FREE *to* PROSPER

A Pro-Growth Agenda for the 115th Congress

COMPETITIVE ENTERPRISE INSTITUTE

CEI

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A Pro-Growth Agenda for the 115th Congress

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Introduction

by Kent Lassman
President, Competitive Enterprise Institute

In scarcely more than two dozen words, Article I, Section 1 of the United States Constitution lays out a singular idea at the root of any serious plan for Congress.

> *All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

As a nation, we authorize one institution, Congress, to write the law. It is a significant undertaking. Federal law prescribes all manner of economic activity. It shapes personal choices in myriad unseen ways, from the products we buy to how we work. Perhaps most expansively, statutes provide direction to a far-reaching federal regulatory apparatus. Yet today, the administration of Congress' work has grown to an extent and scope the Founders never imagined. Unaccountable regulators rule our lives.

The body of federal law is massive. Although Congress passes and the president signs only a few hundred bills into law every year, many of these are hundreds, even thousands of pages long. Worse still, these new laws give broad discretion to federal regulators to force sweeping change to the American economy. The *Code of Federal Regulations*, the catalog of all federal rules and regulations imposed by agencies, runs nearly 180,000 pages. And new rules are added every year. The 2015 *Federal Register* reached a total page count of 80,260, the third highest in its history.

In America's Constitutional structure, the Congress is given a primary role in government. It is where our voices are represented. Logically, it is given primacy in the Constitution ahead of the Article II and III functions of the executive and the judiciary. Matters of utmost national importance like lifetime appointments, war and peace, treaties, and governmental spending are designated for special treatment by Congress.

The Constitution's architect, James Madison, believed the legislative was the strongest of the three branches of government. Yet in recent history, we have scarcely seen the Congress act with any discernable agenda. Partisan conflict is certainly part of the challenge; but it has been so for a long time.

An often heard contemporary line of argument suggests that, absent a clear threat to the nation, Congress cannot come together given strong ideological polarization among its members. One might call this the September 11 Theorem. In the wake of attacks on civilians at home, major legislation did pass in the 107th and 108th Congresses.

However, in the past 15 years we have seen fundamental overhauls of major sectors of the economy that cannot be explained by external threats. Beginning with the 2002 Sarbanes-Oxley reorganization of financial services and corporate governance, Medicare expansion in 2004, and moving straight through the Affordable Care Act ("Obamacare"), the 2010 Dodd-Frank financial "reform" law, and restrictions on energy, the counterargument is strong. Congress, along with its regulatory designees in the federal agencies, is hyperactive but not particularly directed.

It is time for a reckoning. At the Competitive Enterprise Institute (CEI), we believe a clear agenda is necessary to move America toward economic growth, prosperity, and liberty for individuals to chart their own paths in a world of empowering technological advances.

As legal scholar and CEI Board Member Michael S. Greve explains it, the Constitution "serves a two-fold objective: to make politics possible and to limit it." To the first point, there are rules governing our legislative institutions. These rules have worked reasonably well to promote reasoned discourse, allow for policy experimentation, and discover, analyze, and recover when those experiments fail.

Congress must be willing to look at the evidence and revisit policy choices that have produced significant costs and negligible benefits for the typical American. The inertia of bureaucratic expansion prohibits agencies from doing this vital evaluation of the law and regulation that reach into every corner of our lives. There will be political disagreements about these issues, but we can all concur that Congress is our national institution designed to channel political disagreement toward changes in policy.

And that is why Greve's latter point is important. We must not let politics seep into every nook and cranny of national discourse. There are clear areas for commonsense prescriptions that accentuate consumer choice and reduce the negative effects of rigid, centralized regulatory dictates. We know the 115th Congress can implement basic budgeting, cost-benefit analysis, and review systems to increase regulatory transparency and accountability.

More importantly, it is past time for Congress to assert its rightful Constitutional Article I, Section 1 authority and fundamentally reform the unbounded regulatory state. Regulatory agencies have proven all too vulnerable to narrow political agendas and mission creep. Only Congress can bring them back in line by demanding adherence to the laws, as written by Congress and signed by the President.

Congress can invigorate the rarely used, 20-year-old Congressional Review Act. Congress should institute a regulatory budget—a bipartisan idea—and pass the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require Congress to vote on all major rules before they can go into effect. With a management mindset for the executive branch, genuine oversight is possible.

When economic failures are plain to see, there is no need for blame or finger-pointing. Fortunately, there are steps available to correct the situation, premised on a belief in the ability of individuals to make informed, sound decisions for their own well-being. At CEI, we are ready to help all political leaders understand and implement these ideas.

What follows is a detailed set of recommendations, backed by legal, economic, and policy analysis, to accomplish three objectives.

First, with this report, we clearly aim to make Congress the fulcrum from which the separation of powers returns to its primary role in America's constitutional republic.

Second, while it does not provide recommendations on the entirety of federal power, it does address the fundamentals of a free economy—an area where commentators of all stripes can agree we have much work to do.

Third, in addition to the historical background and forward-looking recommendations, this 2017 edition of CEI's Agenda for Congress provides access to additional resources and scholarship.

In 2015, federal regulations imposed costs of an estimated $1.885 trillion on the American economy and public. The following proposals are designed to reduce the federal regulatory cost burden and unleash the America's entrepreneurial, wealth-creating potential. A brief description of six policy areas follows.

Regulatory and Institutional Reform. Congress must come first. Delegation can be a management tool for the administration of large legislative mandates. It is not, however, a blanket handoff of responsibility to executive branch or "independent" agencies. Absent congressional approval, no president has authority to issue regulations. Specific changes to the "rules about the rules" of delegation and review, the power of the purse, which is solely the responsibility of Congress, and a reassertion of the separation of powers can reinvigorate the primary role of Congress in federal lawmaking.

Banking and Finance. A free and growing economy cannot thrive without access to capital. A healthy financial system helps coordinate investors, enterprises, risk, and innovation to the benefit of all. Increasing the cost of access to capital or restricting it through artificial limits harmfully reorients resources toward politically favored areas of the economy and away from the most productive channels of activity. Expansionist regulatory agencies are a direct threat to the continued availability of high-quality capital throughout all parts of society.

Labor and Employment. People adapt to change, including to developments in the market economy. By contrast, centrally managed regulation tends to become captured by vested interests and is wholly resistant to changing conditions of a modern workplace. Pro-growth policies distinguish between regulated labor prices and genuine labor productivity, and they emphasize worker flexibility.

Energy. Access to reliable, affordable energy is the hallmark of growth and essential to prosperity and human well-being. Misdirection from the essentials of energy policy toward discussion of climate—whether warming, cooling, or some other change—is politics dressed as science. Carbon-based fuels are reliable and affordable sources of energy for a growing and developing world. There is serious scientific debate about the magnitude and rate of climate change. However, the focus of Congress must be on the appropriate policy choices available. There is no planetary emergency. National and international campaigns to tax, regulate, and ban carbon fuels must be rejected in favor of affordable, plentiful, and reliable energy to make the world safer and the environment more livable.

Environment. Private property and secure property rights are essential to freedom and prosperity. Private landowners' environmental stewardship is far superior to that of government, yet federal regulations often undermine private conservation and provide no incentives for regulators to contain costs because the costs are borne by landowners. The solution is to enact meaningful compensation for regulatory takings. Moreover, it is time to stop the locking up of federal land and restore multiple-use management and resource production, and stop the federal government from buying more private land and instead work to privatize it or transfer it to the states.

Technology and Telecommunications. The Internet and massive investments in information technology have fueled innovation, creating tens of millions of high-skilled jobs and improving lives around the world. In a world of radical change for technology and communications, lawmakers should avoid new mandates or prohibitions in all but the most exceptional circumstances. In the unlikely event that legislative intervention is necessary, Congress should use the scalpel approach. Meanwhile, lawmakers should break out the machete to cut through convoluted statutory and regulatory schemes that have long outlived their usefulness.

Transportation. Reliable transport of both persons and goods depends upon adequate infrastructure investments and management. As lawmakers consider how to improve the nation's transportation infrastructure, they should keep in mind that the private sector is generally better than government at financing and operating well-functioning transportation systems, and generally does so at lower cost. Transportation infrastructure and operations should be paid for by those who directly benefit from their use.

Food, Drug, and Consumer Choice. Few matters are as important to consumers as the foods they eat, the medicines they put in their bodies, and how they choose to spend their time and money. Consumers, not government, are generally the best judges of the value and quality of individual products and services. Government regulation of consumer choices should be limited to policing the marketplace to ensure that consumers are not misled by false claims. Where safety restrictions are truly needed to protect consumers or the environment, quality standards should be based on the best available scientific data, while allowing producers and consumers the widest possible range of choice.

For more information on each of the above policy areas, please read on.

Regulatory Reform and Agency Oversight

1

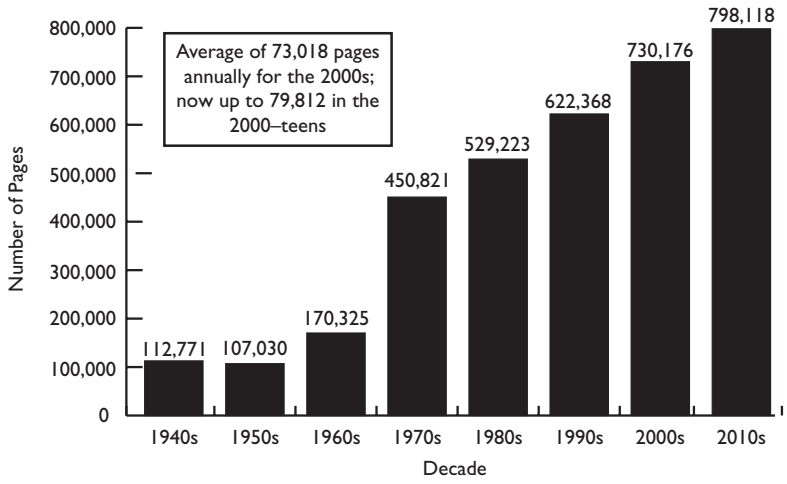
All legislative Powers herein granted shall be vested in a Congress of the United States.

—Article 1, Section 1, U.S. Constitution

The United States of America has debated "Energy in the Executive" since the *Federalist Papers* championed the new Constitution's ratification. But along with a doubling of the national debt in less than a decade, recent years have brought executive branch power and regulation to the forefront as the regulatory enterprise has attained new heights. Pages in the *Federal Register*, the daily repository of all proposed and final federal rules and regulations, occupy historic levels, having finished 2015 at 80,260 pages (Figure 1.1).

Although regulators overreach, Congress has stood by without using existing tools at its disposal to rein in the ever-growing regulatory state—including oversight hearings, insistence on agency adherence to the Administrative Procedure Act (APA), defunding and appropriations process options, and the resolution of disapproval process established by the Congressional Review Act (CRA). As 2016 House of Representative task forces on Article I powers and economic liberalization contended, Congress should reassert its constitutional oversight responsibilities and implement a series of regulatory reforms and liberalizations. Those include, broadly, limiting regulatory agency authority, reforming the rulemaking process, employing the power of the purse to regulate agencies, and increasing oversight.

Figure 1.1 *Federal Register* Pages per Decade



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2016 edition, https://cei.org/10KC2016.

What is the effect of regulatory excess? Unemployment is "down" because statistics omit those who have given up the job hunt, as labor force participation is at historic lows. Instead, we see reduced business ownership, lower self-employment rates among the young, declining rates of small business formation, and more businesses closing than are being created.

To put the upcoming recommendations into context, we should note specific shortcomings in oversight of the ordinary, everyday rules and regulations.

First, the central review process conducted by the White House Office of Management and Budget (OMB)—to presumably ensure that rules' benefits exceed costs—is lacking. That executive branch regulatory review was initially formalized by President Ronald Reagan's Executive Order 12291 (February 17, 1981) and extended in less strict form by subsequent executive orders from other presidents. As Table 1.1 shows, of over 3,500 rules issued by agencies annually, cost–benefit analyses reviewed by the OMB exist for only about a dozen, with a handful of other rules accompanied by a reviewed cost analysis.

Congress should:

- Defund unapproved agency initiatives and use the Congressional Review Act to rein in agency overreach.
- Improve regulatory disclosure, transparency, and cost analysis of regulations and guidance. A first step would be implementing a Regulatory Report Card to tally regulatory costs and flows in a user-friendly way and to promote more accurate reporting and enable analysis of the regulatory enterprise by third parties.
- Implement a bipartisan Regulatory Reduction Commission and regulatory sunset procedures.
- Require votes on major and controversial rules—those with estimated annual costs of $100 million or more. One option is to enact the Regulations from the Executive in Need of Scrutiny (REINS) Act.
- Implement a regulatory budget.

Table 1.1 Proposed Breakdown of Economically Significant Rules

Year	Rules with costs and benefits	Rules with costs only	Total rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007`	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	13	3	16	3,554
Total	160	86	246	53,838

Sources: Costed rule counts, OMB, *2015 Report to Congress* on regulatory costs; *Federal Register* final rules, author search on FederalRegister.gov advanced search function.

Second, the Administrative Procedure Act's notice-and-comment rulemaking process is broken. Agencies routinely fail to issue notices of proposed rulemaking for a substantial portion of their rules, thereby undermining democratic accountability and the public's opportunity to weigh in on rules affecting them, according to a December 2012 Government Accountability Office (GAO) report.

Third, Congress rarely defunds agency actions that overstep an agency's statutory authority.

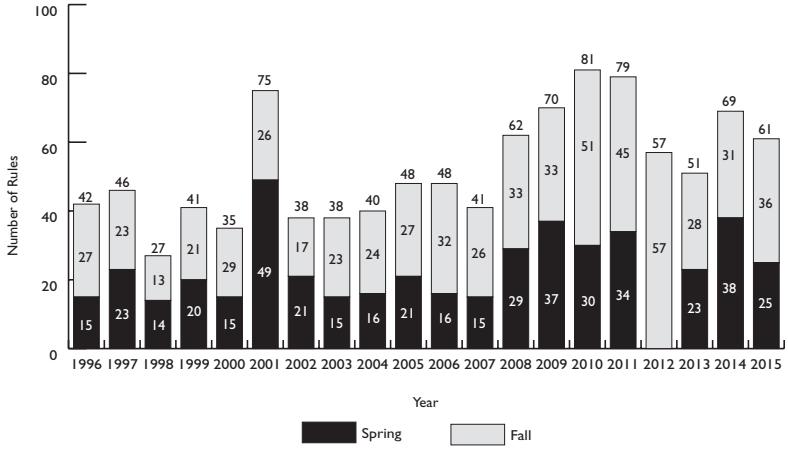
Fourth, Congress rarely uses its most powerful accountability tool, the Congressional Review Act, to pass resolutions of disapproval of costly or controversial agency rules. To improve regulatory cost accountability, in 1996 Congress passed the CRA, which sets up a 60-day period following agency publication of a regulation during which the rule will not take effect. That 60-day pause affords Congress an opportunity to pass a resolution of disapproval to halt the regulation. Congress has used it sparingly. And apart from the 2001 repeal of an intrusive Department of Labor ergonomics rule that would have put undue burdens on home offices, no CRA vote has resulted in repeal of a final rule.

Fifth, even if Congress were inclined to aggressively assert its legitimate author-ity over the regulatory enterprise, the CRA itself is further undermined by agency nonobservance of its procedures. As Curtis W. Copeland, a specialist in American government, demonstrated in a white paper prepared for the Administrative Conference of the United States, agencies no longer properly submit many final rules to the GAO's comptroller general and to Congress as required by the CRA. That submission is viewed as necessary should Congress introduce a formal CRA resolution of disapproval of an agency rule, so its neglect creates a major lapse in accountability.

With spotty public notice and inadequate accountability, it is imperative that Congress frequently go on record regarding the merits of particular regulations. That process matters, because although overall rules have since settled around the 3,500 mark annually, the costly "economically significant" subset has risen, as Figure 1.2 shows.

Much overregulation stems from a breakdown of checks and balances under the Constitution's separation of powers. Overdelegation by Congress has enabled regulatory agencies to pursue ambitious efforts to assert control over wide swaths of the Amer-

Figure 1.2 Annual Completed Economically Significant Rules in the Unified Agenda, 1996–2014



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2016 edition, https://cei.org/10KC2016.

ican economy through both rules and guidance. On the one hand, executive branch and regulatory actions require far more congressional oversight, including hearings, better information disclosure, and slashing budgets of agencies when they exceed their bounds. On the other hand, Congress needs to grapple with the reality that lawmakers themselves are the source of overdelegation, and that Congress has relinquished much of its legitimate authority to the executive branch.

In a two-pronged approach, Congress must heighten disclosure of regulatory matters, and its own accountability for the "law" that regulatory agencies make, either formally as notice-and-comment regulation or informally as guidance and "dark matter." Congress can start by recognizing the fundamental need to enforce the Administrative Procedure Act's scrutiny of rules and incorporate "regulatory dark matter" into the process.

IMPROVE REGULATORY OVERSIGHT AND ACCOUNTABILITY

Recent years have seen growing overreach by the executive branch, as the administration and regulators increasingly attempt to impose policy while circumventing Congress. Yet Congress has often stood by in the face of that power grab. Such regulatory excess has led to:

- Historically low labor force participation;
- Reduced business ownership;
- Lower self-employment rates among the young;
- Declining rates of small business formation; and
- More businesses closing than are being created.

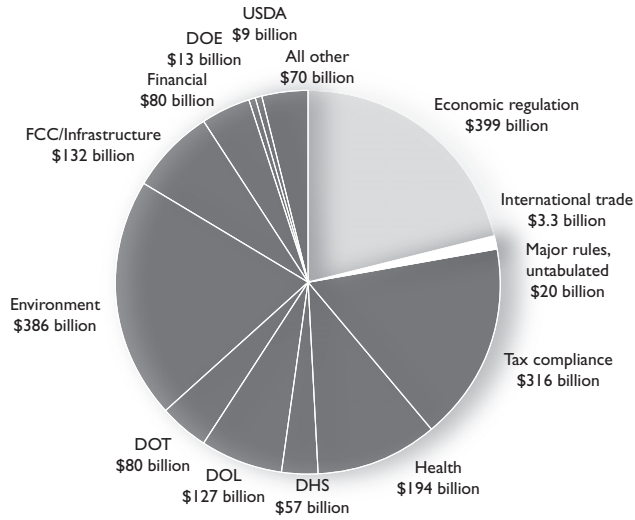
In its 2014 *Information Collection Budget of the U.S. Government*, the Office of Management and Budget estimates that 9.453 billion hours were necessary in FY 2013 to complete the paperwork requirements issuing from 28 executive departments and independent agencies. In addition, OMB's *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates*, which surveys regulatory costs and benefits, pegs the cumulative costs of 120 selected major regulations during the decade from 2004 to 2014 at between $68.4 billion and $102.9 billion annually (in 2010 dollars). The 2016 draft report is late as of this writing; the 2015 report was the latest ever.

Federal spending is the squeaky wheel, particularly since the federal debt has nearly doubled since 2008, but decades of cumulative regulation may have even greater effects. Official disclosures fail to adequately capture the nearly $2 trillion regulatory

Congress should:

- Hold oversight hearings on aggressive agency initiatives.
- Insist that agencies adhere to the Administrative Procedure Act's notice-and-comment rulemaking process.
- When appropriate, defund appropriations for agency initiatives that Congress has not approved.
- Introduce resolutions of disapproval under the Congressional Review Act for unpopular or controversial rules.

Figure 1.3. Annual Cost of Federal Regulation and Intervention, 2016 Estimate, $1.885 Trillion



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2016 edition, https://cei.org/10KC2016.

state, with its interventions, bans, uncertainty, wealth destruction, job loss, stifling of entrepreneurship, and loss of liberty (see Figure 1.3). Many government controls simply do not show up in statistics. Regulation is often redistributive, burdensome, costly, and destabilizing, since coercive government solutions to perceived market failures can have consequences worse than the problem they allegedly address. Regulatory bureaus cannot respond rapidly to changes in fields like health care provision, finance, infrastructure, and cybersecurity. Central, bureaucratic regulation undermines actual regulation and discipline. Agency pursuit of "benefits" imposes costs of its own when agencies interfere with the improvements in health and safety driven by competitive processes and consumer and social demands.

Policy makers' choice has never been between regulation and no regulation, but over what institutional frameworks are more appropriate to advancing health, safety, and efficiency. For every market failure cited to justify government intervention, one can find offsetting political and bureaucratic failure. Price regulation either increases prices or creates shortages. Internet net neutrality regulation will undermine communications infrastructure's potential. Much environmental regulation arose because of the

lack of property or use rights in resources and amenities in the first place—government failures.

Unfortunately, many businesses not only favor regulation but actively pursue it to disadvantage competitors. So at the very minimum, policy makers should challenge agency benefit claims and demand better justification since agencies may selectively overstate.

Expert: Clyde Wayne Crews Jr.

For Further Reading

Clyde Wayne Crews Jr., *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State* (Washington, DC: Competitive Enterprise Institute, 2016), https://cei.org/10KC2016.

W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," National Association of Manufacturers, September 10, 2014, http://www.nam.org/~/media/A7A8456F33484E498F-40CB46D6167F31.ashx.

National Federation of Independent Business, "The Fourth Branch and Underground Regulations," September 2015, http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, "The Cumulative Cost of Regulations," Mercatus Working Paper, Mercatus Center at George Mason University, April 2016, http://mercatus.org/sites/default/files/Coffey-Cumulative-Cost-Regs-v3.pdf.

Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," Administrative Conference of the United States, July 15, 2014, https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf.

"Final Bulletin for Agency Good Guidance Practices," *Federal Register*, Vol. 72, No. 16, January 25, 2007, pp. 3432–40, http://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB_Bulletin.pdf.

Harvard Journal of Law and Public Policy, Executive Discretion and the Rule of Law issue, vol. 37, No. 2 (2014), http://www.harvard-jlpp.com/vols-35-39/.

Office of Management and Budget, *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Table

1-1, "Estimates of the Total Annual Benefits and Costs of Major Federal Rules by Agency, October 1, 2004–September 30, 2014."

Rob Portman, Office of Management and Budget, "Issuance of OMB's 'Final Bulletin for Agency Good Guidance Practices,'" Memorandum for the Heads of Executive Departments and Agencies, January 18, 2007, http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

U.S. Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Washington, DC: GAO, December 2012), http://www.gao.gov/assets/660/651052.pdf.

REIN IN OVERREGULATION AND REGULATORY "DARK MATTER"

Congress should make far greater use of defunding unapproved agency initiatives as a routine matter and of engaging the Congressional Review Act to rein in agency overreach.

Regulations require more transparency and scrutiny, but so do executive orders, agency guidance documents, memoranda, bulletins, and other "nonrules" that duck notice and comment and the central review process that is already inadequately applied to routine rules. Thousands of such "regulatory dark matter" documents are issued annually—far more than the number of rules—that amount to off-the-books regulation.

The basis of the modern regulatory process is the post–New Deal Administrative Procedure Act of 1946 (Pub. L. No. 79-404), which set up the process of public advance

Congress should:

- Apply the Administrative Procedure Act's notice-and-comment requirement to rules with heightened force.
- Abolish, downsize, reduce the budgets for, and deny appropriations to agencies, subagencies, and programs that pursue regulatory actions not authorized by Congress.
- Repeal or amend enabling statutes that sustain a particularly objectionable regulatory enterprise or program.
- Subject regulatory dark matter, alongside ordinary rules, to more intense review by the Office of Management and Budget. By exposing the costs of guidance, this step can provide a public record for future legislative reforms of guidance-as-regulation. President Reagan's Executive Order 12291 provides a model in that it puts the burden of proof on agencies to demonstrate the need for a new rule. Guidance should be held to the same standard.
- Apply the Congressional Review Act's 60-day resolution of disapproval process to rules, and extend it to guidance. Then, if guidance grows, the public will be able to see those instances in which Congress could have acted to stop or call attention to it but did not.
- Introduce bills to repeal guidance as appropriate.

notice of rulemakings and provided the opportunity for the public to offer input and comment before agencies finalize proposed rules and again before a final rule becomes effective. However, agencies can avoid notice and comment for self-determined "good cause." As a 2016 Congressional Research Service report noted:

> *While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute's "good cause" exception permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and bypass its 30-day publication requirement if good cause exists.*

That leaves agencies with a huge loophole to avoid scrutiny of a wide array of rules.

Amendments to the Adminstrative Procedure Act have intended that complex and expensive rules be subject to additional analysis. These reforms include the Paperwork Reduction Act of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–21), Regulatory Flexibility Act (to address small business impacts, Pub. L. No. 96-354), and Congressional Review Act, which enables Congress to vote on a resolution of disapproval to reject agency regulations (5 U.S.C. §§ 801–8).

In addition, various presidential executive orders govern central review of rules by the OMB to address cost–benefit analysis for some rules. Ronald Reagan's Executive Order 12291 set up central review of agency rules by the OMB. Bill Clinton's E.O. 12866, however, restored "primacy" to agencies, thereby weakening the process. Although President Obama issued several orders to ostensibly streamline regulation, his underlying "pen and phone" approach to policy making eclipsed any regulatory curtailment.

