was enacted in 1975, its cumulative death toll is staggering. Making CAFE more stringent would make it even deadlier.

CAFE's political popularity stems from its smoke-and-mirrors nature. By regulating automakers, it avoids the public firestorm that higher gas tax proposals would ignite. Consumers, however, are still its ultimate victims, in terms of higher new-car prices, reduced automotive choices, and decreased safety.

As last year's gas price spikes demonstrate, markets respond to higher prices far more quickly and flexibly than can any government program. Consumers reduce their fuel consumption by changing their driving habits and car-buying patterns, while those automakers who have invested in new fuel-saving technologies gain market share. When gas prices are high, CAFE is irrelevant; when gas prices are low, it is deadly. It is time to scrap CAFE.

- Sam Kazman

### **Rethink Water Rights Policies**

Battles over limited water supplies in the United States and around the world have long produced conflicts and costs to affected communities. While limited supplies are a problem in and of themselves, political management of water is the key problem. Government control of water allocation generally produces inefficient and unfair results:

- A property rights-based system could alleviate water shortages and pollution problems by properly pricing water resources and giving parties a stake in ensuring water quality.
- Policy makers should rethink current approaches to facilitate water markets, which have developed in some areas and show great promise.

- Angela Logomasini

### **Reform Wetlands Policies**

Wetlands regulations poorly protect wetlands habitat. Much federal regulation focuses on preventing development on lands that are dry most days of the year and that do not provide useful habitat for wildlife. In contrast, private initiatives have successfully ensured the protection, restoration, and creation of vital wetlands habitat around the nation. Yet federal wetlands regulations have seriously impeded such private wetlands protection initiatives, and even forced some parties to abandon attempts to provide such habitat. Policies can better ensure private wetlands protection, while eliminating destructive and needless red tape.

- Congress should replace the Section 404 regulatory program, which regulates the dredging and filling of lands, with a non-coercive, incentive-based program.
- At a minimum, the federal government should provide financial compensation to property owners who lose the use of their land due

*Government control of water allocation generally produces inefficient and unfair results. Policy makers should rethink current approaches to facilitate water markets, which have developed in some areas and show great promise.*

to wetlands regulations.

- State efforts, non-regulatory federal programs, and private conservation would do a better job of protecting ecologically significant wetlands than could the existing regulatory approach. These steps would enhance the protection of wetlands and private property without increasing the costs of conservation to taxpayers or to landowners.

- Angela Logomasini and other CEI Staff

*By demanding perfect safety, a precautionary regulatory philosophy can actually make our world less safe. Regulation's proper goal should be to permit experimentation and the introduction of new technologies, while balancing the risk of moving too quickly into the future against the very real risk of staying too long in the past.*

## IMPROVING HEALTH AND SAFETY

What can markets contribute to promoting human well-being? Quite a lot. Many governmental risk management efforts attempt to regulate negligible and theoretical risks—diverting resources away from more serious problems. Yet the health and safety debate is polarized: On one side are government regulation advocates claiming to protect health and safety; on the other side are reformers portrayed as being interested only in saving money. But overregulation—the wrong kind of over-caution and risk-averseness—itself can be lethal.

### **Reject the Precautionary Principle, a Threat to Technological Progress**

Increasingly, governments and environmental activists are demanding that producers of both new and old technologies prove that their products are totally safe. Although this may seem like a reasonable approach—being “better safe than sorry”—health and environmental risk issues aren’t so simple. Nothing is totally without risk; and the reason for adopting new technologies in the first place is that they often improve our well-being by protecting us from the risks of older, more established products and practices. New medicines protect us from diseases, even though there is always a risk of side effects. Automobile innovations, from airbags to antilock brakes, make traveling safer, even though they pose their own risks. And food and agriculture technologies—such as preservatives, pesticides, and bioengineered crops—help make our food supply safer and less expensive, and lighten farming’s impact on the environment.

So, by demanding perfect safety, a precautionary regulatory philosophy can actually make our world *less* safe. Regulation’s proper goal should be to permit experimentation and the introduction of new technologies, while balancing the risk of moving too quickly into the future against the very real risk of staying too long in the past.

- Gregory Conko

### **Recognize the Deadly Effects of Overregulating Medicines and Medical Devices**

For the past century, American consumers have benefited from

thousands of new pharmaceuticals and medical devices that combat disease, alleviate the symptoms of illness and infirmity, and improve patient well-being. However, patients often demand that such treatments meet a near-perfect level of safety at bargain basement prices. In turn, Congress and the federal Food and Drug Administration have steadily raised the regulatory hurdles that drug and medical device manufacturers must clear before marketing a new therapy.