Moreover, the APA's already-weakened "good-cause" requirement to publish notice of proposed rulemaking and allow public comment does not apply at all to agency guidance, memoranda, and other regulatory dark matter.

> *Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause*

Recent Examples of Regulatory "Dark Matter"

- **Internal Revenue Service** and **Department of Health and Human Services** waivers of provisions of the Patient Protection and Affordable Care Act
- **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act
- **Environmental Protection Agency** Clean Water Act interpretive guidance on "Waters of the United States"
- **Securities and Exchange Commission** interpretive "Commission Guidance Regarding Disclosure Related to Climate Change"
- **Commodity Futures Trading Commission** "Staff Advisory" guidance on international financial transactions between overseas parties "arranged, negotiated, or executed" by a U.S.-based individual
- A series of **Department of Education** guidance documents imposing new mandates on colleges and schools on issues ranging from bullying and harassment to gender identity
- The **U.S. Department of Agriculture's Forest Service** "Notice of Final Directive" permanent Ecosystem Restoration policy
- **Department of Labor Wage and Hour Division** "Administrative Interpretations" on independent contracting and on joint employment
- **Department of Labor** guidance documents regarding the Process Safety Management standards for hazardous chemicals
- **Equal Employment Opportunity Commission** series of guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks
- **Consumer Financial Protection Bureau** "Bulletin" on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act"
- **Council on Environmental Quality** Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change

> *finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (Pub. L. No. 79-404, Section 553)*

With respect to "significant guidance," some executive (not independent) agencies comply with a 2007 OMB memorandum on "Good Guidance Principles"—in effect, guidance for guidance. "Significant" guidance often means having an economic effect

of $100 million annually, similar to the definition for significant and major rules. With conspicuous exceptions—such as the Departments of Energy, Housing and Urban Development, and Health and Human Services—some agencies not only continue to invoke the 2007 OMB memo but follow its directive of maintaining Web pages devoted specifically to their "significant guidance." Unfortunately, that is a suggestion rather than a command, which allows, for example, the Food and Drug Administration to report no "significant guidance," even though it has 1,184 acknowledged final guidance documents.

Unelected agencies' declarations face insufficient oversight, yet they are binding. Congress needs to require adherence to the APA, thereby affirming the concept of separation of powers, outlined above.

Expert: Clyde Wayne Crews Jr.

For Further Reading

Clyde Wayne Crews Jr., "Mapping Washington's Lawlessness," *Issue Analysis* 2015 No. 6, Competitive Enterprise Institute, December 9, 2015, https://cei.org/content/mapping-washington%E2%80%99s-lawlessness.

———, *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State* (Washington, DC: Competitive Enterprise Institute, 2016), https://cei.org/10KC2016.

———, Testimony before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, July 6, 2016, https://judiciary.house.gov/wp-content/uploads/2016/06/Crews-Testimony.pdf.

Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). See also Hamburger's discussions of administrative law in a summer 2014 *Washington Post* blog series, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/14/prof-philip-hamburger-columbia-guest-blogging-on-his-is-administrative-law-unlawful/.

Maeve P. Carey, "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register*," Congressional Research Service, July 14, 2015, https://fas.org/sgp/crs/misc/R43056.pdf.

Jared P. Cole, "The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action, Congressional Research Service 7-5700, January 29, 2016, https://www.fas.org/sgp/crs/misc/R44356.pdf.

Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," Administrative Conference of the United States, July 15, 2014, https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf.

"Final Bulletin for Agency Good Guidance Practices," *Federal Register*, Vol. 72, No. 16, January 25, 2007, pp. 3432–40, http://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/OMB_Bulletin.pdf.

Harvard Journal of Law and Public Policy, Executive Discretion and the Rule of Law issue, Vol. 37, No. 2, 2014, http://www.harvard-jlpp.com/vols-35-39/.

National Federation of Independent Business, *The Fourth Branch and Underground Regulations*, September 2015, http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

Rob Portman, Office of Management and Budget, "Issuance of OMB's 'Final Bulletin for Agency Good Guidance Practices,'" Memorandum for the Heads of Executive Departments and Agencies, January 18, 2007, http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

U.S. Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Washington, DC: GAO, December 2012), http://www.gao.gov/assets/660/651052.pdf.

STRENGTHEN DISCLOSURE WITH A "REGULATORY REPORT CARD"

A greater level of disclosure is needed for regulatory guidance documents, memoranda, and other regulatory dark matter that have been neglected in the regulatory oversight process. Regulatory information is often available but difficult to compile or interpret. A regulatory report card that makes that information more accessible would go a long way toward increasing transparency. Since the early 1980s, regulatory oversight has been governed primarily by the semiformal central review of economic, environmental, and health and safety regulations by OMB's Office of Information and Regulatory Affairs. The process is insufficient, as OMB review captures a fraction of the regulatory enterprise. As a result, less than 1 percent of rules have an "audited" cost–benefit analysis. By requiring a periodic publication summarizing available but scattered data, Congress could make complex regulatory data more user-friendly and encourage public accountability.

The Reagan and George H. W. Bush administrations formalized such disclosure, in a document accompanying the federal budget known as the *Regulatory Program of the United States Government*. The compilation included a lengthy appendix, "Annual Report on Executive Order 12291," which could provide a template for accessible disclosure of information about rules, as well as guidance and dark matter. The *Regulatory Program*'s run concluded in 1993 when the Clinton administration replaced E.O. 12291 with E.O. 12866 as part of that administration's reaffirmation of agency

Congress should:

- Require agencies to present data regarding regulation and guidance to Congress and the public in a format comparable to the federal budget's Historical Tables.
- Require streamlined, single-location online disclosure of economically significant guidance from both independent and executive agencies, augmenting what a few agencies already voluntarily publish in accordance with the 2007 OMB memorandum to agencies.
- Require centralized disclosure of the thousands of guidance documents issued annually that do not rise to agencies' reckoning of "significant." Currently, those documents are scattered under numerous monikers and across various websites, if published at all.

Table 1.2 Proposed Breakdown of Economically Significant Rules

Category 1	> $100 million < $500 million
Category 2	> $500 million < $1 billion
Category 3	> $1 billion < $5 billion
Category 4	> $5 billion < $10 billion
Category 5	> $10 billion

primacy. Worse, in recent years, federal agency oversight reports—such as the Unified Agenda of Federal Regulations, the OMB *Report to Congress* on regulatory benefits and costs, and the *Information Collection Budget*—have been published late—or not at all in the case of the Unified Agenda.

A regulatory report card could take the form of a modified and reinstated *Regulatory Program* or a compilation of regulatory data published as chapters or appendixes in the federal budget, the *Economic Report of the President*, the OMB *Benefits and Costs* report, or other existing data sources.

Whatever its format, a federal regulatory transparency report card should include the following:

- Tallies of economically significant, major, and nonmajor rules by department, agency, and commission;
- Tallies of significant and other guidance documents and memoranda by department, agency, and commission;
- Numbers and percentages of rules and guidance documents affecting small business;
- Depictions of how agencies' regulations accumulate as a business grows;
- Numbers and percentages of regulations that contain numerical cost estimates;
- Tallies of existing cost estimates, including subtotals by agency and grand total;
- Numbers and percentages that lack cost estimates, with reasons for absence of cost estimates (such as rules for which weighing costs and benefits is statutorily prohibited);

- Aggregate cost estimates of regulation: grand total, paperwork, economic (for example, financial, antitrust, communications sector), social, health and safety, and environmental;
- *Federal Register* analysis, including numbers of pages and proposed and final rule breakdowns by agency;
- Number of major rules reported on by the GAO in its database of reports on regulations;
- Rankings of most active executive and independent rulemaking agencies;
- Identification of agency actions that are deregulatory rather than regulatory;
- Rules and guidance purported to affect internal agency procedures alone;
- Number of rules new to the Unified Agenda;
- Number of rules that are carryovers from previous years;
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them;
- Rules for which weighing costs and benefits is statutorily prohibited;
- Percentages of rules reviewed by the OMB and action taken.

Regulations fall into two broad classes: (a) those that are economically significant, that is, costing more than $100 million annually; and (b) those that are not. However, many rules that technically fly below that threshold can still be very significant in the real-world sense of the term. Congress could require agencies to break cost categories into tiers more descriptive of their real-world costs. Table 1.2 provides one possible itemization.

Expert: Clyde Wayne Crews Jr.

For Further Reading

Clyde Wayne Crews Jr., "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 4, 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

———, *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State* (Washington, DC: Competitive Enterprise Institute, 2016), https://cei.org/10KC2016.

Executive Office of the President, Office of Management and Budget, *Regulatory Program of the United States Government*, April 1, 1991–March 31, 1992, pp. 673–777, http://babel.hathitrust.org/cgi/pt?id=umn.31951d003498102;view=1up;seq=5.

IMPLEMENT A REGULATORY REDUCTION COMMISSION AND SUNSET PROCEDURES

Much concern is expressed over agencies' new regulations, but Congress should also aggressively address those already on the books, which have accumulated over decades. An option is to create a Regulatory Reduction Commission and task it to convene periodically and propose a repeal package.

Modeled on the successful military Base Realignment and Closure (BRAC) Commission, the Commission on Regulatory Relief and Rollback was first proposed in 1995 by then-Sen. Phil Gramm (R-Tex.). A similar 2004 House proposal—the Commission on the Accountability and Review of Federal Agencies—would have addressed agencies and programs in need of rollback. The Progressive Policy Institute has detailed a similar idea, calling it a Regulatory Improvement Commission.

The BRAC model's bipartisan, independent structure helped resolve the politically intractable task of closing obsolete military bases that provide jobs in members' districts by bundling them into a single legislative package. BRAC formulated a list of recommended base closures set to go into effect after a given time interval unless Congress enacted a joint resolution of disapproval. If no such resolution was passed, the closures happened automatically. That technique could be applied to the similarly difficult regulatory arena.

Any commission recommendation requiring no legislation might be implemented by the president. The filtering process of holding hearings combined with the bundling of regulations would make the commission's recommendations more difficult to oppose politically—everybody stands a good chance of getting "hit," providing political cover.

Congress should:

- Appoint a bipartisan Regulatory Reduction Commission to conduct hearings, assess agencies' accumulated rules and regulations, and assemble a yearly package of proposed regulatory reductions, subject to an up-or-down vote by Congress, with no amendments allowed.
- Include sunset provisions for rules in any new legislation that directs agencies to implement regulations.

International precedent exists for streamlining. The Netherlands and the United Kingdom both set up autonomous, nongovernmental bodies to review regulation—the Regulatory Reduction Committee in the Netherlands and the Better Regulation Commission in the UK. Both sought to reduce regulatory burdens by 25 percent over a four-year period, and they achieved some success.

Review and sunset requirements built into laws and regulations could also incentivize agencies to repeal outdated rules. Although continuation of rules will likely be common, the procedure could improve the transparency reporting urged earlier, thereby inspiring reforms indirectly. Widespread sunsetting across government could lessen the effectiveness of the interest-group mobilization that could be prompted by an approaching sunset deadline affecting a single agency.

Expert: Clyde Wayne Crews Jr.

For Further Reading:

Clyde Wayne Crews Jr., "Sunsetting Federal Regulations," Competitive Enterprise Institute blog, July 15, 2015, https://cei.org/blog/sunsetting-federal-regulations.

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

Organisation for Economic Co-operation and Development, *Better Regulation in Europe: Netherlands* (Paris: OECD Publishing, 2010), http://www.oecd.org/gov/regulatory-policy/betterregulationineuropenetherlands.htm.

———, *Better Regulation in Europe: United Kingdom* (Paris: OECD Publishing, 2010), http://www.oecd.org/gov/regulatory-policy/betterregulationineuropeunitedkingdom.htm#contents.

REQUIRE VOTES ON MAJOR OR CONTROVERSIAL RULES

Congress passed 114 laws in 2015, while agencies issued 3,410 rules—a ratio of 30 rules for every law. As administrative law has steadily displaced the representative republican government our Founders envisioned, congressional overdelegation to bureaucrats has widened the disconnect between the power to establish regulatory programs and the responsibility for the results of those programs. Legal scholar Philip Hamburger has detailed the emergence of a preconstitutional, monarchy-style prerogative, a development defying the Constitution, which "expressly bars the delegation of legislative power."

The Congressional Review Act's resolution of disapproval process represents a significant tilt back toward congressional accountability, but has been rarely used. A serious flaw is that the CRA effectively requires a two-thirds supermajority to strike "laws" that Congress never passed in the first place. So the flow of rules only increases. The solution is to require congressional affirmation for agency rules, guidance, and other proclamations likely to have significant economic impact, or that are societally or socially controversial.

The basic principle for public accountability for Congress and agencies should require that no major or controversial agency rule becomes law until it receives an affirmative vote by Congress. This principle is particularly important since most agencies do not quantify most rules' costs. In addition, many costly rules can escape the "significant" classification by their cost estimates coming in below the $100 million threshold. The REINS Act passed the House of Representatives in the 112th, 113th, and 114th Congresses and deserves to be revisited. Democratic accountability is most important.

Congress should:

- Pass the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would establish an affirmation procedure for major rules with annual costs of $100 million or more.
- Expanding the REINS Act to cover any controversial rule, whether it is tied to a cost estimate or not.
- Extend the REINS Act to apply to guidance documents and other agency decrees.

Cost–benefit analyses matter less when every elected representative goes on record as either supporting or opposing a particular regulation.

Expert: Clyde Wayne Crews Jr.

For Further Reading

Clyde Wayne Crews Jr., "The Other National Debt Crisis: How and Why Congress Must Quantify Regulation," *Issue Analysis* 2011 No. 4, Competitive Enterprise Institute, October 4, 2011, https://cei.org/issue-analysis/other-national-debt-crisis.

———, *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State* (Washington, DC: Competitive Enterprise Institute, 2016), https://cei.org/10KC2016.

IMPLEMENT A REGULATORY COST BUDGET

Federal spending, taxes, and the deficit get plenty of attention. But it is equally important to monitor and reduce nontax expenditures that the government imposes. The concept is both bipartisan and not new. For example, then-Sen. Lloyd Bentsen (D-Tex.) proposed an "annual regulatory budget" in 1979. Recent legislative offerings include the National Regulatory Budget Act, introduced by Sen. Marco Rubio (R-Fla.) in 2014, and the Article I Regulatory Budget Act, introduced by Sen. Mike Lee (R-Utah) in 2016.

A regulatory budget could help incentivize other reforms, such as cost analysis and sunsets. It would also allow Congress to allocate regulatory cost authority among agencies and better distinguish between categories like economic, health and safety, and environmental regulations.

A comprehensive regulatory cost budget would include individual tallies from agencies, paralleling the fiscal budget. Congress would specify the total cost budget for which it is willing to be held accountable and divide it among agencies. Budgeting would force agencies to "compete" to ensure that their least-effective, more poorly performing mandates save more lives per dollar or correct some alleged market imperfection better than another agency's rules. That approach should improve decision making and encourage adherence to congressional intent.

Agencies would concentrate on assessing costs, much as the fiscal budget focuses on costs and not benefits. Benefits are what Congress must supervise in the first place through its lawmaking and budgetary allocations. Although a regulatory budget's compliance cost calculations would be difficult, they would be easier to manage than

Congress should:

- Require agencies to present annual regulatory cost projections to Congress as part of the appropriations process, in order to enable Congress to decide what level of regulatory burden it is willing to impose on a given industry or region.
- Require a "one in, one out" procedure for new rules, which a regulatory budget would make possible. Like the Regulatory Reduction Commission, this idea holds bipartisan appeal. For example, Sen. Mark Warner (D-Va.) recommend offsetting every new rule by eliminating an existing one. Such a "one in, one out" system amounts to a status quo regulatory "budget," or a freeze at current levels.

separate cost and benefit calculations for every single rule, which is not being done anyway. Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency, or even face elimination.

Pitfalls of regulatory budgeting include:

- The risk of creating perverse incentives to expand rather than reduce the size of government because of the elevation of utilitarianism over individual rights in the pursuit of "social" benefits;
- The reality that apart from raw compliance, cost calculation involves mere estimations; and
- The temptation to include benefits and generate a phony "net benefit" budget—which would mean no end to regulation, as it would give agencies fodder to argue that cutting their regulatory budgets costs lives.

Regulatory transparency; a Regulatory Reduction Commission and rule sunsetting; one-in, one-out approaches; and congressional approval of rules would all lay a needed foundation for any attempt at a regulatory cost budget.

Expert: Clyde Wayne Crews Jr.

For Further Reading

Clyde Wayne Crews Jr., "Promise and Peril: Implementing a Regulatory Budget," *Policy Sciences*, Vol. 31, No. 4 (1998), pp. 343–369, http://link.springer.com/article/10.1023%2FA%3A1004483131309.

———, Testimony on "An Introduction to Regulatory Budgeting" before the House Budget Committee, July 7, 2016, http://budget.house.gov/uploadedfiles/crewstestimony.pdf.

"Policy Statement on Federal Regulatory Budgeting and Reform," in H. Con. Res. 125, House Budget Committee, Fiscal Year 2017 Budget Resolution, http://budget.house.gov/uploadedfiles/fy2017_legislative_text.pdf. See also Committee on the Budget report (H. Report 114-470), "Concurrent Resolution on the Budget: Fiscal Year 2017," March 23, 2016. http://budget.house.gov/uploadedfiles/fy2017_budget_resolution.pdf.

Jeff Rosen, "Putting Regulators on a Budget," *National Affairs*, Spring 2016, pp. 42–58. http://www.nationalaffairs.com/doclib/20160318_Rosen.pdf.

RESTRAIN THE RUNAWAY ADMINISTRATIVE STATE BY REINING IN *CHEVRON* DEFERENCE

Chevron deference is the legal doctrine whereby courts generally defer to regulatory agencies' interpretations of their enabling statutes. That means that when an agency's statutory interpretation undergoes judicial review, it need only be reasonable to pass legal muster. A court may believe that its own interpretation is a superior reading of the law, but under *Chevron* deference, it would have to give way to the agency's construction.

The U.S. Supreme Court established this doctrine in its seminal 1984 ruling in *Chevron v. National Resources Defense Council*. In that ruling, the Court set up a now widely used two-step analytical framework for courts to review agency interpretations of their own rules under the relevant statutes. At step 1, the reviewing court asks "whether Congress has spoken directly to the precise question at issue." At this point, "if the intent of Congress is clear, that is the end of the matter," because courts "must give effect to the unambiguously expressed intent of Congress." However, if "the statute is silent or ambiguous with respect to the specific issue," the court moves on to *Chevron* step 2, whereupon "the question … is whether the agency's answer is based on a permissible construction of the statute."

From an institutional perspective, the problem with *Chevron* deference is that it flies in the face of the judiciary's role, as Chief Justice John Marshall famously put it, "to say what the law is." *Chevron* deference operates under the assumption that Congress intended for courts to defer to agencies' interpretations of statutes. That runs counter to Congress's express stipulation in the Administrative Procedure Act that "the reviewing court shall decide all relevant questions of law."

From a practical perspective, *Chevron* deference has been a crucial impetus for the growth of the administrative state. Because of the richness of the English language, it is easy for an agency to engineer ambiguity into virtually any statutory provision. Having thus engendered a textual imprecision, the agency can then advance an expansive interpretation that grants itself greater regulatory authority.

At its theoretical core, the *Chevron* deference doctrine is based on the Supreme Court's assumption that Congress intended for administrative agencies, rather

Congress should:

- Pass the Separation of Powers Restoration Act, which would direct courts to stop giving controlling deference to agency interpretations of their enabling statutes.
- In expectation of a possible increased administrative burden on Article III courts, complement passage of the Separation of Powers Restoration Act with a modest appropriation to support another 36 appellate judges and 140 district court judges, plus the accompanying clerks and assistants.

than judges, to interpret statutes, because of the former's comparative strengths in expertise and accountability. In making that assumption, the Supreme Court overlooked the possibility that Congress's intent may run counter to that of the executive branch. For example, in light of the growth of the administrative state, it is likely that many members of Congress would give priority to providing an institutional check on the powers of the president through the judiciary, regardless of the supposed advantages in expertise and accountability enjoyed by administrative agencies in interpreting statutes.

Given that *Chevron* deference is a function of supposed congressional intent, it is well past time for Congress to express its will with respect to which branch of government should have the power to interpret the law.

Experts: William Yeatman, Iain Murray

For Further Reading

Iain Murray, "Stopping the Bureaucrats Requires an End to Chevron Deference," *National Review*, May 11, 2016, https://cei.org/content/stopping-bureaucrats-requires-end-chevron-deference.

William Yeatman, "EPA's Clean Power Plan Overreach," *OnPoint* No. 204, Competitive Enterprise Institute, July 28, 2015, https://cei.org/content/epa%E2%80%99s-clean-power-plan-overreach.

———, "Primer on the Separation of Powers Restoration Act," Competitive Enterprise Institute blog, July 12, 2016, https://cei.org/blog/primer-separation-powers-restoration-act.

Banking and Finance

2

Access to capital is fundamental to the operation of a free society. It allows for the foundation, expansion, and smooth running of the private enterprises that make up the market economy. It also provides room for the experimentation that allows innovation in product and service delivery. A well-functioning financial system helps match investors with enterprises for mutual benefit—and to the benefit of their employees and customers. When too many restrictions are placed on the financial system, the economy slows both in its general flows and in innovation.

In the modern global economy, provision of access to capital generally occurs through the banking system as credit, through loans or credit cards. Once enterprises have reached a certain size, they can access capital markets, such as stock markets and debt offerings. Thanks to technological innovation, recent years have seen an explosion of alternative means of gaining capital—peer-to-peer lending and crowdfunding most prominent among them. At the individual household level, a variety of finance companies offer small-dollar loans that are often essential for keeping the lights on.

The smooth running of this system was disrupted by the financial crisis. A variety of government interventions, such as the Community Reinvestment Act and the actions of Fannie Mae and Freddie Mac, led lenders to overextend themselves by extending credit to a variety of sources that were unlikely to pay it back. Political convenience replaced sound economic judgment as a determinant of capital provision. A multitude of other factors added to the problem, including:

- The moral hazard of deposit insurance;
- Zoning restrictions that fueled unsustainable housing price rises;
- Loose monetary policy;
- Problems with bank modeling of risk; and
- International regulation (such as the Basel Accords on the risk weighting of capital assets) that inaccurately weighted the risk faced by debt holders.

When the banks that had extended the most problematic credit began to fail, government's reaction was to prop them up with taxpayer bailouts, thereby socializing their losses and breaking the incentive structure for avoiding such problems.

The Dodd-Frank Act of 2010 was meant to help solve the financial crisis, but in fact it did nothing to change the situation and made the problem worse. Instead, it doubled down on the bank regulatory regime that failed to prevent the financial crisis. In fact, Dodd-Frank regulates such extraneous issues as debit card interchange fees and accounting for conflict minerals that had nothing to do with the crisis.

Dodd-Frank was intended to address the problem of "too big to fail." It has failed to do so. The big banks are even more dominant than before the crisis, and the vastly increased regulatory burden imposed on smaller banks has led many of them to merge to create bigger banks that are able to withstand the increased regulatory costs. Some have even closed. Wall Street was targeted, but Main Street was hit.

Worse, banking regulators have abused their authority to crack down on legal businesses that regulators find distasteful.

This overregulation has made banks wary of lending to people without perfect credit or to small businesses and startups. These groups have turned to alternative sources of funds, but they are finding those attacked by regulators as well.

Even worse yet, Dodd-Frank created an unconstitutional and overly powerful regulator, the Consumer Financial Protection Bureau (CFPB), which lacks proper checks and balances.

Congress must rein in these regulators and pass laws that will rectify the mistakes of Dodd-Frank. The Financial CHOICE Act—for Creating Hope and Opportunity for

Investors, Consumers and Entrepreneurs—will go a long way toward righting the wrongs inflicted by Dodd-Frank.

The Financial CHOICE Act would:

- Assist in capital formation by allowing banks to swap less stringent regulation for holding more capital;
- Reduce the regulatory burden and make regulators accountable by reforming the Federal Reserve, the CFPB, and other regulators, while allowing meaningful relief from regulation for smaller institutions; and
- Provide a better solution to the too-big-to-fail problem by allowing for a new chapter in the bankruptcy code to replace the counterproductive "orderly liquidation authority" under Dodd-Frank.

Further reforms will be needed, including legislation to allow financial technology firms, known as FinTech, to pursue innovation in financial services without having to deal with the regulatory burdens of banks. An amended Fix Crowdfunding Act and other pieces of legislation described in detail in this section could help achieve those objectives.

BRING ACCOUNTABILITY TO THE UNACCOUNTABLE CONSUMER FINANCIAL PROTECTION BUREAU

The Dodd-Frank Act of 2010 created the Consumer Financial Protection Bureau ostensibly to protect consumers from "faulty" financial products, much like the Consumer Product Safety Commission (CPSC) purportedly protects consumers from faulty household products. However, the CFPB has far more power than the CPSC, as it was deliberately constructed to operate free from the traditional checks and balances of an independent agency. As a result, it is not accountable to Congress, the President, the courts, or the people in general.

Congress exercises no "power of the purse" over the CFPB, because the agency's budget—administered essentially by one person—comes from the Federal Reserve, amounting to approximately $400 million that Congress cannot touch or regulate. The president cannot carry out his or her constitutional obligation to "take care that the laws be faithfully executed" because the president cannot remove the CFPB director except under limited circumstances. Dodd-Frank imposes a "for cause" standard for removal of the CFPB head. While this is normal for most independent agencies, the CFPB is unprecedented because it is headed by a single director, rather than by the multimember commissions that generally run independent agencies. Moreover, it draws its budget from the Federal Reserve, thus eliminating congressional oversight, and is subject to reduced judicial oversight because Dodd-Frank requires the courts to give extra deference to its legal interpretations. However, on October 11 a federal circuit court held that the CFPB's for-cause removal standard is unconstitutional because it makes the director unaccountable to the President.

Congress should:

- Pass the Financial CHOICE Act or at least the section of the Act that deals with the CFPB.
- Pass motions expressing its sense that the CFPB is unconstitutional in its current form, regardless of whether the court ruling that that made the CFPB director removable at will by the President is upheld.
- Pass Congressional Review Act resolutions of disapproval of the arbitration and short-term lending rules early in the new session.

The Financial CHOICE Act contains provisions that would restructure the CFPB as a traditional independent agency. It would change its mandate to provide for both consumer protection and competitive markets, to establish it as a five-member commission, and to appoint an independent inspector general.

Examples of the CFPB's abuse of power include its rules to limit the use of mandatory arbitration clauses in financial contracts and to severely restrict the terms of short-term and small-dollar loans. Those rules will increase the costs of financial contracts and loans, leading to less availability of credit to individuals who need it.

Experts: John Berlau, Iain Murray

For Further Reading

Iain Murray, "How Dodd-Frank Harms Main Street," *OnPoint* No. 202, Competitive Enterprise Institute, July 20, 2015, https://cei.org/content/how-dodd-frank-harms-main-street.

Competitive Enterprise Institute, "Challenging Dodd-Frank: *State National Bank of Big Spring v. Lew*," plaintiffs' briefs (discuss constitutionality of the CFPB), https://cei.org/litigation/challenging-dodd-frank-state-national-bank-big-spring-v-lew.

House Committee on Financial Services, "The Financial CHOICE Act," discussion draft, http://financialservices.house.gov/uploadedfiles/financial_choice_act-_executive_summary.pdf.

Iain Murray and John Berlau, "Comments to the CFPB on Barring Arbitration Agreements," August 22, 2016, https://cei.org/content/comments-cfpb-barring-arbitration-agreements.

OPPOSE REGULATORY OVERREACH IN FINANCIAL SERVICES

Since the passage of the Dodd-Frank Act in 2010, banking regulators have gone into overdrive. Community and regional banks have been so badly affected that their rates of closure and merger have doubled since the Act was passed. Only two new banks have been authorized during the past six years. The result is a lack of choice for consumers and a loss of the personal connection between banker and customer that should have been strengthened after the financial crisis.

Financial technology (FinTech) firms have helped fill that void, but they are limited in the credit choices they can offer consumers. Unlike banks, which can be federally chartered, nonbank FinTech lenders must incorporate in their home states. As a result, FinTech lenders cannot lend to customers in other states at the same interest rates that they lend to their in-state customers if the borrower's state caps the interest at a lower amount. That restriction limits consumer choices, including the choice to get a loan at an interest rate lower than that of a federally chartered bank.

Moreover, the centuries-old "valid when made" doctrine—under which loans considered valid in the state they were made could not be considered usurious when sold to an out-of-state party—is under attack. The Supreme Court recently refused to hear *Madden v. Midland Funding*, in which the Second Circuit Court of Appeals reversed a century of "valid when made" precedent, when the Circuit Court decided that a New York State usury cap was applied to a loan that a debt collector had bought from North Carolina–based Bank of America. That ruling created massive uncertainty in the lending market that could devastate FinTech innovations, such as peer-to-peer lending.

Banking regulators have also felt empowered to go beyond their strict remit. Under a Department of Justice–led initiative called Operation Choke Point, regulators have threatened to crack down on banks that provide financial services to legal businesses that regulators simply do not like, including payday lenders, gun dealers, fireworks stores, and adult entertainment. Many of those businesses have found themselves without access to payment or banking services, despite their not having committed any crime.

Congress should:

- Pass the Protecting Consumers' Access to Credit Act, sponsored by Rep. Patrick McHenry (R-N.C.) in the previous Congress, to explicitly make the "valid when made" doctrine the law of the land.
- Pass the Consumer Credit Access, Innovation, and Modernization Act, previously cosponsored by Reps. Blaine Letukemeyer (R-Mo.) and Gregory Meeks (D-N.Y.), to create a system of optional federal charters for nonbank finance companies that would give them the same right as banks to export interest rates to out-of-state consumers.
- Pass the Financial Institutions Consumer Protection Act, sponsored in the previous Congress by Rep. Blaine Letukemeyer (R-Mo.) and Sens. Ted Cruz (R-Tex.) and Mike Lee (R-Utah), to curb the abuses of existing law that allowed Operation Choke Point. Specifically, it would stop regulators from (a) terminating bank accounts without reason and (b) threatening banks with subpoenas.
- Repeal the Durbin Amendment, which imposes caps on interchange fees for payment cards that have led to fewer financial service offerings for bank customers.

Finally, the Dodd-Frank Act gave the Federal Reserve the power to impose a price cap on interchange fees, which are part of the fees banks charge merchants when a customer uses the bank's debit card to purchase something from them. Interchange fees had nothing to do with the financial crisis, but the cap was included in the Act at the last minute in "the Durbin Amendment," named after its sponsor, Illinois Senator Dick Durbin. The rationale was that merchants would pass along the cost savings to customers. But research has shown that those cost savings never materialized; instead, banks passed along the loss of revenue to all customers in the form of higher fees. As a result, the Federal Reserve's price controls have led to a reduction in the number of free checking accounts available, an end to debit card rewards programs, and higher costs at the margin of bank service availability that may have pushed up to 1 million people out of the banking system altogether.

Experts: Iain Murray, John Berlau

For Further Reading

John Berlau, Testimony on "Examining Consumer Credit Access Concerns, New Products and Federal Regulations" before the House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit, July 24,

2012, http://financialservices.house.gov/uploadedfiles/hhrg-112-ba15-wstate-jberlau-20120724.pdf.

Iain Murray, "How Dodd-Frank Harms Main Street," *OnPoint* No. 202, Competitive Enterprise Institute, July 20, 2015, https://cei.org/content/how-dodd-frank-harms-main-street.

———, "Operation Choke Point: What It Is and Why It Matters," *Issue Analysis* 2014 No. 1, July 31, 2014, https://cei.org/content/operation-choke-point.

Richard A. Vance, "U.S. Supreme Court to Consider 'Valid When Made' Doctrine," Creditors' Sidebar (blog), January 28, 2016, http://www.creditorssidebar.com/2016/01/u-s-supreme-court-to-consider-valid-when-made-doctrine/.

Todd J. Zywicki, Geoffrey A. Manne, and Julian Morris, "Price Controls on Payment Card Interchange Fees: The U.S. Experience," George Mason Law and Economics Research Paper No. 14-18, June 4, 2014, http://ssrn.com/abstract=2446080.

ALLOW FINANCIAL SERVICE PROVIDERS TO OFFER CONSUMERS INNOVATIVE NEW SERVICES THROUGH THE GROWTH OF FINTECH AND CROWDFUNDING

The advent of "sharing economy" platforms like Uber and Airbnb has vastly improved transportation and lodging options for consumers. Financial services are starting to undergo a similar revolution. But just as Uber and Airbnb had to fight outdated taxi and hotel regulations to gain a foothold, new financial service providers face a number of antiquated rules that keep their innovations from growing or even getting off the ground.

Crowdfunding—which allows filmmakers, artists, and entrepreneurs to raise funds online from millions of fans on sites like Kickstarter and Indiegogo—is becoming the next frontier in investing across the world. Entrepreneurs are using portals to find investors, without a need for the "middlemen" of brokers and stock exchanges. But in the United States, even individuals raising small amounts have been barred from equity crowdfunding from investors.

The Jumpstart Our Business Startups (JOBS) Act attempted to change that situation, and it has had much success in allowing entrepreneurs more freedom to solicit and advertise to "accredited investors"—those with $1 million in assets or earnings of $200,000 a year. The growth of portals that match entrepreneurs with those wealthy investors, such as CircleUp and Israel-based OurCrowd, has exploded.

But unfortunately, after much delay, the JOBS Act provisions recently implemented by the Securities and Exchange Commission (SEC) to allow equity crowdfunding from ordinary investors fell woefully short of their stated goal. Although the rules exempt small public companies from some onerous mandates of the Sarbanes-Oxley and Dodd-Frank financial regulation laws, they contain their own thicket of new red tape. And the limits on the amount that can be raised this way are so low that they do not justify the compliance costs for many small firms.

Peer-to-peer lending has expanded credit options for consumers and small businesses. But it is also limited by the SEC's interpretation of 1930s-era securities laws. The SEC treats peer-to-peer loans as "securities" that must be subject to much of the same red tape as a stock or bond offering. As a result, two large companies, Prosper and Lending Club, have a virtual duopoly on peer-to-peer lending for consumers.

And unlike in other countries, ordinary investors make almost no peer-to-peer loans to small businesses.

Congress should:

- Build on the JOBS Act by expanding the amount that can be raised through equity crowdfunding from $1 million to $5 million and the contribution level from ordinary investors from $1,000 to $5,000. These provisions were contained in the original Fix Crowdfunding Act, sponsored by Rep. Patrick McHenry (R-N.C.) in 2016. Unfortunately, they were dropped in order for the bill to get strong bipartisan support in the House.
- Allow special-purpose acquisition companies, in which lead investors negotiate on behalf of others, to use crowdfunding for ordinary investors. It is a preferred investing method among angel investors and venture capitalists and would likely benefit ordinary investors as well. This provision stayed in the Fix Crowdfunding Act that was overwhelmingly approved by the House in 2016.
- Expand the "accredited investor" definition beyond the wealth threshold to include those who have proved their sophistication in other ways, such as passing exams for financial advisers and brokers. This action would be accomplished by the Fair Investment Opportunities for Professional Experts Act that passed the House with a strong bipartisan vote in 2016.
- Strip the SEC's power to regulate peer-to-peer loans as securities. This action has bipartisan support and passed a Democratic-controlled House as a provision of Dodd-Frank in 2010, but it was cut from the Senate version of the bill.
- Protect cybercurrency from overregulation.
- Repeal the Durbin Amendment. Short of that, make sure it applies only to physical debit cards and not to electronic methods of payment.
- Repeal the Department of Labor's "fiduciary rule," which limits choices and raises costs for retirement saving in Individual Retirement Accounts and 401(k) plans.

The SEC is one of several regulatory agencies vying—or being pushed—to regulate Bitcoin, a new form of cybercurrency that offers substantial benefits, from currency hedging to faster payments. Such new payment technologies may also be stifled by Dodd-Frank's Durbin Amendment, which controls the fees that debit card issuers can charge retailers from whom they process payments. According to George Mason University Law Professor Todd Zywicki and other researchers, the Durbin Amendment may have already caused as many as 1 million consumers to lose access to banking services, as the price controls shifted debit card costs from the nation's biggest retailers to its poorest consumers. If regulators treat new payment methods

such as Apple Pay as electronic "debit cards," innovation benefiting consumers and retailers will be stifled.

Even with the advent of financial technology, some consumers and providers will always value personalized service. Whether to use automated or personal service should be a choice rather than a mandate. Unfortunately, the Department of Labor's "fiduciary rule"—which mandates that financial professionals serve savers' "best interests" as the DOL paternalistically defines those interests—will impose so many costly mandates on brokers and insurance agents who help with retirement savings that they may no longer be able to work with middle-income and low-income savers. Those savers will be stuck with untested "robo-advice" because of this flawed regulation.

Experts: John Berlau, Iain Murray

For Further Reading

John Berlau, "Declaration of Crowdfunding Independence," *OnPoint* No. 199, Competitive Enterprise Institute, November 18, 2014, https://cei.org/content/declaration-crowdfunding-independence.

———, "The Department of Labor's Fiduciary Rule for Dummies (But Not the Dummies They Think We Are," *Web Memo* No. 35, Competitive Enterprise Institute, March 2, 2016, https://cei.org/content/department-labor%E2%80%99s-fiduciary-rule-dummies-not-dummies-they-think-we-are.

Iain Murray, "The Next Revolution," presentation on Prezi, Competitive Enterprise Institute, July 5, 2016, https://prezi.com/a87ozauohp0x/the-next-revolution/.

Todd J. Zywicki, Geoffrey A. Manne, and Julian Morris, "Price Controls on Payment Card Interchange Fees: The U.S. Experience," George Mason Law and Economics Research Paper No. 14-18, June 4, 2014, http://ssrn.com/abstract=2446080.

ADDRESS TOO-BIG-TO-FAIL

The Dodd-Frank "financial reform" law, rammed through Congress in 2010, was supposed to protect taxpayers against the prospect of future bailouts by ending the phenomenon of "too big to fail." Yet many of its provisions enshrine too-big-to-fail and potential bailouts.

Most prominently, the federal government can designate certain financial firms as "systemically important financial institutions" (SIFIs) that cannot be allowed to fail through the normal bankruptcy or receivership process. The government also has the authority to make creditors of those SIFIs whole, which gives them a competitive advantage in obtaining credit. It is always harmful for the government to pick winners and losers and designate firms for additional protection or additional regulation.

The Financial Stability Oversight Council (FSOC), a secretive bureaucracy created by Dodd-Frank, designates firms as SIFIs through an arbitrary process. Some firms embrace their SIFI designation, whereas others fight it because of the added regulation it entails. MetLife has successfully challenged its SIFI designation in federal court, but the FSOC is appealing.

In spite of these actions, the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac—arguably the most "systemically important" financial entities given their role in fomenting the financial crisis—are allowed to operate with virtually no capital buffer. The government's "conservatorship" of Fannie and Freddie since 2008—when it bailed out the GSEs in exchange for a 79.9 percent ownership stake in each of them—has increased the hazard they pose to taxpayers.

Under the Third Amendment to the GSEs' senior preferred state purchase agreements, implemented by the Obama administration in 2012, the government confiscates any profit the GSEs make—even after they have paid the government back. That action leaves the GSEs with no capital reserves, making them vulnerable to even the slightest hiccup in the economy. The Third Amendment "sweep" is an unjust taking from Fannie and Freddie's private shareholders and is currently being challenged in several lawsuits as unconstitutional. As long as this arbitrary confiscation is allowed to stand, a great amount of private capital will be scared off from the mortgage market, leaving government-backed mortgages as the only alternative for prospective home buyers.

Congress should:

- End the Financial Stability Oversight Council's exemption from the Freedom of Information Act and mandate that its meetings be open to the public.
- Repeal the FSOC's power to designate firms as too-big-to-fail SIFIs under Dodd-Frank. The Financial Choice Act would accomplish that objective. Short of that, grant both designated firms and their competitors express avenues to challenge a SIFI designation in court.
- Phase out Fannie and Freddie, and do not replace them. That phaseout can be done through the method laid out in the Protect American Homeowners and Taxpayers (PATH) Act, in which the GSEs sell off parts of their portfolios every year until they are completely liquidated. It can also be done by breaking up the GSEs and ending their line of credit with the U.S. Treasury. Any plan must uphold the rule of law by granting shareholders fair compensation for the value of their shares.
- Until Fannie and Freddie are phased out, end the Third Amendment profit sweep and ensure that they maintain adequate capital. The Housing Finance Restructuring Act of 2016, introduced in the House by Rep. Mick Mulvaney (R-S.C.) in the last Congress, is an important step in this direction. It requires that any profits made by the GSEs be used for rebuilding capital levels to help prevent future taxpayer bailouts.
- Phase out federal deposit insurance. Short of that, bring down the maximum insured per deposit from $250,000 to $100,000, the limit that existed for two decades before the financial crisis.
- Shift the burden of proof to bank regulatory agencies when processing applications for new bank entrants. Require those agencies to give specific reasons why a new bank would harm the safety and soundness of the financial system before rejecting its application. Make denial of an application challengeable in court.

To really end too-big-to-fail, Congress must minimize the damage to the financial system from any one bank's failing by limiting deposit insurance and allowing more competition. Deposit insurance creates moral hazard as banks know they will be bailed out if they take too many risks. Meanwhile, depositors lack incentives to monitor how much risk their banks are exposed to. The private sector can create more responsive mechanisms of insurance.

Also, innovative new entrants should be allowed to bring new competition into the financial services industry. Since the passage of Dodd-Frank in 2010, federal regula-

tors have allowed only two new banks to open for business. And well-managed non-financial firms, such as Walmart and Berkshire Hathaway, have been rebuffed in their attempts to open affiliated banks to serve consumers. Virtually no other developed country has these restrictions to entry. For example, in Great Britain the retail giant Tesco runs one of the country's largest banks. Keeping banking as an "old boys' club" with few new entrants makes the financial system less competitive and less safe.

Experts: John Berlau, Iain Murray

For Further Reading

John Berlau, "A Bird in the Hand and No Banks in the Bush: Why Competition Offers a Solution to Too Big to Fail," *Issue Analysis* 2015 No. 3, Competitive Enterprise Institute, July 16, 2015, https://cei.org/content/bird-hand-and-no-banks-bush.

Iain Murray, "How Dodd-Frank Harms Main Street," *OnPoint* No. 202, Competitive Enterprise Institute, July 20, 2015, https://cei.org/content/how-dodd-frank-harms-main-street.

Norbert J. Michel, "Financial Stability Oversight Council and Asset Management Firms," *Issue Brief* No. 4215, Heritage Foundation, May 6, 2014, http://www.heritage.org/research/reports/2014/05/financial-stability-oversight-council-and-asset-management-firms.

Alex J. Pollock and Thomas H. Stanton, "The Definition of SIFIs Must Include Fannie Mae and Freddie Mac, the Federal Reserve Banks and Open Market Committee, and Large Federal Credit Programs," January 10, 2016, https://www.aei.org/publication/the-definition-of-sifis-must-include-fannie-mae-and-freddie-mac-the-federal-reserve-banks-and-open-market-committee-and-large-federal-credit-programs/.

Fred L. Smith Jr., "Fannie, Freddie Critic Ridiculed in 2000," *Investor's Business Daily*, September 24, 2008, https://cei.org/op-eds-and-articles/fannie-freddie-critic-ridiculed-2000.

Labor and Employment

3

Increases in productivity—not artificial increases in labor prices—are the key to economic growth and rising wages. For most of its history, America has enjoyed strong economic growth thanks to the flourishing of dynamic and flexible labor markets. Individuals and businesses in the United States have benefited greatly from this atmosphere, which affords them the freedom to adapt to changing market conditions.

Despite this success, obsolete New Deal–era labor laws and regulations are becoming a drag on the economy. The old adversarial master–servant model of labor relations has little to offer the 21st-century workforce, which is characterized by horizontal corporate structures, significant job mobility, and instant, constant communications. However, rather than adapt to the changing economy, regulators are doubling down on enforcement of outdated national labor policy in a transparent effort to prop up labor unions, major political donors to Democrats.

The National Labor Relations Board (NLRB) and the Department of Labor (DOL) are the key federal labor regulators. Recent regulatory efforts by those agencies have sought to restrict flexible work arrangements and well-established business-to-business relationships, while giving favorable treatment to labor unions in order to aid their organizing efforts. Members of Congress must resist efforts to politicize regulation, adjudication, and legislation in labor relations. The threats are quite real for franchising, temporary staffing, independent contracting and subcontracting, interning, volunteering, supplying, and outsourcing.

REFORM THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is the primary law governing wage and hour mandates across the country, including full-time and part-time private-sector workers and local, state, and federal employees. It sets the minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements. Through the FLSA, Congress delegated broad authority to the Secretary of Labor to issue regulations on the conditions employees must meet to achieve exempt status from the statute's wage and hour requirements, including for minimum wage and maximum hours. Those exemptions are displayed in Section 213 of the FLSA.

Recently, the Secretary of Labor has used that power in an expansive and overreaching manner. For example, in 2016, the Department of Labor (DOL) dramatically raised the salary threshold for an employee to be exempt from overtime pay from $23,660 to $47,476—an increase of over 100 percent. As former DOL Wage and Hour Division Administrator Tammy McCutchen pointed out in congressional testimony, such an increase is out of line with historical raises of the salary threshold. Such significant changes to the rules of the game burden employers with massive costs and create new compliance issues.

In addition to the broad authority it gives to the Secretary of Labor, many of the FLSA's current definitions of employment categories are unclear and outdated. For example, the FLSA requires that an employee must earn more than the above-stated salary threshold and primarily perform "bona fide executive, administrative, or professional" activity to fall within the wage and hour exempt status. However, determining

Congress should:

- Reclaim authority over changes to Fair Labor Standards Act rules that affect millions of workers. Legislation should require that any proposed DOL regulatory change to an exemption from wage and hour requirements has to pass both houses of Congress before the rule is finalized.
- Pass legislation to clearly define the parameters of exempt workers in a way that enables employers to offer innovative compensation packages and allow for flexible schedules without fear of running afoul of the law under some technicality.

whether an employee meets the requirement of "executive, administrative, or professional" employee has become increasingly difficult.

In today's economy, it is more difficult to clearly define employees as either management or rank-and-file workers. The FLSA was created in 1938 and needs modernization. With an ever-changing regulatory landscape, this Depression-era wage and hour statute's requirements are ill-suited to govern today's modern workplace, and create confusion and uncertainty that present challenges to employers' ability to comply with the law.

Expert: Trey Kovacs

For Further Reading

Tammy D. McCutchen, Testimony on "An Examination of the Administration's Overtime Rule and the Rising Costs of Doing Business" before the Senate Committee on Small Business and Entrepreneurship, May 11, 2016, http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=88A0B32E-6A2E-4707-AA5B-F48D65097419.

REVERSE THE DEPARTMENT OF LABOR'S OVERTIME RULE

On November 22, 2016, Judge Amos Mazzant, of the Eastern Texas U.S. District Court, issued a nationwide preliminary injunction against the Department of Labor's (DOL) overtime rule. Judge Mazzant ruled that the plaintiffs—21 states—would suffer irreparable harm, including millions in compliance costs that would cause a detrimental effect on state governments' ability to provide public services. The injunction means existing overtime regulations remain in place until the court issues a final judgement. From the language of the ruling, it seems likely that Judge Mazzant would again rule in favor of the plaintiffs in a final judgement on the merits of the case.

Although the DOL could file an appeal, it would be during the twilight of the Obama administration, and the Trump administration likely would drop the case. However, it is possible that the judge could reverse course and deem the rule lawful.

If the DOL's rule ultimately goes into effect, it will raise the salary threshold for paid overtime if salaried employees work over 40 hours. The rule adjusts the threshold from $455 to $913 per week, or from $23,660 to $47,476 per year. That change would force many businesses to make some tough decisions about limiting hours or shifting some salaried employees to hourly status in order to rein in labor costs. It would be particularly problematic for small businesses and entrepreneurs with tight budgets, especially those that seek employees who wish to work longer hours with the opportunity for future gains. Companies without large profit margins and large executive salaries would be the most affected by far.

Congress should:

- Challenge the Department of Labor's final overtime rule under the Congressional Review Act, which authorizes Congress to file a joint resolution of disapproval of federal regulations within 60 days of their being finalized. The rule is invalidated if the resolution is passed by the House and Senate and signed by the President. Congress can override a presidential veto with two-thirds of both houses voting in favor of the resolution of disapproval.
- Include a rider in appropriation bills for the Departments of Labor, Health and Human Services, and Education and their related agencies to defund enforcement of the overtime rule.

Universities and nonprofit organizations would also be negatively affected by this new rule because of their fixed budgets. The University of Kansas is a prime example, with 354 employees would become nonexempt, at a cost to the school of $2.3 million in increased overtime, or $2.9 million to raise their salaries above the threshold. The University of Tennessee predicts a $9 million increase in wages paid, which is equivalent to a 2 percent tuition increase on all students, if the rule were to go into effect.

Nonprofit organizations like Operation Smile—which helps provide cleft palate operations for children— have also expressed concern over the new DOL rule, saying the new rule would affect over 50 percent of its workforce and increase costs by about $1 million. Putting this new rule in perspective, Nancy Duncan, Operation Smile's vice president for human resources, said it would eliminate 4,200 cleft lip surgeries annually, priced at $240 each.

Businesses, universities, and nonprofits will be negatively affected by this new rule. Employees face certain struggles due to this regulation as well. Employees wishing to set themselves apart by putting in extra hours will not have the same opportunities to show their dedication and work ethic, which are typically rewarded.

Expert: Trey Kovacs

For Further Reading

Trey Kovacs, "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.

———, "House Committee Examines Overtime Rule's Negative Impact on Non-Profits and Universities," Competitive Enterprise Institute blog, June 9, 2016, https://cei.org/blog/house-committee-examines-overtime-rules-negative-impact-non-profits-and-universities.