FDA is overcautious in its approval of new therapies. Caution may sound like a virtue, but for patients in need of new therapies, regulatory overcaution can be deadly. Patients can be injured if FDA approves a therapy that is later found to be unsafe, but they also suffer when needed therapies are delayed by regulatory hurdles.

FDA, however, is predominantly focused on the first of these two risks, for political reasons. FDA's approval of a drug or device that turns out to be unsafe will lead to front-page headlines and congressional hearings, while its delay or denial of a needed new therapy stirs little public notice. Even though patients may suffer or die as a result of FDA delays, neither they nor their families are likely to know that a possible treatment exists, let alone that it was blocked by the FDA. As a result, FDA is under constant pressure to assure the safety of new drugs, but under little pressure to speed up their availability.

Many doctors, patient groups, and public policy experts recognize that FDA's lengthy process for approving new drugs and devices often costs lives by denying patients potentially beneficial new treatments. Polls of medical specialists commissioned by CEI over the past decade have consistently found that majorities of doctors believe FDA is too slow in approving new therapies.

In addition, governments at all levels have placed increasing pressure on manufacturers to lower prices. But efforts to artificially lower prices destroy the incentives to produce more and better medical treatments. The likely end result is fewer new drugs and devices, and greater loss of life to what should be treatable illnesses.

The 1997 FDA Modernization Act granted the agency authority to reduce the number of clinical trials needed for approval and to expedite the review of treatments for serious conditions. In that and other legislation, Congress has also offered the incentive of longer patent life for new drugs in order to spur research and development. But more must be done to increase access to innovative new medical treatments.

Individual patients and their doctors are in a far better position than FDA to balance the risks and benefits of individual new therapies. FDA should focus on providing them with information, rather than on restricting their choices.

- Gregory Conko and Sam Kazman

*The FDA's approval of a drug or device that turns out to be unsafe will lead to front-page headlines and congressional hearings, while its delay or denial of a needed new therapy stirs little public notice.*



## Purify Federal Water Policies

**Drinking water.** Drinking water policy should focus on how best to ensure that Americans have clean and safe water to drink. Currently, many communities are forced to spend limited resources to meet misguided and scientifically questionable federal mandates. States and localities are better able to set priorities based on their particular needs. Moreover, drinking water policy would benefit from a more market-driven model, one that allows for more private innovation in the provision of drinking water services:

- The best solution would be to return to the states full authority to set standards, allowing them to work with localities to meet their specific needs.
- Should the federal government remain involved, there are ways to help empower localities within a federal framework. Congress should engage in greater congressional review of safe drinking water rules to ensure that EPA has employed the “best available science” as demanded under the law. If large questions remain over science, and standards are likely to impose considerable costs, Congress should preempt the overly stringent standard.
- Congress could grant states discretion on how to regulate the naturally occurring contaminants, such as radon and arsenic, to reflect localized levels of risk.

*Drinking water policy would benefit from a more market-driven model, one that allows for more private innovation in the provision of drinking water services.*

**Water quality.** Waterways throughout the United States have suffered from various pollution problems because they have long been held in common; no one was in charge of keeping them clean. Congress passed the Clean Water Act in the 1970s, which has been a mixed blessing. While many waterways have seen improvements, the program is very bureaucratic, and it has promoted too much expensive litigation that focuses on paperwork violations rather than on improving water quality. In addition, the science underlying many of the regulations is weak. In addition, parts of the program have proven ineffective, such as programs addressing nonpoint source water pollution (water run off from lands). Policy makers would be wise to look at innovative, market-based systems for advancing water quality:

- Instead of focusing on paperwork violations, policy makers should hold polluters liable for the harm they cause to other persons or to their property.
- States need flexibility; because the science of water pollution control is evolving, and because each state and watershed has different needs and problems, states should be allowed flexibility in water quality management approaches.

- Angela Logomasini and other CEI Staff

## Enhancing Auto Safety

Automotive safety is the primary mission of the National Highway Traffic Safety Administration (NHTSA). In recent decades, however, NHTSA's mission has increasingly become distorted by political correctness. For example, the agency has focused on the alleged safety hazards of SUVs while paying little attention to the safety risks of subcompact cars. Moreover, NHTSA has moved to mandate safety features that are already becoming widely adopted due to consumer demand, such as electronic stability control systems. Such mandates end up limiting design flexibility and constitute little more than an exercise of regulatory muscle.