———, "The True Losers of the Overtime Rule: Small Businesses," Competitive Enterprise Institute blog, June 24, 2016, https://cei.org/blog/true-losers-overtime-rule-small-businesses.

REFORM THE WORKER CLASSIFICATION PROCESS

The Fair Labor Standards Act is the primary law governing wage and hour mandates across the country, including full-time and part-time private-sector workers and local, state, and federal employees. It sets the minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements.

As noted, the definitions of whether an employee is exempt from FLSA minimum wage and maximum hour requirements are antiquated and complicated. They need to be modernized to take into account today's workplace practices. For example, the FLSA demands that an employee must earn more than the above-stated salary threshold and primarily perform "bona fide executive, administrative, or professional" activity to fall within the wage and hour exempt status. However, in today's economy, it is more difficult to clearly define employees as either management or rank-and-file workers.

Another area where the FLSA falls short is in clearly differentiating between employees and independent contractors. The FLSA uses a "suffer or permit to work" standard of employee, which is one of the broadest and most far-reaching definitions of employee under U.S. law.

Worker misclassification happens primarily in one of two ways:

- An employee is inappropriately labeled as exempt from minimum wage and maximum hour requirements.
- An employee is classified as an independent contractor when he or she meets the FLSA's employee test.

Congress should:

- Pass legislation to streamline the definition of employee across federal statutes.
- Pass legislation to enable individuals who prefer the flexibility that comes with contractor status to choose that form of work instead of being forced into an employment relationship.

Instead of taking action to simplify the definition of an employee and reduce confusion over worker status, the DOL issued an administrator's interpretation that effectively defines nearly all work arrangements as falling into the category of a traditional employer–employee relationship.

In essence, the DOL guidance attempts to greatly reduce an individual's ability to undertake work as an independent contractor. Eliminating a form of work is poor policy at any time. Overwhelmingly, workers choose to take independent contractor positions because they value working independently instead of being directed by an employer.

Temporary workers and independent contractors serve an important business function. Many businesses, as in the construction industry, have peak seasons when they need extra workers to complete projects for a short duration. For example, using independent contractors allows residential builders to scale up and hire more workers during the summer, without having to take on permanent staff members whom they would not be able to afford during the winter.

Such a major policy change should be implemented through the Administrative Procedure Act's notice-and-comment rulemaking process, not by agency guidance that does not give affected parties the ability to air concerns over the policy's potential effects. Regulation by guidance document drops new policies on stakeholders without notice and may lead to greater noncompliance because of a lack of familiarity with the policy.

Moreover, it is extremely costly for an employer to misclassify a nonexempt worker as exempt or an employee as an independent contractor, which may incur costs in the form of back pay and legal fees. In FY 2015, investigations by the DOL's Wage and Hour Division resulted in $74 million in back pay assessed on employers. Certainly, some bad actors attempt to short workers on pay, but the DOL's Depression-era wage and hour laws defining who is an employee do not match up with the modern workplace and often lead to penalties based on mere technicalities. That possibility is exacerbated by the DOL's changing the definition of exempt through guidance without reaching out to the stakeholders who must comply with the law.

Expert: Trey Kovacs

For Further Reading

Iain Murray, "Depression-Era Laws Threaten the Sharing Economy," Foundation for Economic Education, October 21, 2015, https://fee.org/articles/depression-era-laws-threaten-the-sharing-economy/.

Trey Kovacs, "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.

IMPROVE OVERSIGHT OF THE DEPARTMENT OF LABOR'S WAGE AND HOUR DIVISION

Under the Obama administration, the Department of Labor issued 19 major rules during 2009–2015, and a total of 570 rules during 2009–2014, along with precedent-changing guidance documents that significantly alter the rules by which firms must abide. Such prolific regulation creates uncertainty and makes it more difficult for firms to comply with the law. Unfortunately, instead of assisting companies with compliance or slowing down the pace of regulations, the DOL has aggressively enforced its new mandates.

Part of the department's strategy has been developed by DOL Wage and Hour Administrator David Weil. The DOL has set its strategic enforcement strategy's sights on the top of corporate supply chains in order to hold them responsible for ensuring compliance further down the chain. However, that strategy, rather than ensure greater compliance by their small-firm partners, will more likely encourage larger companies to steer clear of contracting with small companies, which are vital to job creation. A better solution is to simplify wage and hour rules by reducing record-keeping requirements and liberalizing employee classifications.

Difficulties in complying with onerous wage and hour requirements are evident in the rapid rise in wage and hour lawsuits. Since 2000, wage and hour lawsuits filed in federal courts have increased by more than 450 percent cumulatively. Since 2012, over 8,000 wage and hour suits have been filed. The volume is only part of the story. Just the lawsuit settlements in 2014 under the Fair Labor Standard Act cost employers $400 million and an average of $5.3 million per settlement, according to a July 2015 study by NERA Economic Consulting.

There is no sign of the DOL loosening its stringent enforcement policies. Since 2014, the DOL has requested significant increases in funding to ramp up its enforcement

Congress should:

- Decrease the Department of Labor's enforcement budget until Congress passes legislation to modernize the Fair Labor Standards Act to simplify worker classification and streamline compliance.

activity. For FY 2017, the Wage and Hour Division requests $277 million to pursue its enforcement strategy.

Expert: Trey Kovacs

For Further Reading

Trey Kovacs, "Redefining Workers out of a Job," *OnPoint* No. 219, Competitive Enterprise Institute, August 3, 2016, https://cei.org/content/redefining-workers-out-job.

———, "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.

Stephanie Plancich, Neil Fanaroff, and Janeen McIntosh, "Trends in Wage and Hour Settlements: 2015 Update," NERA Economic Consulting, July 14, 2015, http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf.

REFORM THE NATIONAL LABOR RELATIONS ACT AND NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Act (NLRA) is the primary federal statute governing private-sector labor relations. It establishes the process employees may use to organize and guarantees workers' right to refrain from doing so. The Act outlines "unfair labor practices," or activity that employers and unions are prohibited from undertaking. The NLRA created the National Labor Relations Board, an independent agency made up of five members, which is in charge of enforcing the Act and overseeing labor union elections.

In 1935, Congress established the National Labor Relations Board as a body made up solely of "three impartial Government members" to represent the public interest in labor disputes under the National Labor Relations Act. However, during the 80-year experiment, almost all NLRB members have had either a business or union background. Consequently, most Board members have a predisposition to favor one side or the other. With nearly all Board members having a bias, the NLRB has been unable to act in an impartial manner, as it was created to do.

Today, the NLRB is composed of five members, traditionally two Democrats, two Republicans, and a chair from the President's party, who determines the partisan balance. As a result, Board policy swings like a pendulum. The Board's case precedent flip-flops in favor of organized labor or management, depending on whether a Democrat or Republican holds the presidency. Worse, even though changes in precedent are made in a purely partisan fashion, federal courts routinely give judicial deference to the NLRB on the basis of the Board members' "expertise." The constantly changing NLRB policy creates immense uncertainty for all stakeholders—employees, employers, and unions.

The National Labor Relations Act sets the rules for union elections and unfair labor practices. However, much of it is outdated and needs reform. The Employee Rights Act, a comprehensive reform measure introduced in the past two Congresses, would go a long way toward bringing labor law in line with the needs of the 21st-century workforce by protecting workers' freedom of choice of whether to join a union and by increasing union accountability. Specifically, it would:

- Protect secret ballots in union organizing elections;

- Enable workers at unionized workplaces to choose whether they wish to retain a union as their bargaining representative; and
- Protect workers and employers from union violence.

Congress should:

- Pass legislation to strip the National Labor Relations Board of its adjudication and rulemaking authority, in order to avoid uncertainty surrounding national labor policy, and vest it on Article III courts.
- Short of stripping the NLRB of its decision-making authority, pass legislation to add a sixth member to the Board. This action would greatly reduce constant change in Board precedent and bring a greater level of stability to labor relations.
- Enact the Employee Rights Act.
- Amend the National Labor Relations Act to (a) guarantee all workers a secret ballot in union elections, (b) require union recertification elections by secret ballot once the workforce has turned over by more than 50 percent since the last election, and (c) prohibit unions from penalizing workers who wish to decertify.

Currently, unions may organize a group of workers in two ways: by secret-ballot election or through a process known as "card check." A secret-ballot election allows workers to cast their ballots in private and free from coercion. Card check invovles union organizers confronting individual workers and asking them to sign a card that acts as their vote for the union. Unsurprisingly, the card-check process opens the door to deception and intimidation of workers. Pressured to sign, workers are deprived of time to hear the pros and cons of unionization and to reflect on whether they want to unionize.

Since employers must agree to card-check elections in place of NLRB-supervised secret-ballot elections, it encourages unions to use a strategy known as a "corporate campaign" to browbeat employers into agreeing to card-check organizing. Corporate campaigns are aggressive, public relations campaigns designed to damage an employer's reputation until it accedes to union demands.

Under the National Labor Relations Act, once a union wins representation over a group of workers, it remains those workers' representative in perpetuity, unless the workers vote to decertify the union. Decertification is an arduous and difficult process

that the NLRB is trying to make even more difficult. That provision has led to a number of "inherited unions." Recent research by the Mackinac Center for Public Policy shows that only 7 percent of current union members actually voted for the union representing them. Thus, a vast majority of workers never had a voice in choosing their workplace representation.

Rightly, the NLRA makes it an unfair labor practice by an employer to interfere with the workers' right to organize. The same should be true for unions that attempt to restrain the workers' right to remove an unwanted union. Currently, many union constitutions contain provisions that punish workers who seek to decertify their union, including through steep fines and even termination of employment.

Expert: Trey Kovacs

For Further Reading

Trey Kovacs, "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.

Trey Kovacs and F. Vincent Vernuccio, "Corporate Campaigns," *Labor Watch*, Capital Research Center, April 30, 2012, https://cei.org/op-eds-articles/corporate-campaigns.

Russ Brown, "A Deep Secret that Labor Unions Don't Want Workers to Know," Forbes.com, August 16, 2012, http://www.forbes.com/sites/realspin/2012/08/16/a-deep-secret-that-labor-unions-dont-want-workers-to-know/#495667e77b3c.

F. Vincent Vernuccio, "Workplace Democracy for Less than the Price of a Cup of Coffee," Mackinac Center blog, March 9, 2016, https://www.mackinac.org/22234.

OUTLAW UNION VIOLENCE

Although workers should have every right to organize and unions should have every right to try to attract workers to join, some limits must be set on the kinds of activities that are allowed toward this goal. One such restriction should be outlawing union violence. Unfortunately, the U.S. Supreme Court's 1973 decision in *United States v. Enmons* created a loophole in the Hobbs Act, a major federal anti-extortion law, that exempts unions from prosecution for violence committed in the course of promoting union goals. Since 1975, the National Institute for Labor Relations Research has collected more than 9,000 accounts of union violence reported in the media.

Congress should:

- Close the loophole that exempts union violence from the Hobbs Act via the Employee Rights Act.

Expert: Trey Kovacs

For Further Reading

David Kendrick, "Freedom from Union Violence," *Policy Analysis* No. 315, Cato Institute, September 9, 1998, http://www.cato.org/pubs/pas/pa-316es.html.

PREVENT IMPLEMENTATION OF THE NLRB'S AMBUSH ELECTION RULE

In April, 2015, the National Labor Relations Board amended its rules governing unions organizing elections in a way that will limit debate concerning the pros and cons of union representation, thereby limiting workers' ability to cast an informed vote. The rule shortens the time frame between the filing of a petition and the date on which an election is conducted to as few as 14 days. This rule is both unnecessary and unfair to voters wishing to educate themselves on the merits of union representation. In FY 2013, the median time frame from petition to election was 38 days, with unions winning 64 percent of organizing elections, dropping to a median of 33 days in FY 2015, with unions winning upward of 70 percent of elections, according to the NLRB.

Furthermore, the rule compels employers to provide union organizers with employees' contact information. This provision is highly troublesome for privacy concerns and can lead to harassment. For example, the Communications Workers of America obtained one woman's information and subscribed her to thousands of unsolicited magazines. She was inappropriately billed for those subscriptions and then had to spend hours of her own time to unsubscribe from them. The NLRB itself has recognized the adverse results of the rule, including "[(1)] selling the list to telemarketers, (2) providing it to a political campaign, or (3) using the list to harass, coerce, or rob employees."

Congress should:

- Defund the enforcement and implementation of the NLRB's ambush election rule.

Expert: Trey Kovacs

For Further Reading

Trey Kovacs, "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.

PREVENT IMPLEMENTATION OF THE NLRB'S NEW JOINT EMPLOYER STANDARD

In August 2015, the National Labor Relations Board unilaterally changed the definition of joint employment in a way that could expose tens of thousands of businesses across the United States to increased costs and liability. The NLRB's action will:

- Block a path toward entrepreneurship;
- Reduce job creation;
- Expand employer liability;
- Increase employment insurance costs;
- Lead to a surge in lawsuits; and
- Disrupt thriving business models.

The underlying motive of the NLRB's move is to ease union organizing.

Traditionally, joint employer liability was established when one company, normally the larger one, exercised *direct* and *immediate* control over the employees of smaller companies with which they contract. Under the new standard, a company may be held liable for labor violations by other employers they contract with, by merely exercising *indirect* control or possessing *unexercised potential* control over the other company's employees.

As a result of the change the increased liability imposes on employers, the NLRB's new joint employer standard puts a wide swath of proven, established business models at risk, including franchising, the contracting out of a business's noncore functions, and the use of temporary staffing agencies. Those industries create thousands of jobs annually and generate opportunities for entrepreneurs to start new businesses. The NLRB's new joint employer standard will result in reduced opportunities for entre-

Congress should:

- Defund enforcement of the National Labor Relations Board's joint employer standard through appropriations bills for the Departments of Labor, Health and Human Services, and Education and related agencies.

preneurs and fewer jobs by making larger firms liable for the employment practices of entities it may be unable to control.

Expert: Trey Kovacs

For Further Reading

Trey Kovacs, "Redefining Workers out of a Job," *OnPoint* No. 219, Competitive Enterprise Institute, August 3, 2016, https://cei.org/content/redefining-workers-out-job.

———, "NLRB's New Joint Employer Standard Threatens Business Formation and Job Creation," *Web Memo* No. 33, Competitive Enterprise Institute, February 2, 2016, https://cei.org/content/nlrb%E2%80%99s-new-joint-employer-standard-threatens-business-formation-and-job-creation.

———, "Federal Labor Agencies Ambush American Economy," *OnPoint* No. 205, Competitive Enterprise Institute, August 27, 2015, https://cei.org/content/federal-labor-agencies-ambush-american-economy.

PROTECT WORKER PENSIONS BY REFORMING THE PENSION BENEFIT GUARANTY CORPORATION'S MULTIEMPLOYER PROGRAM

The Pension Benefit Guaranty Corporation (PBGC) is a federal agency that insures private-sector pensions. Created by Congress in 1974 as part of the Employee Retirement Income Security Act, the PBGC has become so entrenched in the pension insurance firmament that it has crowded out private alternatives for securing worker pensions. Although the PBGC's insurance program is funded through premiums paid by insured companies, not federal tax dollars, the premium amounts are set by Congress and do not reflect the riskiness of individual pension plans. Consequently, the premiums are too low to cover anticipated payouts. In effect, the program now functions as a huge subsidy to businesses and unions that threatens to make taxpayers liable for billions of dollars in private-sector pension losses.

Artificially low premiums are bad enough. But the way the PBGC treats multiemployer pension plans—those maintained by several employers, usually in related industries, to cover members of a labor union or collective-bargaining unit—is even worse. The PBGC's multiemployer pension insurance program insures the pensions of more than 10,000 employees in about 1,400 pension plans set up under collective-bargaining agreements and run by labor unions. Under the PBGC's single-employer plan, only the company that promises benefits to its workers is liable for paying those benefits. But under the multiemployer plan, every participating employer is potentially responsible for covering the promised benefits of other participating employers that go out of business.

Under that arrangement, the PBGC poses a textbook illustration of moral hazard driven by perverse incentives—a situation colloquially known as the "last man standing rule." Economically distressed companies have an incentive not to pay premiums in order to push their costs onto other participating firms, and those added costs tend to make the other participant companies less healthy.

The PBGC's multiemployer plan also caps benefits at a much lower level, $12,870 a year, compared to $60,136 for the single-employer plan. Because of that lower cap and the fact that "orphan" pension plans are first taken over by other participating employ-

Congress should:

- Raise PBGC premiums in the short term.
- Give the PBGC the flexibility to adjust premiums for the multiemployer program to reflect risk in the future, as PBGC's single-employer program and the Federal Deposit Insurance Corporation does for their premiums.
- End the special treatment for multiemployer plans and require them to follow the same rules as single-employer plans, including specified discount rates.
- Require the PBGC to take over failing multiemployer plans.
- Oppose any PBGC bailout proposals.

ers, the PBGC's multiemployer plan has much lower premiums than its single-employer plan—currently $26 per year, compared to $57 for the single employer plan.

For its multiemployer program, the PBGC recently reported a $42.4 billion deficit for FY 2014, and that deficit is projected to grow to $53.4 billion by 2025. Worse, in 2025, the PBGC's multiemployer program is projected to become insolvent. With massive new liabilities from some very large plans that are projected to become bankrupt within the decade, the PBGC's multiemployer program will be paying out about 10 times as much in benefits as it takes in through premium revenues. This will quickly drain the PBGC's budget, and absent significant reforms or a taxpayer bailout, the agency's multiemployer program will only be able to pay about 10 percent of its insured benefit level. This would reduce the maximum benefit for a worker with a 30-year work history from its current level of $12,870 per year to only $1,500. The combination of the collapse of many multiemployer pension plans, along with the PBGC's threatened insolvency, could be financially catastrophic for many pensioners.

That deficit is clearly unsustainable, and taxpayers could be forced to cover billions of dollars of eventual losses.

PBGC premiums are set by Congress, which makes no effort to take the risk of private pension plan default into account when setting those premiums. That omission undermines one of the most important purposes of insurance premiums: pricing risk, as determined by market signals, in order to deter risky behavior. The beneficiaries of those low premiums—primarily unions and large unionized firms—lobby to keep those premiums low, because artificially low premiums act as a huge subsidy. All pension plans are treated the same, regardless of their solvency.

To make pension insurance truly sustainable, Congress should not simply raise premiums to some other legislatively determined level, but instead give the PBGC the flexibility to adjust its own premiums on a risk-related basis, as the Federal Deposit Insurance Corporation does. Lawmakers should not be in the business of setting prices, and they should not make an exception for pensions, especially for an insurer supposedly funded by premiums.

For the beneficiaries of that de facto subsidy, defending it publicly requires some rhetorical sleight of hand. For example, the Pension Coalition, a group of large companies and trade associations opposed to PBGC premium increases, denounces risk-based premiums as a "tax" on employers. In reality, raising premiums, even steeply, amounts to the removal of a subsidy—a solution that can be made permanent only by Congress getting out of the business of setting the PBGC's premiums.

Severely underfunded plans that cannot realistically meet their existing obligations should stop digging themselves into a fiscal hole. The Department of Labor deems a pension plan "endangered" if its funding level is less than 80 percent of what it needs to meet its payout obligations, and it deems a plan "critical" if it is funded below 65 percent. Congress should also require the PBGC to take over multiemployer plans that reach critical status, close them to new entrants, and pay current beneficiaries to the extent possible.

Pension plans use discount rates to determine the level of direct present contributions needed for the plan to meet its obligations in the future, minus the expected returns on the plan's investments. Pension payout obligations are fixed; they do not go away and often increase over time. Given that reality, pension plan managers should base discount rates on conservative investment return projections. Yet pension managers face a perverse incentive to base discount rates on overly optimistic rates of return, because such optimistic rates lower their current contribution amounts. Currently, multiemployer plans can use whatever discount rate they choose. Instead, they should be required to use the same discount rates used by single-employer plans.

The U.S. government is not directly responsible for the PBGC's unfunded liabilities, but the agency's massive, mounting deficit makes a federal bailout a real possibility. In fact, some politicians have already proposed such a bailout. A bill introduced in the 112th Congress by Sen. Robert Casey (D-Pa.) sought to make the federal government

explicitly liable for multiemployer plans under the PBGC's purview. The bill failed, but similar schemes could come up again, especially if the PBGC's deficit were to get much worse. Congress should resist any attempt at a bailout.

Expert: Ivan Osorio

For Further Reading

Ivan Osorio, "PBGC's Perverse Incentives Undermine Multiemployer Pensions," Competitive Enterprise Institute blog, April 12, 2016, https://cei.org/blog/pbgcs-perverse-incentives-undermine-multiemployer-pensions.

———, "To Fix the PBGC, Fix Its Premiums," Competitive Enterprise Institute blog, July 23, 2012, https://cei.org/blog/fix-pbgc-free-its-premiums.

Rachel Greszler, "Congress Needs to Address the PBGC's Multiemployer Program Deficit *Now*," *Issue Brief* No. 4610, Heritage Foundation, September 13, 2016, http://www.heritage.org/research/reports/2016/09/congress-needs-to-address-the-pbgcs-multiemployer-program-deficit-now.

———, "Bankrupt Pensions and Insolvent Pension Insurance: The Case of Multiemployer Pensions and the PBGC's Multiemployer Program," *Backgrounder* #3209, Heritage Foundation, July 30, 2015, http://www.heritage.org/research/reports/2015/07/bankrupt-pensions-and-insolvent-pension-insurance-the-case-of-multiemployer-pensions-and-the-pbgcs-multiemployer-program.

Shelby Livingston, "Despite PBGC Deficit, Sharp Premium Hikes Stir Opposition," *Business Insurance*, November 18, 2015, http://www.businessinsurance.com/article/20151118/NEWS03/151119792/despite-pbgc-deficit-sharp-premium-hikes-stir-opposition.

Paula Aven Gladyich, "The PBGC's Perfect Storm," *BenefitsPro*, November 26, 2013, http://www.benefitspro.com/2013/11/26/the-pbgcs-perfect-storm.

PROTECT STATE AND LOCAL TAXPAYERS BY PROMOTING BETTER PUBLIC PENSION GOVERNANCE

Limited government is essential to prosperity. Conversely, having to pay for a large and growing public sector puts considerable strain on taxpayers and curtails entrepreneurial activity by diverting capital away from the private sector. At the state and local level, that has become a major problem, with states and municipalities promising government employees generous health and pension benefits but failing to fund them adequately. As a consequence, many local governments are facing large public pension shortfalls that threaten large future tax increases and cuts in public services—and a less favorable business environment.

One important factor contributing to public pension underfunding is dubious accounting facilitated by the Governmental Accounting Standards Board (GASB), the independent, quasi-private organization that issues accounting standards for state and local governments. Although state and local pensions are not a federal matter, the size of many pension shortfalls could likely lead to calls for federal assistance. Congress should resist such calls and work to expose the causes and scope of the underfunding problem.

For years, GASB allowed public pension managers to calculate employer contributions using discount rates based on overly optimistic projected investment returns, usually in the 7 percent to 8 percent range. Although some pension funds can achieve such return rates in some years, they rarely do so year after year. To be sustainable, low returns in any given year have to be offset by very high returns (far higher than 7 percent or 8 percent) in most other years in order to keep up with the growth in pension liabilities, which rise in an uninterrupted straight line. Given the fixed nature of public pension liabilities, pension managers should use a more realistic, risk-free rate, based on investment return projections consistent with 15- to 20-year Treasury bonds, in the 3 percent to 4 percent range.

Congress should:

- Hold hearings aimed at clarifying the Governmental Accounting Standards Board's decision-making process in setting discount rates of public pension plans.
- Resist calls for bailing out underfunded state public pensions.

The Governmental Accounting Standards Board reformed its pension accounting standards in June 2012, when it approved GASB Statements 67 and 68, to replace GASB Statements 25 and 27. Under the previous standard, pension plans could base discount rates not on the certainty of liabilities coming due, but on the projected returns on plan assets. Although it was a small step in the right direction, the reform did not go nearly far enough, for two reasons.

First, the new GASB standards allow for two different discount rates, depending on a plan's ability to pay its obligations.

Second, a plan's ability to make its payout obligations is determined for individual years, not over the long term. Plans must pay pension benefits to current retirees at the same time they are accumulating new obligations to pay today's workers in the future. Therefore, constant payouts reduce the balance on which future investment returns can be earned. Thus, thinking only of long-term average growth rates is misleading.

Plans whose "fiduciary net position" is sufficient to meet their obligations in a given year may continue to use their investments' projected rate of return, much as under the older, GASB Statement 25 standard. A GASB fact sheet on Statements 67 and 68 states, "This asset-based rate is appropriate because the earnings on the plan's investments reduce the amount an employer will need to contribute to the plan." But that is precisely the problem. The new standards treat pensions as though they were pay-as-you-go plans, by basing contributions on short-term obligations. In the end, lower short-term contributions lead to long-term shortfalls. Thus, a plan that can meet its obligations one year may be unable to do so in the future.

By contrast, GASB calls on plans that are unable to meet their obligations in a given year to use a discount rate based on a 20-year tax-free municipal bond. Given the fixed nature of pension obligations, such a risk-free rate should be standard for pension contributions across the board. GASB's adoption of a dual discount rate makes little sense. Congress should seek to find out why GASB adopted this standard before state and local officials come to Capitol Hill seeking a pension bailout.

Expert: Ivan Osorio

For Further Reading

Ivan Osorio, "More Than Good Enough for Government Work," *The American*, April 25, 2012, http://www.aei.org/publication/more-than-good-enough-for-government-work/.

Robert Sarvis, "The High Cost of Big Labor: Understanding Public Pension Debt," Competitive Enterprise Institute, July 9, 2014, http://cei.org/content/understanding-public-pension-debt.

Caleb O. Brown, "The Real Reason We Have a Public Pension Crisis," *The American*, October 23, 2013, http://www.aei.org/publication/the-real-reasons-we-have-a-public-pension-crisis/.

Jennifer Sorensen Senta, "GASB 67/68: Beginning Implementation and Overview," *Milliman PERiScope*, January 2014, http://www.milliman.com/uploadedFiles/insight/Periodicals/peri/pdfs/gasb-67-68.pdf.

Governmental Accounting Standards Board, "GASB's New Pension Standards: Setting the Record Straight," Pension Fact Sheet, accessed October 6, 2016, http://gasb.org/cs/ContentServer?c=Page&pagename=GASB%2FPage%2FGASBSectionPage&cid=1176160432178.

Energy and Environment

4

Energy is the lifeblood of the economy. Thanks to affordable energy, the average person today lives longer and healthier, travels farther and faster in greater comfort and safety, and has greater access to information than the privileged elites of former times.

Carbon fuels—coal, oil, and natural gas—provide 82 percent of both U.S. and global energy, according to the U.S. Energy Information Administration. They are the world's dominant energy sources because, in most markets, they beat the alternatives in both cost and performance.

Critics claim carbon fuels have hidden costs that make them unsustainable. In the 1970s and 1980s, experts often depicted carbon fuels as both intractably polluting and rapidly depleting. Technological advances—spurred by sensible regulation and the market-driven imperative to minimize waste and improve efficiency—put the lie to those gloomy prophesies, as energy supplies increased while the air and water got much cleaner.

Today, critics claim unchecked carbon energy use will cause catastrophic climate change. However, the climate models producing scary impact assessments increasingly diverge from reality. More important, the climate change mitigation policies

those critics advocate pose serious risks to American prosperity, competitiveness, and living standards.

The wealth creation and technological progress made possible by affordable carbon-based energy make societies more resilient, as they protect people from extreme weather, improve health, and increase life expectancy. Since the 1920s, global deaths and death rates from extreme weather have decreased by 93 percent and 98 percent, respectively.

The war on affordable energy also raises serious humanitarian concerns, especially regarding the poor. Energy costs already impose real burdens on low-income households, including reduced expenditures for food, medicine, education, and late credit card payments. "Consensus" climatology implies that the Paris climate treaty's objective of limiting average global temperatures to 2°C above preindustrial levels cannot be accomplished without massive cuts in developing countries' current consumption of carbon fuels. Putting an energy-starved planet on an energy diet is bound to be a cure worse than the supposed disease.

Increasing the affordability of both U.S. and global energy is an important economic and humanitarian objective. Policy makers heeding the time-honored healer's maxim, "First, do no harm," should reject policies to tax and regulate away mankind's access to affordable energy.

REPUDIATE THE PARIS CLIMATE AGREEMENT

The Paris Climate Agreement endangers America's economic future and capacity for self-government. However, based on nothing other than President Obama's claim that the agreement is nonbinding, unenforceable, and, therefore, not a treaty, many lawmakers do not see how it would suppress domestic energy production or extort billions of taxpayer dollars in "green" foreign aid.

Three insights should inform legislative deliberation on the Paris Agreement.

First, the agreement is a treaty by virtue of its:

- Costs, risks, and "ambition" compared with predecessor climate treaties;
- Dependence on enactment of subsequent legislation by Congress;
- Intent to affect state laws;
- Degree of formality;
- Past U.S. practice; and
- General international practice with respect to similar agreements.

President Obama deemed what is clearly a treaty to be a nontreaty so he could claim authority to approve it unilaterally, knowing that if submitted to the Senate for its review, the pact would be dead on arrival.

Second, although each nation's emission-reduction pledges—known as nationally determined contributions—and associated plans to curb fossil-energy production and use are self-chosen and thus "nonbinding" under international law, that is a distinction without a difference.

Congress should:

- Clarify that the agreement is a treaty.
- Insist, per Article II, Section 2, of the Constitution, that proposed treaties are subject to the Senate's advice and consent.
- Schedule a ratification vote in the Senate, where the Paris Agreement would almost certainly fail to win the requisite support of "two thirds of the Senators present."

The agreement's reporting, monitoring, and verification provisions are legally binding. Those "procedural commitments" constitute the framework for a multidecade global political pressure campaign waged by a permanent coalition of 190-plus foreign governments, hundreds of multilateral bureaucrats, and scores of green lobbying groups. The coalition is primed to "name and shame" U.S. leaders who fail to propose increasingly "ambitious" nationally determined contributions and transform those "nonbinding commitments" into legally binding domestic policies and regulations. In addition, the agreement will pressure Congress to pay developing countries billions of dollars annually in "climate finance" for renewable energy projects.

Third, even if the next president opposes the Paris Agreement, he or she may be unable to cancel it upon taking office. The agreement enters into force after at least 55 countries representing at least 55 percent of global greenhouse gas emissions ratify it. Once the agreement enters into force, a nation may not notify its intention to withdraw until three years later, and withdrawal cannot take effect until one year after the United Nations receives the notification.

Experts: Myron Ebell, Christopher Horner, Marlo Lewis, William Yeatman

For Further Reading

Christopher Horner, "The Senate Must Confront the President on the Paris Climate Treaty," Competitive Enterprise Institute blog, April 21, 2016, https://cei.org/blog/senate-must-confront-president-paris-climate-treaty.

Steven Groves, "The Paris Agreement Is a Treaty and Should Be Submitted to the Senate," *Backgrounder* #3103, Heritage Foundation, March 15, 2016, http://www.heritage.org/research/reports/2016/03/the-paris-agreement-is-a-treaty-and-should-be-submitted-to-the-senate.

Marlo Lewis, "The Paris Agreement Is a Treaty Requiring Senate Review," *OnPoint* No. 213, Competitive Enterprise Institute, February 24, 2015, https://cei.org/content/paris-climate-agreement-treaty-requiring-senate-review.

DEFUND THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

The United Nations Framework Convention on Climate Change (UNFCCC) is the name of both the climate treaty adopted by the first Conference of the Parties in 1992 and the U.N. agency that hosts international negotiations pursuant to the treaty, including negotiations pertaining to the Kyoto Protocol and the Paris Agreement.

It is longstanding U.S. policy that Palestinian statehood is a matter to be negotiated by Israel and the Palestinians, not imposed on Israel by the United Nations. To put teeth into that policy, Title 22, Section 287e, of the U.S. Code prohibits the U.S. government from funding any U.N. agency that "grants full membership as a state in the United Nations to any organization or group that does not have the internationally recognized attributes of statehood."

On December 18, 2015, the Palestinian Authority submitted its instruments of accession to the UNFCCC, and on March 17, 2016, the "State of Palestine" was accepted as a full member. A month later, 28 senators led by Sen. John Barrasso (R-Wyo.) sent Secretary of State John Kerry a letter explaining that U.S. law bars the federal government from providing taxpayer funds "to the UNFCCC and its related entities, such as the UNFCCC Secretariat, the Green Climate Fund, the Conference of the Parties (COP), and the Conference of the Parties serving as the meeting of the Parties under the Kyoto Protocol (CMP)."

The Obama administration argues that the UNFCCC is a treaty, not a U.N. agency, and hence is not subject to the prohibition. But as Sen. Barrasso and his colleagues point out, the U.N. Secretary-General appoints the executive secretary of the UNFCCC, and the first Conference of the Parties decided that the UNFCCC secretariat "shall be institutionally linked to the United Nations."

Moreover, the UNFCC is clearly a U.N. agency. According to its own website, the UNFCCC Secretariat:

- Has a staff of about 500 people from more than 100 countries;
- Provides technical assistance to an increasing number of specialized bodies related to the Kyoto Protocol and the Paris Agreement; and
- Hosts two to four international climate negotiations annually.

Congress should:

- Defund the agency.

Just as Congress cut off funds to the United Nations Educational, Scientific and Cultural Organization (UNESCO) when the "State of Palestine" joined that organization in 2011, so now it should terminate funding for the UNFCCC and its related bodies, such as the Green Climate Fund.

Experts: Myron Ebell, Christopher Horner, Marlo Lewis, William Yeatman

For Further Reading

Sen. John Barrasso et al., letter to the Honorable John F. Kerry, Secretary of State, April 18, 2016, http://www.eenews.net/assets/2016/04/19/document_daily_01.pdf.

Nicolas Loris, Brett D. Schaefer, and Steven Groves, "The U.S. Should Withdraw from the United Nations Framework on Climate Change," *Backgrounder* No. 3130, Heritage Foundation, June 9, 2016, http://www.heritage.org/research/reports/2016/06/the-us-should-withdraw-from-the-united-nations-framework-convention-on-climate-change.

OVERTURN OR AT LEAST DEFUND THE EPA'S CLEAN POWER PLAN

The Environmental Protection Agency's (EPA) so-called Clean Power Plan (CPP) is an unlawful power grab that will increase consumer electricity prices, reduce U.S. job growth and gross domestic product, and have no discernible effects on global warming or sea-level rise.

The CPP is unlawful in at least half a dozen ways. To mention just the most obvious flaws, Section 111(d) of the Clean Air Act, the CPP's putative statutory basis, authorizes the EPA to establish performance standards for existing stationary sources. What the CPP does instead is impose a partial ban—a nonperformance standard—on coal-based power. Moreover, instead of regulating individual "sources" (emitting facilities) as the statute requires, it regulates the market activities of source owners and operators.

The CPP is an extreme case of agenda-driven regulation. The EPA concocted novel meanings for "performance standard" and "source" to advance the Obama administration's war on coal. In a nutshell, the CPP sets a carbon dioxide (CO_2) emission standard for existing coal power plants that no new coal power plant can meet and then gives owners and operators the "choice" to comply by reducing the output of coal power plants, shutting them down entirely, or "investing" in new renewable generation.

Adding insult to injury, the restructuring of electricity markets under the CPP is to be accomplished chiefly through emission cap-and-trade programs—the same unpopular climate policy Congress has repeatedly rejected. The CPP is so legally challenged that on February 9, 2016, the Supreme Court took the unprecedented step of putting a stay on the rule, even though it had not yet been reviewed by a lower court.

The EPA claims the CPP will deliver up to $60 billion in climate benefits in 2030. That is flimflam. According to the agency's own climate model calculator, the CPP will avert 0.018°C of global warming by 2100—less than the margin of error for measuring annual changes in global temperature. The amount of warming averted in 2030 would be even more minuscule and undetectable.

The EPA estimates that utilities will spend $5.1 billion to $8.5 billion in 2030 to comply with the CPP. Several private-sector analysts project much higher costs. NERA

Congress should:

- Overturn the CPP and defund EPA actions to implement the rule.

Economic Consulting estimates that the CPP will increase electric sector expenditures by $29 billion to $39 billion annually, increase retail electric rates by 10 percent or more in 40 states, 20 percent or more in 17 states, and 30 percent or more in 10 states. The Heritage Foundation estimates that, by 2030, the CPP will have reduced average annual employment by nearly 300,000 jobs, reduced cumulative gross domestic product growth by $2.5 trillion (inflation adjusted), and reduced cumulative household purchasing power by $7,000 per person.

Experts: Myron Ebell, Marlo Lewis, William Yeatman

For Further Reading

William Yeatman, "CEI Comments on EPA's Clean Power Plan," Global-Warming.org, December 2, 2014, http://www.globalwarming.org/2014/12/02/cei-comments-on-epas-clean-powerplan/.

Marlo Lewis, "How Can EPA's Clean Power Plan Deliver $Billions in Climate Benefits If It Has No Detectable Impact on Global Temperatures, Sea-Level Rise, or Other Climate Indicators?" GlobalWarming.org, June 12, 2014, http://www.globalwarming.org/2014/06/12/how-can-epas-clean-power-plan-deliver-billions-in-climate-benefits-if-it-has-no-detectable-impact-on-global-temperatures-sea-level-rise-or-other-climate-indicators/.

Eric Groten, "Here Be Dragons: Legal Threats to EPA's ESPS Proposal," *Vinson & Elkins Climate Change Report*, No. 22, September 2014, http://www.velaw.com/uploadedFiles/VEsite/Resources/ELR_Here_Be_Dragons_February2015_Groten.pdf.

Nicolas Loris, "The Many Problems of the EPA's Clean Power Plan and Climate Regulations," *Backgrounder* No. 3025, Heritage Foundation, July 7, 2015, http://thf_media.s3.amazonaws.com/2015/pdf/BG3025.pdf.

NERA Economic Consulting, "Energy and Consumer Impacts of EPA's Clean Power Plan," prepared for the American Coalition for Clean Coal Electricity, November 7, 2015, http://www.nera.com/content/dam/nera/publications/2015/NERA_ACCCE_CPP_Results_Nov72015.pdf.

———, "EPA's Illegitimate Climate Rule," *OnPoint* No. 196, July 28, 2014, http://cei.org/content/epa%E2%80%99s-illegitimate-climate-rule.

REPEAL THE EPA'S PURLOINED POWER TO LEGISLATE CLIMATE POLICY

In *Massachusetts v. EPA* (2007), the U.S. Supreme Court ruled that the 1970 Clean Air Act (CAA), enacted years before Congress's first climate change hearing, gives the U.S. Environmental Protection Agency "unambiguous" authority to regulate greenhouse gases (GHGs). The EPA has interpreted that decision as a license to steamroller congressional opposition to its climate policies.

In *Massachusetts v. EPA*, the Supreme Court ruled that the EPA must regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Clean Air Act, if the agency determines that such emissions endanger the public health or welfare. The Court reasoned that GHGs fit the Act's "capacious definition" of an air pollutant and that regulating GHG emissions from new motor vehicles would not lead to "extreme measures."

However, neither the EPA nor the petitioners informed the Court what would happen once the agency established GHG emission standards for new motor vehicles. Under the EPA's longstanding interpretation, regulating any air pollutant under any part of the CAA automatically triggers regulation of "major" stationary sources under the Act's preconstruction and operating permit programs. The Court had unwittingly set the stage for an era of extreme measures.

Carbon dioxide is emitted in much larger quantities and by vastly more sources than the air pollutants the CAA was designed to regulate. Consequently, the EPA and its state counterparts faced the absurd prospect each year of having to apply the Act's preconstruction permits program to some 80,000 previously unregulated nonindustrial sources and the Title V operating permits program to 6.1 million such sources. Agency workloads would expand far beyond administrative capabilities, sabotaging environmental enforcement and economic development alike.

Congress should:

- Amend the Clean Air Act to clarify that it never delegated to the EPA the authority to make climate policy.

To avoid administrative chaos, the EPA adopted a rule to "tailor" (amend) the Act's clear numerical definition of "major" stationary sources to exempt all but the largest greenhouse gas emitters from the permitting programs. In *Utility Air Regulatory Group v. EPA* (2014), the Supreme Court overturned the EPA's so-called Tailoring Rule, for the simple reason that agencies have no power to amend statutes. But to prevent *Massachusetts v. EPA* from spawning an administrative debacle, the Court had to engage in tailoring of its own. Without any textual support, the Court ruled that the EPA may include GHGs in the permitting programs for sources that are otherwise subject to such regulation but not for small sources that would otherwise be exempt.

Massachusetts v. EPA continues to undermine the separation of powers. Congress has often considered and rejected GHG cap-and-trade legislation, and a bill authorizing the EPA to restructure state electric power sectors would be dead on arrival. Yet the EPA's so-called Clean Power Plan would force most states to adopt cap-and-trade programs to restructure their power sectors. The CPP has egregious legal flaws above and beyond the Court's errors in *Massachusetts v. EPA*. Nonetheless, as long as Congress treats *Massachusetts v. EPA* as "settled law," the EPA will be continually tempted to usurp legislative power. Congress should curb the EPA's overreach by clarifying that it has no power under the CAA to make climate policy.

Experts: Myron Ebell, Christopher Horner, Marlo Lewis, William Yeatman

For Further Reading

Marlo Lewis, "EPA Regulation of Fuel Economy: Congressional Intent or Climate Coup?" *Engage*, Vol. 12, No. 3 (2011), pp. 36–46, http://www.fed-soc.org/publications/detail/epa-regulation-of-fuel-economy-congressional-intent-or-climate-coup.

———, "The Unbearable Lightness of *UARG v. EPA*," GlobalWarming.org, July 4, 2014, http://www.globalwarming.org/2014/07/04/the-unbearable-lightness-of-uarg-v-epa/.

George F. Allen and Marlo Lewis, "Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of *Massachusetts v. EPA*," *University of Richmond Law Review*, Vol. 44, No. 3 (2010), pp. 919–935.

REPEAL THE EPA'S CARBON DIOXIDE STANDARDS FOR NEW FOSSIL-FUEL POWER PLANTS

The U.S. Environmental Protection Agency's carbon dioxide emission standards for new fossil-fuel power plants would make energy more expensive by effectively banning investment in new coal generation—a policy Congress never approved.

The Clean Air Act gives the EPA no authority to kill the future of coal-based power. Yet under the New Source Performance Standards (NSPS) rule, if utilities want to build coal power plants they can, but doing so will bankrupt them. The rule sets a performance standard of 1,400 pounds of carbon dioxide per megawatt hour (1,400 lbs. CO_2/MWh) for new coal power plants. Since today's state-of-the-art coal plants emit 1,800 pounds of CO_2 per megawatt hour, the rule is a de facto ban on the construction of new coal plants.

The EPA claims that new coal plants can meet the standards by installing carbon capture and storage (CCS) technology. However, new natural gas combined-cycle power plants are already cheaper to build and operate than new coal power plants, and CCS can substantially increase the cost and construction time of coal plants. For example, Mississippi Power's Kemper CCS Project was originally estimated to cost $2.2 billion. As of August 2016, Kemper is projected to cost almost $6.6 billion and is nearly three years behind schedule.

Under Section 111(a) of the Clean Air Act, a performance standard must reflect the "best system of emission reduction" that is "adequately demonstrated," taking "cost" into account. CCS has not been adequately demonstrated to be cost-effective. No commercial, utility-scale CCS power plant is currently operating, and the handful under construction would be unaffordable absent generous subsidies.

CCS is not the best system of emission reduction for a more fundamental reason. Even with subsidies, CCS power plants are not commercially viable unless they can

Congress should:

- Repeal the EPA's carbon dioxide standards for new fossil-fuel power plants.

sell the captured CO_2 to petroleum producers that inject it underground to coax stubborn crude out of older wells—a process known as enhanced oil recovery. However, when oil is combusted, it emits CO_2. Based on Department of Energy and EPA data, the recovered oil emits more CO_2 than must be injected underground to extract it. In commercial practice—that is, when combined with enhanced oil recovery —the net emissions of a CCS power plant exceed those of a conventional coal power plant.

Repealing the EPA's CO_2 standards for new coal power plants has an added benefit. The NSPS rule is the legal prerequisite for the agency's existing source rule—the so-called Clean Power Plan. Overturn the NSPS rule, and the CPP rule must fall as well.

Experts: Myron Ebell, Christopher Horner, Marlo Lewis, William Yeatman

For Further Reading

Marlo Lewis, "Carbon Capture and Storage: Adequately Demonstrated?" GlobalWarming.org, March 31, 2016, http://www.globalwarming.org/2016/03/31/carbon-capture-and-storage-adequately-demonstrated/#more-25583.

———, "Southern Company Power Plant Investigation Misses Larger Policy Scandal," Competitive Enterprise Institute blog, July 8, 2016, https://cei.org/blog/southern-company-power-plant-investigation-misses-larger-policy-scandal.

William Yeatman, "The Great Green Lie: CCS Today Is Not like Scrubbers in the 1970s (Part I)," Master Resource (blog), December 5, 2013, https://www.masterresource.org/environmental-pressure-groups/the-great-green-lie-ccs-today-is-not-like-scrubbers-in-the-1970s-part-i/.

———, "The Great Green Lie: CCS Today Is Not like Scrubbers in the 1970s (Part II)," Master Resource (blog), December 6, 2013, https://www.masterresource.org/environmental-pressure-groups/the-great-green-lie-ccs-today-is-not-like-scrubbers-in-the-1970s-part-ii-3/.

———, "Top Six Reasons the Carbon Pollution Standard Is Illegal," GlobalWarming.org, April 17, 2014, http://www.globalwarming.org/2014/04/17/the-top-six-reasons-epas-carbon-pollution-standard-is-illegal/.

William Yeatman, Darin Bartram, and Justin Schwab, "Comments of the Competitive Enterprise Institute on Clean Air Act §111(b) Carbon Pollution Standards," Competitive Enterprise Institute, May 9, 2014, https://www.scribd.com/

doc/223510674/CEIWilliam-Yeatman-Darin-Bartram-Justin-Schwab-Comments-on-Carbon-Pollution-Standard-5-9-2014.

"Kemper County IGCC Fact Sheet: Carbon Dioxide Capture and Storage Project," MIT Carbon Capture and Storage Database, https://sequestration.mit.edu/tools/projects/kemper.html.

OPPOSE CARBON TAXES

A carbon tax is a market-rigging policy, not a free market one. It would not be revenue neutral and it would not displace greenhouse gas regulations. Even if the tax were revenue neutral, it would make the tax system less efficient, as politics—not the social cost of carbon, which is unknowable—would determine carbon tax rates. Moreover, even the most aggressive feasible carbon tax would have negligible climate impacts, while imposing significant costs on the economy.

The function of a carbon tax is identical to that of cap and trade: to pick energy market winners and losers. As President Obama put it, the point of pricing carbon is to "finally make renewable energy the profitable kind of energy in America."

As climate policy, carbon taxes are costly symbolism. A carbon tax phasing out all coal generation by 2038 would reduce employment by 600,000 jobs in 2023, reduce a typical household's annual income by $1,200, and reduce the cumulative gross domestic product by $2.3 trillion, according to a 2013 Heritage Foundation analysis. Yet even a carbon tax eliminating all U.S. CO_2 emissions would avert less than 0.14°C of global warming in 2100, according to the EPA's climate model simulator.

A carbon tax would not be revenue neutral. Washington's big spenders have no interest in "tax reform" that does not also "enhance" revenues. And even a revenue-neutral carbon tax would make the tax system less efficient. The smaller the base on which a tax of a given size is levied, the more it adversely affects employment and distorts investment. The base of a carbon tax—a set of particular commodities or industries—is narrower than the base for retail sales, income, and labor taxes.

A carbon tax would not displace greenhouse gas regulations. The regulatory-litigation complex that is the administrative state enriches and empowers too many bureaucrats, activist groups, and corporate rent seekers for the global warming movement to seriously consider trading it all away for a carbon tax. It speaks volumes that all carbon

Congress should:

- Reject legislation intended to enact carbon taxes.

tax bills introduced to date have been designed to reinforce rather than replace greenhouse gas regulations.

Politics, not the unknowable social cost of carbon, would determine carbon tax rates. In debates over carbon tax rates, revenue-hungry agencies and anti-fossil-fuel politicians would patronize the social cost of carbon (SCC) modelers whose computers crank out the biggest, scariest numbers.

The power to tax is the power to destroy. Congress should not give the federal government another weapon for bankrupting industries that provide affordable, reliable energy to the people and economy of the United States.

Experts: Myron Ebell, Christopher Horner, Marlo Lewis, William Yeatman

For Further Reading

Marlo Lewis, "Why British Columbia's Carbon Tax Is Not Applicable to America," *On-Point* No. 198, Competitive Enterprise Institute, September 16, 2014, http://cei.org/content/why-british-columbia%E2%80%99s-carbon-tax-not-applicable-america.

Oren Cass, "The Carbon Tax Shell Game," *National Affairs*, Summer 2015, http://www.nationalaffairs.com/publications/detail/the-carbon-tax-shell-game.

James V. DeLong, *A Skeptical Look at the Carbon Tax* (Arlington, VA: George C. Marshall Institute, 2013), http://marshall.org/climate-change/a-skeptical-look-at-the-carbon-tax/.

Chip Knappenberger, "Carbon Tax: Climatically Useless," Master Resource (blog), December 3, 2012, https://www.masterresource.org/carbon-tax/carbon-tax-climatically-useless/.

Nicolas Loris, Kevin D. Dayaratna, and David W. Kreutzer, "EPA Power Plan Regulations: A Backdoor Energy Tax," *Backgrounder* No. 2863, Heritage Foundation, December 5, 2013, http://www.heritage.org/research/reports/2013/12/epa-power-plant-regulations-a-backdoor-energy-tax#_ftnref18.

Robert P. Murphy, "Carbon Taxes and the Tax Interaction Effect," Library of Economics and Liberty, October 1, 2012, http://www.econlib.org/library/Columns/y2012/Murphycarbon.html.