Finally, while NHTSA has moved to reduce the deadly effects of its fuel economy standards through its Reformed CAFE program, CAFE will nonetheless continue to kill through its downsizing effect on new vehicles. The single most important task that NHTSA can undertake regarding CAFE is to come up with a comprehensive estimate of the deaths attributable to this program over its 30-year history.

- Sam Kazman

*Too often, the government's regulatory agenda favors politically expedient outcomes over those that would actually promote safety and availability.*

## Improve Food Safety and Labeling

From microbial contaminants to pesticides, and from organics to obesity, few issues are as important to consumers as the safety and quality of their food. But government regulation can compromise food safety, affordability, and choice if it focuses on a fear-driven activist agenda rather than on basic principles of science and genuine safety.

Too often, the government's regulatory agenda favors politically expedient outcomes over those that would actually promote safety and availability. For example, the U.S. government maintains outmoded "poke and sniff" food inspectors whose methods are incapable of preventing food-borne illnesses, while making it difficult to introduce such technologies as irradiation that could cut the incidence of those illness by half or more.

Regulators control the content of food labels so stringently that sellers are often forbidden from informing consumers of many beneficial product attributes. Food safety and labeling regulations should be designed with maximum flexibility, to allow food producers to use the production methods and labeling information that best meet their customers' demands.

- Lawmakers should eliminate regulatory barriers that make it harder to adopt new food production technologies, such as irradiation and crop biotechnology, that can improve food safety. For example, mandatory labeling of irradiated food provides no useful or material information to consumers, but it does scare consumers and retailers away from safe irradiated foods. Existing USDA rules make it impossible for cattle ranchers to voluntarily test their herds

*By driving up development costs and slowing the research pipeline, overregulation of biotech foods harms consumers by denying them safer, less expensive, and more nutritious food choices.*

- for mad cow disease and then advertise the attribute to consumers.
- Governments should move away from the misguided assumption that natural products are inherently safe and synthetic products inherently dangerous. Synthetic compounds, as a class, are no more toxic or carcinogenic than compounds that exist in nature. The dose makes the poison: Many substances that are dangerous at very high levels are totally harmless at lower levels. This is true for both natural and manmade substances. Rules that mandate labeling of even trace amounts of certain synthetic chemicals are based on a faulty understanding of science and are therefore bad public policy.
- Governments should avoid making lifestyle choices for consumers regarding the foods they eat. *All* foods, whether they contain large amounts of fat, calories, sugar, sodium, or other constituents, can be a part of a healthy diet. Consumers may benefit from having accurate information about nutrition, calories, and fat content, but government should not ban or otherwise limit consumer access to foods simply because public health officials believe that some consumers overindulge.

- Gregory Conko

### **Secure the Future of Food Biotechnology**

For two decades, plant breeders and other producers have used bioengineering—or gene-splicing—techniques to improve the foods we eat. This new biotechnology has been embraced by scientists, farmers, and the food industry. However, some environmental activists and self-styled consumer groups find it unnatural, claim that it is inherently unsafe, and demand that it be regulated much more stringently than other food products. Sadly, even some supporters of food biotechnology argue that heavy regulation will boost its public acceptance. Yet by itself, bioengineering makes food neither dangerous nor safe, and most scientists agree that regulating foods on the basis of the techniques used to produce them lacks scientific sense and wastes public resources. Most importantly, by driving up development costs and slowing the research pipeline, overregulation of biotech foods harms consumers by denying them safer, less expensive, and more nutritious food choices.

- USDA and EPA regulations that require case-by-case approval of every new biotech crop variety should be changed. Once a particular trait has been approved for use in a crop species, every new combination of the trait and species should not require a separate approval. Further, only those traits reasonably believed to pose a genuine danger to consumers or to the environment should require approval on a case-by-case basis.
- Bioengineered animals should not be regulated as New Animal Drugs. As with bioengineered crop plants, what determines the safety of a new animal breed is the animals' specific characteristics and novel traits, not how they were bred. Most animals bioengineered to produce higher quality meat and milk,

or bioengineered to aid in the rearing of livestock, are likely to be safer, not more dangerous, for consumers than conventionally bred livestock. Regulation should be based on the risk posed by the animals' novel traits, not on how those traits were introduced.

- Because the FDA has found meat and milk from cloned animals to be safe for human consumption, the agency's "voluntary moratorium" on the commercial sale of such food products should be lifted immediately.

- Gregory Conko

## **Resist Over-Caution on Nanotechnology and Other Frontier Sciences**

Nanotechnology is the cutting edge science and business of very small-scale manufacturing. Fears about nanotechnology's safety abound in ways that echo those seen in biotechnology and other frontier technologies. Some favor a precautionary principle approach, arguing that the first hint of risk warrants heavy-handed regulation; others have already called for outright bans.

While the oft-cited "gray goo" scenario of out-of-control nanobots belongs in the realm of science fiction, concern about the potential risks posed by nanotech is not entirely misplaced. For example, there are novel homeland security and defense issues that policy makers must consider; but ill-considered regulation of consumer applications of nanotechnology may prevent the promise of this nascent technology from ever being realized.

Rather than giving in to the temptation to regulate nanotechnology simply for the sake of doing *something*, Congress should monitor scientific understanding of potential risks. Congress should also allow the private sector time to cope with any credible risks, through innovations like insurance and safety ratings systems geared toward nanotech and other frontier technologies. Such market responses ought not be interrupted by political stopgaps. Finally, lawmakers should be skeptical of claims that nanoparticle manipulation poses serious threats to the environment. Indeed, if the promise of nanotechnology holds, it offers hope for a cleaner, not dirtier, environment and a vastly wealthier society.

- Wayne Crews and Brooke Oberwetter

## **Enhance the Homeland Security Role of Critical Infrastructure and Cybersecurity**

In both the physical and cyber worlds, the line between government protection and private security is not necessarily a bright one. The government's role is rooted in its defense function, a power delegated to it by citizens. We rely upon the government's courts, police, and military to *protect* us; yet at the same time, we rely upon a complementary and indispensable private sector *security* function. While government's primary reason for being is the protection of society, we nonetheless

*Rather than giving in to the temptation to regulate nanotechnology simply for the sake of doing something, Congress should monitor scientific understanding of potential risks.*



require private strategies to be really secure, such as security guards, gated communities, door locks, burglar alarms, firewalls, and anti-virus software.

Better appreciation of distinct public and private roles is warranted in the critical infrastructure and cybersecurity debates, particularly since the September 11, 2001 terror attacks. To safeguard critical and information-age assets exposed to physical or cyber-attack, we ought not automatically assign security roles to government that would best be left private. Critical infrastructure is privately owned, after all, and private sector leadership and responsibility for still-uncertain cyber and physical security needs should not be lightly overruled. For example, technical matters involving secure infrastructure design, such as backup, redundancy, duplication of data and network pathways, are the province of the private sector.

*Technical matters involving secure infrastructure design, such as backup, redundancy, duplication of data and network pathways, are the province of the private sector.*

Looking beneath the surface of presumed market failures involving large-scale enterprises often reveals heavy government regulation, and government failure. Franchise laws and network regulation, like open access requirements, interfere with competitive incentives to improve products or services and invest in infrastructure and maintenance.

Security policy should avoid rigidities like those that characterize airport security, where the federal government has taken over the entire baggage checking function, for example, with unfavorable implications for future private luggage delivery efforts, the ability for airlines and airport operators to adapt to changing threats, and longer term airport privatization efforts.

Private identity systems managed and protected by answerable firms—systems in which owners reserve the right to refuse to admit anybody who is not a member—may often be preferable whether the issue is access to a piece of critical infrastructure, such as an airport or power plant, or access to a computer network. Biometric technologies and other forms of authentication offer significant promise for securing both critical infrastructure and electronic networks.

Following the 9/11 terrorist attacks, American society faced a choice: Whether to seek private or government security strategies. While a new government role was probably unavoidable after 9/11, we might reasonably conclude that to further government's entrenchment in security is not necessarily a good thing. Privately, security could have been beefed up by private sector mechanisms and technologies like IDs and biometrics, and even non-technical means like private sector-mandated background checks and insurance innovations like premium adjustments.

Entrenching government on behalf of critical infrastructure security is a step backward toward viewing large enterprises as “utilities,” hampering both industry growth and security. In electricity, for example, mandates to supposedly enhance “reliability” can impair operation of the infrastructure itself. The blackouts of 2003 served to justify renewed calls for enhanced eminent domain powers to seize land for transmission lines. In such cases,

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