PROHIBIT USE OF SOCIAL COST OF CARBON AS A JUSTIFICATION FOR REGULATING EMISSIONS

The social cost of carbon—the damage supposedly caused by an incremental ton of carbon dioxide emitted in a given year—is an unknown quantity. By fiddling with speculative model inputs, SCC analysts can make renewables look like a bargain at any price and fossil fuels look unaffordable no matter how cheap.

SCC estimates are generated by computer programs called integrated assessment models, which combine nonvalidated climate parameters, made-up damage functions, and below-market discount rates, allowing SCC analysts to get almost any result they desire. The higher the SCC estimate, the more plausible the claim that the benefits of "climate action" exceed the costs. In 2013, the Obama administration increased its 2010 SCC estimates by almost 60 percent—as if global warming got 60 percent worse in four years.

However, recent developments in climate science—including the growing divergence between models and observations and numerous studies indicating that the vast majority of climate models are skewed toward greater warming—indicate that the state of the climate is better than feared, not worse than predicted. For example, there has been no trend since 1900 in U.S. hurricane-related damages once losses are adjusted for changes in population and wealth, and no trend globally since 1970 in the frequency and strength of landfalling hurricanes.

Two of the three assessment models used by the administration—known as Dynamic Integrated Climate-Economy (DICE) and Policy Analysis of the Greenhouse Effect (PAGE)—omit or severely underestimate the benefits of CO_2 fertilization on food production. Those models are structurally biased. Their use in policy making flouts the Information Quality Act.

Congress should:

- Prohibit agencies from using such computer-aided sophistry to justify regulations and defund Social Cost of Carbon modeling programs.

Even if all integrated assessment model inputs were correct, SCC estimation would still be one-sided and misleading, because it disregards the social costs of carbon mitigation policies.

The social benefits of carbon energy are substantial. For example, as climate economist Indur Goklany explains, capabilities supported by carbon energy—including mechanized agriculture, fertilizers, refrigeration, plastic packaging, and motorized transport of food from farms to population centers and from surplus to deficit regions—are among the chief reasons that deaths and death rates from drought have declined by 99.8 percent and 99.9 percent, respectively, since the 1920s. A meal that sustains a human life has a social value far exceeding the market price of the food.

Experts: Myron Ebell, Marlo Lewis, William Yeatman

For Further Reading

Marlo Lewis, "Menace to Society: Commentary on the Social Cost of Carbon," GlobalWarming.org, February 27, 2014, http://www.globalwarming.org/2014/02/27/menace-to-society-commentary-on-the-social-cost-of-carbon/.

Roger H. Bezdek, *The Social Costs of Carbon? No, the Social Benefits of Carbon* (Oakton, VA: Management Information Services Inc., January 2014), http://www.americaspower.org/sites/default/files/Social_Cost_of_Carbon.pdf.

Kevin D. Dayaratna, Testimony before the House Committee on Natural Resources, July 23, 2015, http://naturalresources.house.gov/uploadedfiles/dayaratnatestimony. pdf.

Alex Epstein, *The Moral Case for Fossil Fuels* (New York: Portfolio/Penguin, 2014).

Indur M. Goklany, "A Primer on the Death Toll from Extreme Weather Events: Context and Long Term (1900–2008)," *Observatory*, August 15, 2010, http://www.thegwpf.com/indur-m-goklany-global-death-toll-from-extreme-weatherevents-declining/.

Craig D. Idso, "The Positive Externalities of Carbon Dioxide: Estimating the Monetary Benefits of Rising CO_2 Concentrations on Global Food Production," Center for the Study of Carbon Dioxide and Global Change, October 18, 2013, http://co2science.org/education/reports/co2benefits/co2benefits.php.

Institute for Energy Research, "Comment on the Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866," February 24, 2014, http://instituteforenergyresearch.org/wp-content/uploads/2014/02/IER-Comment-on-SCC.pdf.

Patrick J. Michaels, Testimony before the House Committee on Natural Resources, July 22, 2015, http://naturalresources.house.gov/uploadedfiles/michaelstestimony.pdf.

Robert Pindyck, "Climate Change Policy: What Do the Models Tell Us?" Working Paper No. 12944, National Bureau of Economic Research, July 2013, http://www.globalwarming.org/wp-content/uploads/2013/10/Pindyk-Climate-Change-Policy-What-Do-the-Models-Tell-Us.pdf.

FREEZE AND SUNSET THE RENEWABLE FUEL STANDARD

The Renewable Fuel Standard (RFS)—created by the 2005 Energy Policy Act and expanded by the 2007 Energy Independence and Security Act—requires refiners to blend increasing quantities of biofuel into the nation's motor fuel supply over a 17-year period (2006–2022). As RFS statutory targets diverge from marketplace realities, each year's obligations are actually set by Environmental Protection Agency officials in a setting rife with interest-group lobbying. Lawmakers should strive to restore predictability and choice to U.S. motor fuel markets.

The RFS is a textbook study in the law of unintended consequences. The program was supposed to benefit consumers. Instead, the RFS artificially bids up the price of corn, soy, and other crops, adding billions of dollars to food costs. In addition, the vast majority of biofuel is ethanol, which contains one-third less energy by volume than gasoline. Consequently, the RFS forces motorists to spend more for fuel and to fill up more frequently.

The RFS was supposed to benefit the environment. Instead, the program:

- Increases agricultural runoff, a major contributor to aquatic dead zones;
- Converts millions of acres of wildlife habitat in grasslands and wetlands into energy crop plantations;
- Increases net emissions of air pollutants, such as fine particulate matter (PM2.5) and nitrogen oxides (NO_x); and
- Produces more greenhouse gas emissions than the gasoline it replaces, according to some analyses.

Moreover, compared with the fracking revolution, the RFS has done little to reduce American dependence on foreign oil.

The RFS is incompatible with the constitutional principle of equality under law. It enriches some corn and soy farmers at the expense of poultry, hog, beef, and dairy farmers. The RFS literally compels one set of companies to purchase, process, and create a market for other companies' products. To see the anomaly, suppose instead of enacting renewable volume obligations for refiners, Congress enacted *input* volume obligations, compelling corn farmers to purchase annually increasing quantities of

Congress should:

- Freeze the renewable fuel standard's blending targets below the "blend wall"—the quantity of ethanol that can be sold domestically given the incompatibility of mid- and high-ethanol blends with the vast majority of vehicles and infrastructure, and anemic consumer demand for such blends because of their inferior fuel economy.
- Sunset the RFS after 2022 so that competition and consumer preference, not central planning and political pressure, determine which fuels succeed or fail in the U.S. marketplace.

specific types of seeds, fertilizers, and farm machinery. The howls from RFS supporters would be loud and furious—and justifiably so.

Experts: Myron Ebell, Marlo Lewis, William Yeatman

For Further Reading

Marlo Lewis, "Does EPA's Renewable Fuel Standard Increase Greenhouse Gas Emissions?" Competitive Enterprise Institute blog, August 4, 2016, https://cei.org/blog/does-epas-renewable-fuel-standard-increase-greenhouse-gas-emissions.

———, "Does Global Warming Policy Increase Midwest Summer Swelter?" Competitive Enterprise Institute blog, July 22, 2016, https://cei.org/blog/does-global-warming-policy-increase-summer-swelter.

———, "Gasoline or Ethanol: Which Is More Polluting?" GlobalWarming.org, August 7, 2015, http://www.globalwarming.org/2015/08/07/gasoline-or-ethanol-which-is-more-polluting/.

———, "Running Drivers into the Blend Wall: Push to Ratchet up Renewable Fuel Standards Rewards Ethanol Lobby at Consumers' Expense," *OnPoint* No. 219, Competitive Enterprise Institute, July 25, 2016, https://cei.org/content/running-drivers-blend-wall.

Center for Regulatory Solutions, "Fields of Deception: How the Corn Ethanol Mandate Harmed the Prairie State," Small Business and Entrepreneurship Council, November 20, 2015, http://www.globalwarming.org/wp-content/uploads/2015/11/Fields-of-Deception-CRS-11.19.15.pdf.

Tim Hogan, American Fuel and Petrochemical Manufacturers, Comment Letter on Renewable Fuel Standard Program: Standards for 2017 and Biomass-Diesel Volume for 2018; Proposed Rule, Docket ID No. EPA-HQOAR-2016-0004, July 11, 2016.

Dina Cappiello and Matt Apuzzo, "The Secret Environmental Cost of U.S. Ethanol Policy," Associated Press, November 12, 2013, http://bigstory.ap.org/article/secret-dirty-costobamas-green-power-push-1.

REQUIRE ALL AGENCIES TO MEET RIGOROUS SCIENTIFIC STANDARDS

Too often, the science that agencies use to justify regulations fails to meet even the most basic scientific standards to ensure that conclusions are valid. Reforms to the Toxic Substances Control Act (TSCA) employ some sound scientific principles, such as mandates for the EPA to rely on the best available science and to employ "weight of the evidence testing," but not all regulatory programs include such requirements.

Past efforts to promote scientific integrity have proved insufficient. For example, in 2000, Congress passed a law that called on agencies to follow guidelines for the purpose of "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency." (Pub. L. No. 106-554, Section 515) Unfortunately, those unenforceable guidelines have had little effect.

If Congress fails to pass legislation that provides enforceable standards for scientific integrity in government, consumers will be the ones to pay. Without such accountability, federal agencies will continue to use poor-quality data, weak studies, and excessive reliance on rodent studies of limited relevance to human health. Agencies use such

Congress should:

- Develop standards promoting scientific integrity that are mandatory and judicially enforceable, and ensure that they apply to all federal government departments and independent agencies, including the Environmental Protection Agency and the Consumer Product Safety Commission.
- At a minimum, demand that all scientific research employed to justify regulations relies on the "best available science" and pass a "weight of the evidence test."
- Require that policies and chemical prioritization schemes be based on complete risk assessments that consider actual exposures of the chemicals rather than hazard-based classification systems.
- Require agencies to apply the least burdensome regulation when selecting regulatory measures.
- Require all data and research used to justify regulations to be publicly available in order to promote transparency (with protections for confidential business information for companies that provide information).

incomplete and questionable science to justify excessively precautionary policies that ban or overregulate chemicals that are relatively safe and useful in consumer products. As a result, certain consumer products may soon disappear from the market, and innovation may dwindle as policy makers ban and eliminate many useful chemicals.

Such random elimination of technologies wastes the human ingenuity and investment that went into making those goods and denies society the benefits of those products. Innovators must then divert resources from new enterprises to find substitute products, which may pose new risks. The final result is a poorer, potentially more dangerous world.

Expert: Angela Logomasini

For Further Reading

Angela Logomasini, *A Consumer's Guide to Chemical Risk: Deciphering the 'Science' behind Chemical Scares*, Competitive Enterprise Institute, 2014, https://cei.org/issue-analysis/consumers-guide-chemical-risk.

Richard B. Belzer, "The Report on Carcinogens," *Issue Analysis* 2012 No. 1, Competitive Enterprise Institute, January 2012, https://cei.org/issue-analysis/report-carcinogens.

ADDRESS UNACCOUNTABLE ENVIRONMENTAL RESEARCH PROGRAMS

A number of "nonregulatory" environmental research programs have both regulatory and market effects. Although their effects are significant, the programs have limited systems to ensure accountability and scientific integrity.

In particular, the EPA's Integrated Risk Information System (IRIS) is a non-regulatory program that produces chemical risk assessments that other EPA divisions use to issue regulations under such federal laws as the Safe Drinking Water Act and the Clean Air Act. Yet, IRIS has received much criticism from scientific bodies and others for poor-quality research methodologies. In a 2011 report on IRIS's formaldehyde risk assessment, the National Academy of Sciences criticized the agency for "recurring methodologic problems," including repeated failures to provide "clarity and transparency of the methods," along with inconsistencies, poor research documentation, failure to follow EPA research guidelines, and other issues. At the end of the 2011 report, the National Academy of Sciences included a special section to provide suggestions for IRIS to improve its science, yet IRIS has failed to implement them adequately and continues to garner deserved criticism for problematic risk assessments.

Another program operating outside the regulatory process with little accountability is the EPA's "Safer Choice" program, formerly called "Design for the Environment." The program calls on companies to eliminate certain chemicals from their products voluntarily, largely on the basis of hazard classifications rather than on actual risk assessments. Yet hazard alone is inadequate for making decisions about chemicals because it fails to either consider actual risks related to real-life exposures or weigh the benefits

Congress should:

- Fold the funding and resources of the Integrated Risk Assessment System into the Toxic Substances Control Act (TSCA) program and require it to comply with scientific standards set up in the new TSCA law. Other divisions can still rely on IRIS data, which will be more valuable if those data comply with TSCA's scientific standards.
- Eliminate the EPA's hazard-based Safer Choice program, and use the funds to reduce federal spending.

against the risks. Yet Safer Choice is encouraging companies to deselect valuable products on the basis of hazard alone.

The passage of reforms to the Toxic Substances Control Act makes it an opportune time to leverage resources from programs that are currently outside the official regulatory process. Bringing programs such as IRIS under TSCA will better use those resources, eliminate duplication, and increase accountability in how such research is conducted.

Expert: Angela Logomasini

For Further Reading

National Research Council of the National Academies, *Review of the Environmental Protection Agency's Draft IRIS Assessment of Formaldehyde* (Washington, DC: National Academies Press, 2011), https://www.nap.edu/catalog/13142/review-of-the-environmental-protection-agencys-draft-iris-assessment-of-formaldehyde.

Environmental Protection on Private and Public Lands

5

Private property and secure property rights are essential conditions of freedom and prosperity. Contrary to claims by environmental advocacy groups, private landowners' environmental stewardship has proved to be far superior to that of public land managers. However, federal regulations increasingly undermine private conservation efforts.

The Endangered Species Act (ESA) and wetlands regulations provide no incentives for regulators to contain costs, because the costs of compliance are borne by landowners. The solution is to enact meaningful compensation for regulatory takings that exceed 10 percent of a property's current-use value. The Supreme Court has acknowledged that regulatory takings can fall under the Constitution's Fifth Amendment provision: "nor shall private property be taken for public use without just compensation." Unfortunately, the Court has also made it extremely difficult to claim compensation unless the regulation takes all or nearly all the value of the property. Takings compensation legislation will reduce violations of property rights. Making taxpayers pay the costs of regulating should provide the push necessary to enact significant ESA and wetlands reforms.

Management of federal lands, which compose 27 percent of the surface area of the United States, continues to move away from active multiple-use management of resources toward non-management based on the destructive and false notion that anything humans do is bad for the natural world. For example, timber harvesting in

our National Forests has been replaced by management by catastrophic fires. The environmental degradation of federal lands goes hand in hand with declining resource production and impoverishment of rural people in those areas of the West where the majority of lands are federally owned. It is time to stop and reverse the locking up of federal land, restore multiple-use management, and increase resource production.

It is also time to stop the federal government from buying more private land and instead start privatizing federal land or transfer it to the states. Federal lands are, on average, in worse environmental condition than private lands and produce much less economic activity. Yet the four federal land agencies continue to buy private land under the Land and Water Conservation Fund, thereby taking it out of economic production and off the property tax rolls. Congress should prohibit further federal land acquisition, institute programs to transfer federal lands to states requesting it, and privatize federal lands in states that do not.

Finally, planning for the speculative impacts of potential climate change is now permeating federal land management policy and planning. Climate change is bad enough in itself, but planning for it has given federal land managers an excuse for planning "beyond boundaries"—that is, to include private property in their plans. In addition, calculating the speculative future "social cost of carbon"—an arbitrary figure based on the preferences of federal bureaucrats—is now being used in federal environmental permitting decisions. Congress should prohibit the use of that artificial metric in federal land management and environmental permitting.

REFORM ENVIRONMENTAL REGULATION OF PRIVATE LANDS

Private property and secure property rights are essential conditions of freedom and prosperity. Contrary to claims by environmental advocacy groups, the environmental stewardship of private landowners has proved to be far superior to that of public land managers. However, federal regulations increasingly undermine private conservation efforts. For example, the Endangered Species Act (has proved to be bad for wildlife because it is bad for people. The ESA has largely failed to protect endangered animals and plants because the threat of regulatory takings of private property creates perverse incentives for landowners to manage their land so that it does not provide habitat for listed species.

The first step in reducing regulatory takings is to enact regulatory takings compensation. An underlying problem with both the ESA and wetlands regulations is that regulators have no incentive to contain costs because the costs of compliance are borne by landowners. Supreme Court decisions have acknowledged that regulatory takings can fall under the Constitution's Fifth Amendment provision: "nor shall private property be taken for public use without just compensation." However, the Court has also made it almost impossible to claim compensation unless the regulation takes all or nearly all the value of the property.

The idea that private citizens should not be required to pay for public benefits enjoys widespread popular support. During the 104th Congress, the House of Representatives easily passed legislation to allow landowners who have lost more than half the value of their property because of ESA designations and wetlands and other land-use regulations to claim compensation. In 2004 and again in 2005, Oregon voters passed referendums by wide margins to provide compensation for property owners who have lost value in their property because of state land-use regulations. Yet government encroachment upon private lands continues.

The House of Representatives defeated federal land-use control legislation in the early 1970s. Since that time, several environmental laws—particularly the Endangered Species Act and wetlands regulation under Section 404 of the Clean Water Act—have increasingly been used by federal agencies to extend de facto land-use controls over

Congress should:

- Enact regulatory takings compensation under the following laws and programs:
  - Endangered Species Act;
  - Clean Water Act Section 404 wetlands regulation;
  - Permitting delays under the National Environmental Policy Act;
  - Coastal Zone Management Act;
  - Rails-to-Trails; and
  - Other federal land-use controls.
- Provide compensation when regulatory takings exceed 10 percent of a property's current-use value.
- Allow property owners to bypass administrative delays and file claims directly in federal court.
- Reform the Endangered Species Act by doing the following:
  - Require that all information used in the process of listing species meets the minimal requirements of the Federal Information Quality Act (IQA);
  - Require that petitions for de-listing currently listed species be granted if the information supporting the listing does not meet the minimal requirements of the IQA;
  - Make it explicit in law that the IQA is justiciable in federal court;
  - Require that listing any species must be preceded by the online posting of the information supporting the petition within one month of receipt and a list of the data used to document the existence of each of the five factors used to justify the listing; and
  - Repeal the ESA's command-and-control regulatory regime and replace it with a conservation incentives program.
- Overturn the Environmental Protection Agency's Waters of the United States rule.
- Amend the Clean Water Act to restrict Section 404 jurisdiction to the constitutionally limited navigable waters of the United States.
- Overturn the Surface Mining Control and Reclamation Act's Stream Protection Rule.
- Prohibit funding for:
  - Any new studies, proposals, or designations of National Heritage Areas and Corridors, Wild and Scenic Rivers, or National Trails;
  - National Heritage Areas and Corridors after the initial funding has expired; and
  - The addition of any railroad rights-of-way into the Department of Transportation's rail banking inventory.

much of the United States. (The extent of federal regulatory control of private land can be seen at http://naturalresources.house.gov/federalfootprint.)

The federal footprint threatens to grow larger. As a result of the Obama administration's sue-and-settle agreements with environmental advocacy groups (primarily Wild Earth Guardians and the Center for Biological Diversity), the Fish and Wildlife Service is now in the early stages of a vast new endangered species power grab over large parts of the country. Thus, it is essential for Congress to move quickly to require that species must be listed on the basis of sound science and transparency. Takings compensation legislation will reduce violations of property rights. Making taxpayers pay for the costs of regulating should provide the push necessary to enact significant ESA reforms.

Congress should block implementation of the EPA's so-called Waters of the United States rule, which twists the language of the Clean Water Act out of all recognition. Through this rule, the Obama administration seeks to extend the Act's jurisdiction over the "navigable waters" of the United States to cover any piece of land that may at some time be occupied by water, such as drainage channels or seasonal pools. (The rule is currently being challenged in federal court.)

However, blocking that harmful rule is only the first step. Regulation of wetlands has expanded far beyond what Congress intended when it passed the Clean Water Act and what the Constitution allows. Therefore, Congress needs to amend Section 404 of the Clean Water Act to restrict regulation of wetlands to the constitutionally limited navigable waters of the United States.

Congress should place a moratorium on expanding several other federal programs that threaten private property rights, including National Heritage Areas and Corridors, Wild and Scenic Rivers, National Trails, and Rail-to-Trails. Although those programs are non-regulatory in a technical sense, they are often used to restrict the use of private property in local land-zoning decisions.

Experts: Myron Ebell, Marlo Lewis, William Yeatman, Robert J. Smith

For Further Reading

Myron Ebell, "An Update on Endangered Species Act Reform," *ALEC Issue Analysis*, American Legislative Exchange Council, April 1995, https://cei.org/op-eds-and-articles/update-endangered-species-act-reform.

Bruce Yandle, "Bootleggers and Baptists in Retrospect," *Regulation*, Vol. 22, No. 3 (1999), http://object.cato.org/sites/cato.org/files/serials/files/regulation/1999/10/bootleggers.pdf.

Brian Seasholes, "End America's 42-Year War on Wildlife," Daily Caller, December 28, 2015, http://dailycaller.com/2015/12/28/end-americas-42-year-war-on-wildlife/.

Richard L. Stroup, *Free-Market Environmentalism: The Concise Encyclopedia of Economics* (Indianapolis: Liberty Fund, 2008), http://www.econlib.org/library/Enc/FreeMarketEnvironmentalism.html.

Daren Bakst and Katie Tubb, "Lawmakers Need to Kill EPA's and Corps' Water Rule: Property Rights Are at Stake," Daily Signal, November 3, 2015, http://dailysignal.com/2015/11/03/lawmakers-need-to-kill-epa-and-corps-water-rule-property-rights-are-at-stake/.

SHRINK THE FEDERAL ESTATE

The federal government owns far more land than it can take care of properly. Federal stewardship varies widely, but on average federal lands are in poorer environmental condition than comparable private lands. The four federal land agencies—the Department of the Interior's Bureau of Land Management (BLM), the National Park Service, the U.S. Fish and Wildlife Service, and the Department of Agriculture's Forest Service—control about 609 million acres, or 27 percent of the surface area of the United States.

The first action Congress should take to improve federal environmental stewardship is to stop acquiring more private land.

The second action Congress should take is to transfer federal lands to the states or to private ownership. Although these actions will be more difficult to achieve, Congress can take some practical steps to begin the process.

Since the Land and Water Conservation Fund (LWCF) was enacted in 1965, the federal government has appropriated over $15.5 billion to acquire over 5 million acres

Congress should:

- Defund the Land and Water Conservation Fund of 1965, and let it expire when it comes up for reauthorization in 2018.
- Require all future federal land acquisitions to be funded by selling at least $10 of existing federal land for every $1 of private land purchased.
- Forbid the use of eminent domain in acquiring private land for the four federal land agencies.
- Prohibit the establishment or expansion of National Wildlife Refuges without express congressional approval.
- Make all sources of revenue for the Fish and Wildlife Service subject to congressional appropriation.
- Require federal agencies to prepare a comprehensive report for Congress on all current eminent domain authority in existing statutes.
- Require agencies to report to Congress all instances of threats of condemnation made to private property owners.
- Ban all secret agreements between federal land agencies and land trusts or other entities to acquire private land and transfer it to federal ownership, through either sale or donation.

Congress should:

- Enact legislation to comply with Utah's Transfer of Public Lands Act.
- Enact legislation to comply with future requests from other states for the transfer of their federal lands.
- Require the orderly sale to private ownership of Bureau of Land Management and Forest Service lands in states that have not applied for transfer of their public lands within five years.
- Ensure that all valid existing rights—including water rights, rights-of-way, grazing permits, and traditional recreational uses—are fully protected after the transfer of federal lands to the states or to private ownership.

of private land, according to the Congressional Research Service. Federal taxpayers must pay the annual costs for managing and protecting those lands, which have been removed from economic production and property tax rolls. The LWCF's current authorization expires at the end of FY 2018. Congress should let it expire and then reform federal land acquisition to prohibit the use of eminent domain and to require the sale of $10 of federal land to private hands for every $1 spent on buying more land.

De-federalizing parts of the rural West becomes more and more important as the BLM and U.S. Forest Service (USFS) work with environmental pressure groups to turn vast areas into nature museums. The Utah Transfer of Public Lands Act is a notable step in the right direction. Congress should comply with its provisions.

Experts: Myron Ebell, Robert J. Smith

For Further Reading

"CEI Opposes Senate's Energy Policy Modernization Act," news release, Competitive Enterprise Institute, February 1, 2016, https://cei.org/content/cei-opposes-senate%E2%80%99s-energy-policy-modernization-act.

Robert J. Smith, "The War in the West: Time to Stop Federal Land Acquisition," Daily Caller, January 1, 2016, http://dailycaller.com/2016/01/15/the-war-in-the-west-time-to-stop-federal-land-acquisition/.

Carol Hardy Vincent, Laura A. Hanson, and Jerome P. Bjelopera, "Federal Land Ownership: Overview and Data," Congressional Research Service Report 7-5700, December 29, 2014, http://www.fas.org/sgp/crs/misc/R42346.pdf.

For information on the Utah Transfer of Public Lands Act, consult the American Lands Council website, http://www.americanlandscouncil.org/.

UNLOCK FEDERAL LANDS

Congress has often exercised its authority to designate federal lands under special categories of protection and preservation. For example, under the Wilderness Act of 1964, Congress designated 110 million acres of land managed by the four federal land agencies as officially protected Wilderness Areas.

In recent decades, presidents and land agency officials have decided that they can lock up federal lands in various administrative categories without legislation by Congress. During the Obama administration, such withdrawals have reached outrageous levels. Although congressional oversight is needed for all preservation categories, three methods for locking up federal lands deserve special and immediate attention by Congress:

- The increasingly outrageous misuse by recent presidents of the Antiquities Act of 1906 to designate huge federal areas as National Monuments;
- Administrative designations of federal lands as Bureau of Land Management Wilderness Study Areas and U.S. Forest Service Roadless Areas in perpetuity; and
- Closure of public rights-of-way that are long established, and that in many cases were created under Revised Statute 2477 and grandfathered in the Federal Land Policy and Management Act of 1976.

Congress should:

- Amend the Antiquities Act of 1906 to require that all existing National Monument designations of more than 640 acres be approved by the legislature and governor of the state wherein the National Monument is located within four years.
- Prohibit future National Monument designations of more than 5,760 acres, and require Congress and the legislature and governor of the state wherein the National Monument is located to approve the designation within two years.
- Enact hard-release language for all federal lands that have been administratively designated as Wilderness Study Areas or Roadless Areas for more than 10 years.
- Enact legislation that recognizes and guarantees R.S. 2477 rights-of-way.
- Require that federal right-of-way decisions be subject to state laws and decided in state courts.

The Antiquities Act of 1906 was primarily intended to allow the executive branch to take immediate action to protect Indian ruins and artifacts discovered on federal lands from looting. It was understood that presidents would use this authority to protect areas of a few hundred acres, or a few thousand acres at most. Under recent presidents, the Antiquities Act has been misused to lock up millions of acres of land and hundreds of millions of acres of ocean.

The Bureau of Land Management manages roughly 6 million acres, and the U.S. Forest Service manages roughly 36 million acres as de facto wilderness. Lands that have been classified as BLM Wilderness Study Areas or USFS Roadless Areas for more than 10 years without Congress's officially designating them as Wilderness Areas should be released from these administrative preservation categories.

Revised Statute 2477 was enacted in 1866 to allow local governments and private individuals to establish and maintain rights-of-way across public lands. Those rights-of-way could range from trails and dirt roads to highways. The Federal Land Policy and Management Act of 1976 repealed R.S. 2477 but recognized and protected all R.S. 2477 rights-of-way already in existence.

Experts: Myron Ebell, Robert J. Smith

For Further Reading

Robert J. Smith, "Time to Repeal the Antiquities Act of 1906," National Policy Analysis No. 677, National Center for Public Policy Research, September 2016, http://www.nationalcenter.org/NPA677.html.

Marjorie Haun, "R. S. 2477 and Western Lands," American Thinker, March 31, 2016, http://www.americanthinker.com/blog/2016/03/rs_2477_and_western_lands.html.

RESTORE RESOURCE PRODUCTION ON FEDERAL LANDS

More than half the land in the 11 Western states and Alaska is federally owned. The Bureau of Land Management controls roughly 245 million acres in the West and Alaska, and the U.S. Forest Service controls roughly 165 million acres. At one time, most of that land was managed for multiple uses under the BLM's Federal Land Policy and Management Act of 1976 and the USFS's Multiple Use and Sustained Yield Act of 1960. Multiple uses include:

- Recreation, including hunting and fishing;
- Wildlife and water conservation;
- Livestock grazing; and
- Timber production.

Subsurface production of hard-rock minerals, oil, natural gas, coal, and geothermal energy has also been permitted on most multiple-use lands. More recently, wind and solar energy production has been encouraged on multiple-use lands.

However, BLM and USFS lands have been removed from multiple use and put under various categories of preservation management at an increasing rate over the past 50 years. In the earlier decades of this trend, Congress made most withdrawals from multiple use, such as designating federal lands as Wilderness Areas. In recent decades, most withdrawals have been made administratively by the BLM and the USFS or by presidential decree in the case of National Monument designations. For the most part, those withdrawals have been used to ban or severely limit resource production. And in many cases, types of recreational access have also been banned or limited.

Massive federal landownership means that the BLM and the USFS control the economies of many rural areas in the West. Closing off federal lands to resource production has had several devastating environmental and economic impacts. For example, reducing timber production by more than 80 percent since 1990 has destroyed hundreds of thousands of jobs and has caused scores of mill towns to disappear. Sustained-yield management of National Forests has been replaced by "management" through cat-

Congress should:

- Enact comprehensive reform of the National Environmental Policy Act (NEPA) to:
  - Streamline the NEPA Environmental Impact Statement process;
  - Set time limits for agency decisions; and
  - Severely restrict opportunities for endless litigation by environmental advocacy groups.
- Enact legislation to protect the valid existing rights of grazing permittees, including beneficial water rights allocated under state law.
- Enact legislation to expedite the permitting of production on mining claims under the General Mining Law of 1872.
- Exempt timber salvage sales from the National Environmental Policy Act's Environmental Impact Statement and Environmental Assessment, as is the case with responses to natural disasters.
- Enact legislation to mandate incremental increases in timber sales on National Forests over five years from the current level of 2 billion board feet to 12 billion board feet per year (USFS Forest Products Cut and Sold from the National Forests and Grasslands website, http://www.fs.fed.us/forestmanagement/products/cut-sold/index.shtml#collapseThree).
- End the moratorium on federal coal leasing.
- Overturn the Bureau of Land Management's hydraulic fracturing rule and methane venting and flaring rule.
- Shorten the outlandish delays in issuing drilling permits by enacting legislation to put states in charge of applications for permits to drill for oil and gas on federal land.
- Enact legislation that shares royalties from federal offshore production with all coastal states.
- Overturn the offshore well control rule, offshore air quality rule, and the Arctic rule.

astrophic forest fires. Subsurface energy and mineral production has also started to decline as a result of administrative decisions.

Experts: Myron Ebell, Marlo Lewis, William Yeatman

For Further Reading

Robert H. Nelson, Testimony on "Restoring Forest Health and Avoiding Catastrophic Fire on Federal Lands," before the Task Force on Natural Resources and the Environment, House Budget Committee, September 13, 2000, https://cei.org/outreach-reg-

ulatory-comments-and-testimony/restoring-forest-health-and-avoiding-catastrophic-fire-fe.

Kevin D. Dayaratna, David W. Kreutzer, and Nicolas Loris, "Time to Unlock America's Vast Oil and Gas Resources," *Backgrounder* No. 3148, Heritage Foundation, September 1, 2016, http://www.heritage.org/research/reports/2016/09/time-to-unlock-americas-vast-oil-and-gas-resources.

Institute for Energy Research, "Oil Production on Federal Lands Lags behind Private and State Lands," April 13, 2016, http://instituteforenergyresearch.org/analysis/oil-production-federal-lands-still-not-regained-fy-2010-high/.

REMOVE BOGUS CLIMATE PLANNING FROM FEDERAL LAND POLICY

Planning for the impacts of potential climate change is now permeating federal land management policy and planning. That is unfortunate because, as the United Nations Intergovernmental Panel on Climate Change stated in its Third Assessment Report, "The climate system is a coupled non-linear chaotic system, and therefore the long-term prediction of future climate states is not possible."

Moreover, even assuming that the global mean temperature (GMT) will increase over the next century as a result of increasing atmospheric concentrations of greenhouse gases, regional climate changes cannot be predicted on the basis of the GMT. Major regional and sub-regional climate changes occur constantly around the planet even during periods like the past two decades, when the GMT is more or less steady. Finally, the current scientific understanding of the potential ecological impacts from climate change is highly speculative at best. For these reasons, adding climate to land planning is an expensive and cumbersome waste of time.

The addition of "direct, indirect, and cumulative" impacts of climate change in the preparation of Environmental Impact Statements, as required by a NEPA guidance document, threatens to make that process even more of an ordeal than it already is, thanks to the endless litigation it will engender.

Landscape Conservation Cooperatives (LCCs) are designed to expand the regulatory reach of the Endangered Species Act. The Obama administration's reasoning is that, since changes in the climate could cause species habitats to change over time, planning for projected changes could require huge expansions in critical habitat designations under the ESA. Congress has never authorized the LCCs, and they should be eliminated. The LCCs are not confined to planning for federal lands. All privately owned lands are included in the 22 LCCs, which cover the entire country plus large areas of Canada and Mexico and large tracts in the Gulf of Mexico and the Pacific Ocean. Indeed, the motto of the LCCs is "Beyond Boundaries," which is proudly displayed on the homepage of the LCC Network's website (https://lccnetwork.org/).

Experts: Myron Ebell, Robert J. Smith, Marlo Lewis

Congress should:

- In the preparation or analysis of, or in litigation regarding Environmental Impact Statements, prohibit the use of:
  - The National Environmental Policy Act guidance document on climate impacts (Executive Office of the President, "CEQ Releases Final Guidance on Greenhouse Gases and Climate Change," August 1, 2016, https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance);
  - The Office of Management and Budget (OMB) guidance document on the social cost of carbon (see separate item in this Agenda); or
  - Any other speculative climate impact considerations.
- In the preparation of management plans by the four federal land agencies, prohibit the use of:
  - The NEPA guidance document on climate impacts;
  - The OMB guidance document on the Social Cost of Carbon;
  - Department of the Interior Climate Change Planning Requirements; or
  - Any other speculative climate impact considerations.
- Defund and abolish:
  - The Department of the Interior's Energy and Climate Change Council;
  - The U. S. Forest Service's Offices of the Climate Adviser and of Sustainability and Climate Change;
  - Subordinate offices, councils, programs, and projects in all four federal land agencies; and
  - The 22 Landscape Conservation Cooperatives (LCCs) and associated eight Climate Science Centers established in 2010 by Department of the Interior Secretarial Order No. 3289 (Secretary of the Interior, Order No. 3289, Amendment No. 1, February 22, 2010, https://lccnetwork.org/sites/default/files/Resources/DOI_SecretarialOrder_3289A1.pdf).

For Further Reading

Myron Ebell, "CEQ Releases New Guidance on Including Climate Impacts in Environmental Impact Statements," GlobalWarming.org, December 23, 2014, http://www.globalwarming.org/2014/12/23/ceq-releases-new-guidance-on-including-climate-in-environmental-impact-statements/.

Marlo Lewis, "Menace to Society: Commentary on the Social Cost of Carbon," GlobalWarming.org, February 27, 2014, http://www.globalwarming.org/2014/02/27/menace-to-society-commentary-on-the-social-cost-of-carbon/.

Thomas J. Pyle et al., "CEI Joins Coalition Supporting Halt to 'Social Cost of Carbon,'" Competitive Enterprise Institute, July 19, 2016, https://cei.org/content/cei-joins-coalition-supporting-halt-social-cost-carbon.

United Nations Intergovernmental Panel on Climate Change, Third Assessment Report Executive Summary, https://www.ipcc.ch/ipccreports/tar/wg1/501.htm.

Technology and Telecommunications

6

Few economic sectors rival the technology and telecommunications industries in how rapidly—and momentously—they have evolved. Across the globe, the Internet and high-tech firms have reshaped how we work, live, and interact with one another. Just three decades ago, only a sliver of the population could afford mobile phones, while the World Wide Web had not yet been invented. Today, mobile devices outnumber people—and nearly one in two people uses the Internet. Massive investment in information technology and infrastructure has fueled innovation, enabling global productivity to grow tremendously, creating tens of millions of high-skilled jobs around the world, and making our lives better in ways few could imagine two decades ago.

As technology evolves, new challenges invariably arise, including for policy makers. Setting the wrong rules could stifle the high-tech economy, especially if lawmakers bow to pressure from influential business interests or self-proclaimed consumer advocates to saddle emerging technology markets with arbitrary regulations or draconian liability regimes. That does not mean that government officials should simply ignore disruptive innovations. To the contrary, newcomers who redefine existing markets—or create new markets—often merit a reevaluation of rules to eliminate legal obstacles to innovation. And as history has shown, most concerns expressed about novel technologies eventually prove unfounded or overblown, especially given our capacity to adapt to a changing world without help from central planners.

As lawmakers consider how to govern the technology and telecommunications sectors, new mandates or prohibitions should be avoided in all but the most exceptional circumstances. To the extent that new services or tools raise legitimate concerns about public health, consumer protection, or competition, lawmakers should resist the urge to act until they see how voluntary institutions—including not only the marketplace but also the rest of civil society—react to supposed market failures if and when they arise. In the unlikely event that legislative intervention is necessary, Congress should change the law using a scalpel, not a sledgehammer.

At the same time, lawmakers should break out the sledgehammer when it comes to tearing down convoluted statutory schemes devised in an earlier era—especially when such schemes are administered by independent agencies, many of which are pulling out all the stops to remain relevant in a world where they no longer have a useful role to play.

PROTECT INTERNET FREEDOM AGAINST BURDENSOME NET NEUTRALITY MANDATES

Since the 1990s, the Internet has transformed global commerce, with American companies leading the way in developing better ways to harness the Internet's power and building the infrastructure to enable that progress. Although the Internet economy has remained largely free from the shackles of bureaucracy and overregulation for much of the past quarter century, this era of freedom appears to be coming to an abrupt end. On the infrastructure side, a decade-long effort by federal regulators to dictate business models to companies that provide broadband Internet access to consumers appears to have finally succeeded, pending a last-ditch legal challenge or action by Congress. Firms that operate websites, apps, and mobile platforms have managed to evade a similar crackdown so far, but the early indicators portend a similar fate across the Internet's several layers.

Since taking off in the 1990s, the Internet has flourished as a platform for free expression, innovation, and experimentation—a trend that, until very recently, showed no signs of slowing down. One might assume that federal agencies, having witnessed this success story, would refrain from regulatory intervention. Unfortunately, in recent years, the Federal Communications Commission (FCC) has abandoned its restrained approach, attempting time and time again to expand its reach over the Internet. This effort initially focused on the principle of "net neutrality," which holds that broadband providers should be barred from blocking or offering paid prioritization to time-sensitive Internet traffic—such as videoconferencing or online gaming—upon the request

Congress should:

- Classify the provision of broadband Internet access to consumers—whether wirelessly or by wire—as an information service not subject to common-carrier regulation under the Communications Act of 1934.
- Amend Section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302) to clarify that it does not grant to the FCC any regulatory authority not specifically afforded to the agency by the Act, reversing the D.C. Circuit's contrary holding in *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014).
- Comprehensively revise the Communications Act to deny the FCC the authority to regulate either the provision of broadband Internet access or services that use the Internet.

of either broadband subscribers or companies that sit at the "edge" of the network. The FCC's actions have since revealed that the agency's true intentions go far beyond net neutrality.

Over 20 years have elapsed since Congress last made any major changes to the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*). In 1996, Congress passed the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56), which contained practically no mention of the Internet. Since 1996, the Federal Communications Commission has struggled with the questions of whether and how it should regulate the Internet. Although the 1996 Act made clear that the FCC could not regulate "information services" (47 U.S.C. § 153[24]), it did not expressly specify whether providing Internet access is an "information service" or a "telecommunications service." The FCC is empowered to regulate providers of telecommunications services as common carriers, subjecting them to obligations ranging from mandatory interconnection to price regulation. (See Federal-State Joint Board on Universal Service, "Report to Congress," 13 FCC Rcd 11501, 11534–35, para. 69 and n.140, 1998.)

In the aftermath of the 1996 Act's passage, the FCC adopted a relatively humble approach to regulating the Internet. In a proceeding launched by the FCC under Clinton-appointed Chair William Kennard and completed under Bush-appointed Chair Michael Powell, the FCC concluded in 2002 that broadband delivered by cable television companies was an information service, not a telecommunications services, and therefore it should not be subject to common-carrier regulation. In 2005, the U.S. Supreme Court upheld the FCC's decision as a permissible construction of the 1996 Act (*National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 [2005]).

A related question arose during those years: How should the FCC treat broadband services offered by incumbent telephone companies—also known as the "Baby Bells," which were local telephone providers once part of AT&T before its breakup in the 1980s? The FCC had long regulated those legacy phone companies as common-carrier telecommunications services under Title II of the Communications Act (47 U.S.C. § 201 *et seq.*). Section 101 of the 1996 Act required the Baby Bells to make their last-mile facilities available at government-regulated rates to third-party competitors—many of whom, like the Baby Bells themselves, had started offering broadband Internet access over telephone wires using a technology known as the digital

subscriber line. In 2005, shortly after the Supreme Court's decision in *Brand X*, the FCC decided to align its treatment of broadband delivered over telephone lines with broadband-over-cable facilities, so it deregulated the broadband component of all wireline facilities. That decision not only freed phone companies from common-carrier regulation of their broadband offerings, but it also meant they no longer had to share their private property with broadband rivals.

For a time, wireline broadband providers operated outside of the FCC's legacy regulatory regime, and the Internet flourished. Firms such as Google, Facebook, Netflix, and Amazon grew into global high-tech leaders at a time when U.S. Internet service providers were largely free from the strictures of federal bureaucracy.

The FCC's initial efforts to regulate Internet service providers—first through adjudication, then through rulemaking—did not end well for the agency. In 2010, the U.S. Court of Appeals for the D.C. Circuit invalidated the FCC's first net neutrality attempt, in which the agency had ordered Comcast to stop degrading certain forms of peer-to-peer file sharing (*Comcast Corp. v. FCC*, 600 F.3d 642 [2010]). In response, the FCC issued net neutrality rules, but they too were invalidated by the court in 2014—even though the D.C. Circuit accepted the agency's argument that Section 706 of the 1996 Telecommunications Act conferred on the FCC an independent source of authority for certain types of regulation (*Verizon v. FCC*, 740 F.3d 623 [2014]). The court nonetheless held that the agency's no-blocking and nondiscrimination rules failed to "leave sufficient 'room for individualized bargaining and discrimination in terms.'"

In response, the FCC launched yet another effort to impose net neutrality regulation on Internet service providers. In May 2014, after a vigorous campaign by left-leaning activists and President Obama's administration to influence the FCC—a putatively "independent" agency—Democratic Chair Tom Wheeler proposed that the agency reinterpret the term "telecommunications service" as used in Title II of the Communications Act to encompass broadband Internet access services, contrary to the FCC's earlier determinations that Internet access was an "information service." In early 2015, the FCC voted along party lines to approve the proposal.

Several companies and other parties immediately petitioned the U.S. Court of Appeals for the D.C. Circuit to vacate the FCC's order, arguing that the agency's decision to re-

classify Internet access as a telecommunications service was arbitrary and capricious. But in June 2016, the court upheld the agency's order in a 2–1 opinion (*U.S. Telecom Association v. FCC*, 825 F.3d 674 [2016]). In response, several petitioners have asked the entire D.C. Circuit to review the panel opinion en banc, and some companies have publicly stated that they believe the U.S. Supreme Court will ultimately decide whether the FCC has the authority to regulate Internet service providers as common carriers.

Meanwhile, the FCC has embarked on a regulatory voyage using its proclaimed authority, intervening in ways that have little to do with net neutrality. Most notably, in 2016, the FCC launched a proceeding to regulate the privacy practices of Internet service providers, proposing rules designed to dictate how providers use information related to their subscribers' Internet usage. The agency's proposal risks curtailing the ability of broadband providers to offer consumers lower prices in exchange for targeted advertising, and it would generally make it costlier for broadband companies to do business. Indeed, as the FCC's ambition has grown, investment by providers has stagnated.

If the FCC continues on its current path, its agglomeration of powers will eventually transform the agency into an Internet regulation commission. As companies increasingly offer both facilities-based and edge services, as Google and Verizon already do, it seems unlikely that the FCC will resist the temptation to micromanage the terms by which Internet service providers and companies at the edge do business with one another.

Experts: Ryan Radia, Clyde Wayne Crews Jr.

For Further Reading

Gary S. Becker, Dennis W. Carlton, and Hal S. Sider, "Net Neutrality and Consumer Welfare," *Journal of Comparative Law and Economics*, Vol. 6, No. 3 (2010), pp. 497–519, http://faculty.chicagobooth.edu/dennis.carlton/research/pdfs/NetNeutralityConsumerWelfare.pdf.

Haley Sweetland Edwards, "Net Neutrality Campaign Claims Victory in 'Battle for the Net,'" *Time*, September 10, 2014, http://time.com/3319344/net-neutrality-congress-fcc/.

Robert Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1994).

Daniel B. Klein, *Reputation: Studies in the Voluntary Elicitation of Good Conduct* (Ann Arbor: University of Michigan Press, 1997).

Hal Singer, "Capital Expenditures in Broadband: 2Q-16 Update," Hal Singer blog, August 11, 2016, https://haljsinger.wordpress.com/2016/08/11/capital-expenditures-in-broadband-2q-16-update/.

Philip J. Weiser, "The Future of Internet Regulation," *University of California-Davis Law Review,* Vol. 43 (2009), pp. 529–590.

For a comprehensive discussion of why forbearance is unlikely to avert pervasive Title II regulation of broadband providers, see Comments of TechFreedom and ICLE, July 15, 2014, pp. 32–46, *Protecting and Promoting the Open Internet, FCC GN* Docket No. 14-28, https://ecfsapi.fcc.gov/file/7521706377.pdf.

OPPOSE TAXATION OF INTERNET ACCESS AND E-COMMERCE

Large brick-and-mortar retailers are urging Congress to pass the Marketplace Fairness Act (S. 698 in the 114th Congress), which the Senate passed in 2013, but which has stalled in the House. The bill would allow any state to force out-of-state domestic Internet retailers, such as Overstock and Amazon, to collect sales taxes on goods shipped to customers in that state.

The Marketplace Fairness Act would impose substantial new burdens on small and medium-sized businesses across the country, many of which employ few staffers and rely primarily on the Internet to sell goods across state lines. Those burdens would hurt the thriving online retail industry, which has benefited tremendously from low barriers to entry and minimal regulatory burdens. And it would enable many states to impose a de facto tax increase, as existing state laws that require residents to pay a "use tax" on goods they buy remotely for in-state consumption are rarely enforced.

Congress should:

- Reject the Marketplace Fairness Act.
- Enact legislation that bars states from requiring out-of-state online sellers to remit sales or use taxes based on the remote seller's relationship with passive in-state affiliate websites.

Experts: Jessica Melugin, Ryan Radia, and Clyde Wayne Crews Jr.

For Further Reading

Joseph Henchman, "The Marketplace Fairness Act: A Primer," *Background Paper* No. 69, Tax Foundation, July 14, 2014, http://taxfoundation.org/article/marketplace-fairness-act-primer.

"64 Days to a Tax Increase," editorial, *Wall Street Journal*, October 9, 2014, http://online.wsj.com/articles/64-days-to-a-tax-increase-1412810890.

PROTECT PRIVACY AND CYBERSECURITY BY SECURING PRIVATE INFORMATION FROM UNDUE GOVERNMENT PRYING

More and more consumers use Internet-based services such as Snapchat and Gmail for their private communications and back up sensitive files with "cloud" platforms such as Dropbox and iCloud. Those services do not guarantee perfect security. Fortunately, for Internet users who are not celebrities or public figures, malicious actors on the Internet rarely cause catastrophic consequences, especially for people who take reasonable security precautions. But criminals and hackers are not the only adversaries threatening our privacy and security—we should also worry about government.

Evolving technologies have eroded the legal constraints that were designed to protect Americans from overzealous or unscrupulous officials who want to access the private information we store with third-party service providers. Numerous government entities, from local law enforcement to federal intelligence agencies, have at their disposal a powerful arsenal of technological and legal means for accessing our communications and our metadata—that is, information about our communications, such as when and to whom a particular email was sent. As several high-profile leaks and recently declassified documents have revealed, the breadth of information the U.S. government collects about its citizens is staggering.

To level the playing field between the government and the governed, Congress should update and expand the legal framework under which law enforcement and intelligence officials conduct surveillance and compel private companies to divulge private information. By reaffirming the nation's commitment to individual liberty in the information age, Congress can reassure Americans that using the Internet and other cutting-edge platforms does not mean saying goodbye to privacy—and that fighting crime and protecting national security are consistent with the Fourth Amendment. Indeed, Congress can strengthen our privacy while preserving most of the tools that law enforcement and intelligence agencies need to do their important jobs.

The Stored Communications Act is the primary federal statute governing law enforcement access to private information stored by, or transmitted through, a third-party communications service (Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Title II, 100 Stat. 1848 [1986]; codified as amended at 18 U.S.C. §§ 2701–10

Congress should:

- Require that all law enforcement and intelligence authorities obtain a search warrant before:
  - Compelling a provider to divulge the contents of a U.S. person's private communications or other personal information stored with a third-party provider, in accordance with the provisions of the Email Privacy Act (H.R. 699 in the 114th Congress).
  - Tracking the location of a U.S. person's mobile communications device.

[2012]). The law, enacted in 1986 as part of the broader Electronic Communications Privacy Act, provides for varying degrees of protection for information stored electronically with third parties. Some of those protections are fairly noncontroversial.

For instance, law enforcement may compel a provider to divulge so-called basic subscriber information, including a subscriber's name and address, with a standard subpoena (18 U.S.C. § 2703[c][2]). Yet the same standard applies when law enforcement wishes to access the *contents* of private data stored with a cloud backup provider or folder synchronization service. (The government must generally give a subscriber notice before accessing the contents of his or her records, although the government routinely delays such notice under 18 U.S.C. § 2705[a].) Those subpoenas are typically issued by a prosecutor and receive no judicial review whatsoever. On the other hand, the Stored Communications Act requires law enforcement to obtain a warrant issued upon a showing of probable cause before it may compel a provider to divulge the contents of a person's unopened emails stored remotely, provided that such emails are no more than 180 days old (18 U.S.C. § 2703[a]).

In 1986, when Congress crafted this law, the distinction between opened and unopened email—and that between communications and other information stored electronically online—made sense, given the state of technology at the time. In 2016, however, Americans reasonably assume that their digital "papers and effects" are safe from warrantless government access—an often inaccurate assumption.

To remedy this mismatch between perception and reality, and to assure consumers that their data in the cloud are safe from law enforcement fishing expeditions, Congress should pass legislation based on the Email Privacy Act (H.R. 699 in the 114th

Congress), which already enjoys 314 cosponsors in the House—including most Republicans and several Democrats. Congress should also require law enforcement to obtain a warrant before tracking the location of an individual's mobile device, unless a provider agrees to disclose a subscriber's information because of an apparent emergency involving an imminent threat to human life, such as the kidnapping of a child.

Experts: Ryan Radia, Clyde Wayne Crews, Jr.

For Further Reading

Orin S. Kerr, "A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It," *George Washington Law Review*, Vol. 72 (2004), p. 1208, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=421860.

Glenn Greenwald, "NSA Collecting Phone Records of Millions of Verizon Customers Daily," *The Guardian*, June 5, 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

EMPOWER THE MARKET TO PROTECT CYBERSECURITY

Companies and consumers are increasingly worried about securing their digital information. A single data breach that compromises a firm's trade secrets or customer information can cost $1 billion or more in identity theft, lost business, system repairs, legal fees, and civil damages. Although cybersecurity is primarily a technological and economic challenge, laws and regulations also shape the choices that firms and individuals make about how to secure their systems and respond to intrusions.

The federal government has two primary roles in cybersecurity. First, it should enforce laws against accessing computers and networks without authorization by investigating suspected intrusions and prosecuting such offenses. Second, it should better secure its own computers and networks—with a particular focus on those systems that could endanger human life, if compromised.

Some bills introduced in Congress in recent years would have the federal government regulate private sector cybersecurity practices. Those proposals are unwise, for any improvement they bring about in cybersecurity—if one is even realized—would likely be offset by countervailing economic burdens. Although many businesses have experienced costly cybersecurity intrusions, those businesses also tend to bear much of the ensuing costs—customers leave, insurers increase premiums, and lawsuits are filed by trial attorneys in the business of finding purportedly injured classes of people to represent.

Firms that suffer cyberattacks because of their lax cybersecurity practices often impose costs—externalities—on third parties who may be unable to recover the resulting losses, such as the time a consumer spends resolving disputes with banks over fraudulent credit card purchases. But the mere existence of this externality does not

Congress should:

- Reject proposals to regulate private sector cybersecurity practices.
- Focus on defending government systems and networks from cyberattacks.

necessarily merit government intervention to eliminate it. Instead, such regulation is desirable only if it induces firms to take additional cost-effective precautions.

Even if a systematic market failure existed in cybersecurity, why should regulators be expected to know how a firm should allocate its cybersecurity budget or how much it should spend on cybersecurity? Adjusting liability rules so that companies bear a greater share of the costs resulting from their cybersecurity behavior is far more likely to enhance social welfare than prescriptive regulation.

Experts: Ryan Radia, Clyde Wayne Crews, Jr.

For Further Reading

Jerry Brito and Tate Watkins, "Loving the Cyber Bomb? The Dangers of Threat Inflation in Cybersecurity Policy," *Harvard National Security Journal,* Vol. 3, No. 1 (2011), pp. 39–84, http://harvardnsj.org/wp-content/uploads/2012/01/Vol.-3_Brito_Watkins.pdf.

Eli Dourado, "Is There a Cybersecurity Market Failure," *Working Paper* No. 12–05, Mercatus Center at George Mason University, January 2012, http://mercatus.org/sites/default/files/publication/Cybersecurity_Dourado_WP1205_0.pdf.

Tyler Moore, "Introducing the Economics of Cybersecurity: Principles and Policy Options" in *Proceedings of a Workshop on Deterring Cyberattacks* (Washington, DC: National Academies Press, 2010), pp. 3–24, https://www.nap.edu/catalog/12997/proceedings-of-a-workshop-on-deterring-cyberattacks-informing-strategies-and.

Paul Rosenzweig, "Cybersecurity and the Least Cost Avoider," Lawfare (blog), November 5, 2013, http://www.lawfareblog.com/2013/11/cybersecurity-and-the-least-cost-avoider/.

U.S. Government Accountability Office, *Cybersecurity: National Strategy, Roles, and Responsibilities Need to Be Better Defined and More Effectively Implemented*, GAO-13-187 (Washington, DC: GAO, 2013), p. 36, http://www.gao.gov/assets/660/652170.pdf.

OPPOSE BURDENSOME INTERNET SALES TAXES

The rapid growth of online retailing over the past two decades has been met by calls from state and local officials for greater authority to capture more sales tax revenue, including from consumers residing in other states. Similarly, big-box retailers are asking Congress to "level the playing field" by removing physical nexus standards for collecting state sales tax, which they claim gives an advantage to online retailers.

Currently, under the Supreme Court's decision in *Quill v. North Dakota* (1992), a seller must have a physical presence, or "nexus," in the buyer's state to become subject to the latter state's sales tax. Far from a tax loophole, this is the principle of "no taxation without representation" in action. The seller, not the buyer, calculates and remits sales tax. Although this arrangement can lead to different sales tax treatment among different types of retailers, it greatly benefits consumers by preserving healthy tax competition among states.

However, several state and local governments and big-box retailers are lobbying Congress and the administration to enact in the Marketplace Fairness Act (MFA) and Remote Transaction Parity Act (RTPA), both of which would (a) impose burdensome—in some cases lethal—compliance costs for small and midsize sellers, (b) reduce interstate tax competition, (c) decrease political accountability in cross-border audits, and (d) subject consumers to potential privacy violations.

The Marketplace Fairness Act (MFA) passed the Senate in 2013 and was reintroduced in the 114th Congress, but companion legislation stalled in the House. The MFA empowers states to reach across their borders and collect sales tax from companies based in other states. It would impose high compliance costs on businesses, by requiring them to calculate taxes for approximately 10,000 distinct jurisdictions, each with its own rates, definitions, exemptions, and tax holidays. It would also subject businesses to audits by out-of-state tax authorities. It would lessen downward pressure on sales tax rates from tax competition and would threaten consumer privacy through states' data sharing.

The Remote Transaction Parity Act, introduced in the 114th Congress by U.S. Rep. Jason Chaffetz (R-Utah), adopts the same approach as the MFA, by giving states unprecedented new powers to reach across their borders to tax out-of-state businesses for online sales, but it includes a few tweaks. Presumably to address concerns about cross-

Congress should:

- Prevent states from exporting their taxation regimes outside their geographic borders.
- Codify longstanding rules for physical nexus requirements of state taxation.
- Support origin-based approaches to remote state sales tax.

state audits, the RTPA creates an option for sellers to use state-employed tax compliance agents. It attempts to protect sellers with gross receipts under $5 million from being audited by other states, but it then creates a loophole whereby a state can trigger an audit on a remote seller of any size by claiming "intentional misrepresentation." The draft also contains a boiling frog-style rolling small-seller exemption. In the first year, it exempts businesses with less than $10 million in gross receipts for combined remote and in-state sales in the previous year. In the second year, the threshold drops to $5 million, and in the third and subsequent years, it drops to $1 million.

In August 2016, House Judiciary Committee Chair Bob Goodlatte (R-Va.) released a discussion draft of a hybrid-origin sourcing model as an alternative to the MFA and RTPA approach. Under his plan, the seller applies his home domicile's sales tax base and the buyer's home state's sales tax rate to remote purchases. The seller then remits the tax to his home state's tax authority. That authority then forwards the money to a clearinghouse that channels revenue back to the buyer's home taxing authority by formula. This approach avoids the high compliance costs for sellers in the MFA and RTPA and eliminates their threat of cross-border audits and the resulting consumer privacy concerns. Unfortunately, it also undermines beneficial interstate tax competition by allowing states to export their tax rates to sellers wholly located in other states. It also requires businesses in states with no sales tax to collect and remit sales taxes, thereby compromising those states' autonomy.

While Congress debates the issue, many states have taken it upon themselves to expand the definition of nexus in order to trigger sales tax collection. Those attempts are working their way through the courts with varying results and are likely to continue until Congress acts.

Polling shows that attempts to expand sales taxes on the Internet remain unpopular in the U.S., especially among young adults. A 2013 Gallup poll found 57 percent of

all adults opposed an Internet sales tax, whereas 73 percent of 18- to 29-year-olds opposed one.

Proponents of MFA-style legislation include state and local governments and the associations that represent them. Expanded sales tax collection would be a boon to their coffers and would spare them from politically unpopular budget cuts. Big-box retailers with a physical presence that triggers sales tax obligations in every state stand to gain a competitive advantage from the MFA's disproportionate compliance cost burdens on smaller retailers.

Attempts to expand states' ability to tax online sales outside their borders are wildly unpopular with voters and fly in the face of constitutional principles of federalism. By contrast, an origin-based sales tax approach would address the inequities of the current regime without any of the negative consequences of allowing state governments to tax nonresidents.

Experts: Jessica Melugin, Ryan Radia

For Further Reading

Jessica Melugin, "Facts on the Marketplace Fairness Act (S. 743, formerly S. 336)," *Web Memo* No. 20, Competitive Enterprise Institute, April 18, 2013, https://cei.org/web-memo/facts-marketplace-fairness-act-s-743-formerly-s-336.

———, "The Marketplace Fairness Act Would Create a State Sales Tax Cartel and Hurt Consumers," *OnPoint* No. 180, Competitive Enterprise Institute, July 30, 2012, https://cei.org/onpoint/marketplace-fairness-act-would-create-state-sales-tax-cartel-and-hurt-consumers.

———, "The Real Reason Amazon Flip-Flopped on Internet Sales Taxes," Forbes.com, June 3, 2013, http://www.forbes.com/sites/realspin/2013/06/03/the-real-reason-amazon-flip-flopped-on-internet-sales-taxes/#47eb8301104b.

———, "Understanding an Internet Sales Tax," *Web Memo* No. 31, Competitive Enterprise Institute, November 20, 2015, https://cei.org/content/understanding-internet-sales-tax.

Michael S. Greve, Testimony on "Internet Sales Taxation" submitted to the U.S. Senate Committee on Finance on Internet Sales Taxation, August 1, 2001, http://www.finance.senate.gov/imo/media/doc/080101mgtest.pdf.

———, *Sell Globally, Tax Locally: Sales Tax Reform for the New Economy* (Washington, D.C.: AEI Press, 2003).

———, "The Internet Sales Tax Rush," editorial, *Wall Street Journal*, April 21, 2013, http://www.wsj.com/articles/SB10001424127887324493704578432961601644942.

MODERNIZE REGULATION OF TELEVISION AND MEDIA

In recent years, Americans have increasingly augmented or even replaced traditional television viewing with Internet-based video services, such as Hulu, Netflix, Amazon Instant Video, and HBO Now. Yet the U.S. television marketplace remains fragmented because of an anachronistic set of laws and regulations that govern broadcasters, cable television providers, and satellite carriers. Those outdated rules not only undermine the vitality of traditional media businesses, they also threaten the future of Internet-based television services.

Under current law, if a cable or satellite company wishes to retransmit the signal of a broadcast station, such as a local NBC affiliate, it must first secure the consent of that affiliated station's owner (47 U.S.C. § 325[b]). In most circumstances, the station will permit the television provider to carry its signal only if it agrees to pay the station a monthly fee based on the number of subscribers who receive the station's programming. Ultimately, consumers pay those fees as part of their monthly cable or satellite bill. Most of those fees are not retained by each local station. Instead, stations are typically obligated by contract to pay the fees they collect from cable and satellite providers to the nationwide television network with which they are affiliated. Additionally, each cable or satellite company that retransmits a broadcast signal must pay the U.S. Copyright Office a legally prescribed amount in exchange for a compulsory copyright license to publicly transmit the underlying television programs. In turn, the Copyright

Congress should:

- Amend the Copyright Act to give creators of original television programs the same exclusive rights to their audiovisual works as those afforded to other artists, regardless of whether such programming is transmitted over broadcast stations, cable systems, satellite carriers, or the Internet.
- Repeal Title VI of the Communications Act and related obligations and privileges to which multichannel video programming distributors are currently subject, except for provisions preempting states and their subdivisions from imposing unreasonable regulations on television providers.
- Eliminate ownership limits and similar economic restrictions on legacy media businesses, including the newspaper cross-ownership rule, the television duopoly rule, and limits on local marketing agreements.

Office distributes those fees to the copyright owners whose works were distributed by the television company.

In contrast to this convoluted regime, when an Internet company such as Netflix or Hulu wishes to stream a television show to its subscribers, it must secure the permission of a single entity—the owner of the show's copyright. Both sides are free to come up with mutually agreeable terms. No payments to broadcasters or the Copyright Office are required. No government fee schedule must be examined. Of course, Netflix does not always come to an agreement when it wishes to stream a particular television show—from time to time, certain shows and movies disappear from the company's library and are replaced by new ones. Similarly, cable and satellite providers sometimes fail to reach an agreement with a broadcast station to carry its signal, resulting in a temporary "blackout" for the provider's subscribers. Neither situation is optimal, but existing law assigns the FCC a role in disputes involving broadcasters and traditional television companies, not in disputes involving Internet-based platforms. Clearly, FCC regulation has not improved market outcomes.

Many other complex regulations affect—and in many cases distort—the market for television programs distributed by cable and satellite companies. Title VI of the Communications Act contains myriad rules governing cable systems and satellite carriers (47 U.S.C. § 521 *et seq.*). For example, cable and satellite companies are subject to "program carriage" regulations that limit their ability to strike deals with video programming vendors to obtain exclusive programming rights (47 C.F.R. § 76.1301). Yet that is precisely the type of arrangement that has been central to the success of Internet streaming platforms, many of which differentiate themselves as the exclusive source of first-run hit shows, such as Netflix's *House of Cards* and Amazon's *The Man in the High Castle*. In fact, the FCC has even suggested that it might reinterpret the Communications Act in such a way that many of those legacy provisions would apply to "linear" Internet-based platforms that distribute live programming at prescheduled times.

Beyond the FCC's rules governing television, many other regulations inhibit diversity and competition in mass media. For instance, in recent years, the newspaper industry has lost billions of dollars in revenue and millions of subscribers. In many cities, iconic newspapers have ceased printing a daily edition or have closed their doors entirely. Yet FCC rules effectively bar a company from owning both a newspaper and a broadcast

television station serving the same city—despite the natural advantages of consolidating news-gathering operations across various media platforms. That regulation has undoubtedly contributed to the decline of newspapers, ultimately hurting people who live in communities that would otherwise be served by media outlets with more funding, personnel, and other resources.

Experts: Ryan Radia, Clyde Wayne Crews, Jr.

For Further Reading

Ryan Radia, "Regulation Killed the Video Star: Toward a Freer Market in Broadcast Television," *Federal Communications Law Journal*, Vol. 67, (2015), p. 235, http://www.fclj.org/wp-content/uploads/2015/08/67.2.3_Radia.pdf.

"Comments of CEI, ICLE, and TechFreedom to the FCC in the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking," MB Docket No. 14-261 (2014), https://cei.org/sites/default/files/CEI-ICLE-TechFreedom%20Comments%20in%20FCC%20MVPD%20Definition%20Proceeding%2014-261.pdf.

UPDATE COPYRIGHT FOR THE INTERNET AGE

U.S. copyright law confers upon creators of original expressive works an attenuated property right in their creations. Copyright serves important societal interests—enriching not only artists but also consumers, who benefit from works that might not have been created but for copyright protection. The Internet has made it easier than ever to sell copies and licenses of original works, but it has also facilitated the unauthorized distribution of such works on an unprecedented scale. Therefore, Congress should amend copyright laws to address provisions that inhibit consumers' ability to enjoy original works while also considering reforms that would better protect creative works from infringement.

Article I of the U.S. Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Since the nation's founding, Congress has enacted a series of federal copyright statutes—including, most recently, the Copyright Act of 1976. (Pub. L. No. 94-553, 90 Stat. 2541; codified as amended at 17 U.S.C. §§ 101–810). For the most part, this regime works well, enabling artists who create popular works to earn a return on their efforts. From television shows and movies to music, the United States is home to many of the world's most celebrated artists and creative industries.

But the Copyright Act could be improved in certain ways. For instance, its prohibition of tools that are designed to circumvent digital rights management (DRM) is over-

Congress should:

Amend the U.S. Copyright Act to

- Ban tools that circumvent technological protection measures only if they are likely to undermine the value of the underlying creative works they seek to protect.
- Afford users of copyrighted works an affirmative defense to infringement if they could not find the copyright holder, despite conducting a good-faith, reasonable search for the owner.
- Enhance the ability of copyright owners to ensure that infringing copies of their works on the Internet are permanently taken down without imposing undue burdens on online service providers that host or index online content.

broad. Although effective DRM can be invaluable, enabling content owners to better combat the infringement of their expressive works, not all forms of DRM circumvention are illegitimate or unlawful. Yet Section 1201 of the Copyright Act makes it illegal to create or distribute technologies that are primarily designed to "circumvent a technological measure that effectively controls access" to a work or circumvent "protection afforded by a technological measure that effectively protects a right of a copyright owner" in a copyrighted work (17 U.S.C. § 1201).

In general, companies and individuals who sell or create tools that contribute to copyright infringement are *not* liable for those infringing acts if the tools are "capable of commercially significant non-infringing uses," to borrow a line from the U.S. Supreme Court's famous "Betamax" opinion in 1984 (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417). Similarly, in the case of firms that distribute tools designed to circumvent technological protection measures, courts should assess on a case-by-case basis whether those tools are designed and marketed *primarily* to infringe upon the underlying work, as opposed to merely facilitating noninfringing uses of the work—including fair use (17 U.S.C. § 107).

Congress should also address the "orphan works problem" that plagues the ongoing enjoyment of millions of copyrighted works. The Copyright Act protects the exclusivity of each original work for the life of its author plus 70 years or, for works of corporate authorship, for 120 years after creation or 95 years after publication, whichever endpoint is earlier (17 U.S.C. §§ 302–4). People eventually die, of course, whereas corporations are regularly acquired or cease to exist. Yet many works created by deceased persons or defunct corporations remain subject to copyright protection, making it difficult or impossible to ascertain who holds the copyright in such works. Companies that wish to monetize and distribute these so-called orphan works often forgo the opportunity, for they fear that the true owner might emerge out of nowhere and sue the company for copyright infringement.

To encourage copyright holders to come forward, and to protect firms that genuinely cannot find the owner of a work despite reasonable efforts to do so, Congress should amend the Copyright Act to create a new defense to copyright infringement lawsuits. A person who uses a copyrighted work should enjoy an affirmative defense to copyright infringement if he or she could not find the copyright holder despite conducting a good-faith, reasonable search for the owner. Although this reform would not resolve

the orphan works problem entirely, it would mark a major step toward ensuring that consumers can enjoy the wealth of protected works whose owners are unknown.

Creators seeking to prevent the infringement of their works on the Internet regularly make use of the Copyright Act's notice-and-takedown regime, which Congress created in 1998 (17 U.S.C. § 512). Under that process, online service providers that store digital files on behalf of users—such as video hosting sites—or that provide tools for locating information on the Internet—such as search engines—are eligible for a safe harbor from copyright infringement liability if they expeditiously remove content or links to infringing materials upon receiving notification from a copyright owner regarding the unauthorized work. Although this system has proved to be invaluable for creators seeking to protect their exclusive rights in their original works, many artists—especially those without the resources of larger content companies—struggle to effectively combat the unlawful dissemination of their creations. Therefore, Congress should carefully explore potential revisions to the Copyright Act's notice-and-takedown provisions to ease the burden on copyright owners whose works are repeatedly reposted after being taken down from the same provider's site.

In examining such reforms, however, lawmakers should resist calls to impose technological mandates on online service providers that could materially increase the cost of operating user-centric platforms or encourage the use of tools that indiscriminately filter content without regard to whether it is protected by fair use.

Experts: Ryan Radia, Clyde Wayne Crews, Jr.

For Further Reading

Ryan Radia, "Congress Isn't Ready for a Big Change. Here Are Some Smaller Ones," Cato Unbound, January 25, 2013, http://www.cato-unbound.org/2013/01/25/ryan-radia/congress-isnt-ready-big-change-here-are-some-smaller-ones.

Jerry Brito and Bridget C. E. Dooling, "An Orphan Works Affirmative Defense to Copyright Infringement Actions," *Michigan Telecommunications and Technology Law Review* 12, No. 1 (2005): 75–113, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942052.

John F. Duffy, "The Marginal Cost Controversy in Intellectual Property," *University of Chicago Law Review* 71, No. 1 (2004): 37–56.

7 Transportation

Mobility is one of our most important needs, one we often take for granted until it is threatened or lost. Reliable movement of both persons and goods depends upon adequate transportation infrastructure investments and management. In the United States, transportation now accounts for nearly 10 percent of gross domestic product. Four million miles of highways enable 3 trillion vehicle-miles traveled every year, according to the Bureau of Transportation Statistics. Nearly 20,000 airports enable almost 10 million annual aircraft departures carrying over 685 million passengers. More than $12 trillion worth of goods are moved every year in the United States by road, rail, air, and water.

Transportation networks vary greatly in quality, financing, and management. For instance, roads are generally paid for out of user-tax or property-tax revenues, whereas freight rail is privately financed and operated. One important lesson is that the private sector is generally better than government in financing and operating high-quality transportation systems at lower costs. New technologies and management practices present serious challenges going forward, particularly to those networks that exist largely as government monopolies.

Even if privatization of existing networks is politically unattainable, the starting point for sound transportation policy is adherence to the user-pays/user-benefits principle. Transportation infrastructure and operations should be paid for by those who directly benefit from their use. Despite some spillover effects, the vast majority of benefits

accrue to the network users. Compared with general revenue funding of government-owned infrastructure and services, the user-pays principle offers the following advantages:

- **Transparency**. Unlike tax dollars that wind through convoluted bureaucracies, charges "follow" users.
- **Fairness**. Users pay and benefit directly from improvements generated from their payments; users who use the systems more pay more.
- **Signaling investment**. Operating revenues generally track use, and popular systems can be identified for targeted improvements.

Unfortunately, many federal transportation programs do not adhere to the user-pays principle. In those cases, the programs should be reformed to meet that principle. If such reform proves impossible or unfeasible, it suggests that the program has a high cost and low value and should be eliminated.

The history of economic regulation of transportation systems in the United States shows that competitive markets benefit consumers more than top-down planning and control. In the late 1970s and early 1980s, airlines, motor carriers, and freight rail were partially deregulated, leading to lower prices and improved service. Today, rules aimed at promoting safety dominate many discussions of transportation regulation. However, although safety regulation was well intended, many of the resulting measures provide few, if any, benefits at very high costs. In a number of cases, safety regulation has become a way to impose backdoor economic regulation, even though explicit economic regulation is now greatly constrained or prohibited by law. That factor should concern policy makers.

To better promote high-value, low-cost mobility, Congress should critically examine current practices and work to remove government barriers to competition and innovation in the transportation sector. The Federal Aviation Administration should be reformed to promote increased airline competition and encourage new innovations in aircraft systems, airspace management, and airport financing. The federal role in surface transportation should be rationalized to allow state and local flexibility while adhering to the user-pays principle.

MODERNIZE AMERICA'S AIR TRAVEL INFRASTRUCTURE IN THE FEDERAL AVIATION ADMINISTRATION REAUTHORIZATION

The Airline Deregulation Act of 1978 eliminated much of the economic regulation of airlines. Since then, the airline industry has rationalized, airfares have fallen dramatically, and airline travel has been democratized. Unfortunately, airspace management was not reformed in a similar direction. Limits on airport user funding have reduced investment and competition at U.S. airports. The United States remains one of the few developed economies to have its air navigation service provider integrated into its aviation safety regulatory agency—in this case, the Air Traffic Organization (ATO) within the Federal Aviation Administration (FAA). That failure is reducing the efficiency of the National Airspace System and inhibiting the integration of new technologies, such as unmanned aircraft systems (UAS).

Just as mileage-based user fees offer benefits over general revenue funding in surface transportation, aviation user charges offer significant advantages over nonuser funding. Since 1991, Congress has allowed airports to collect per-head charges on passenger enplanements, known as passenger facility charges, to be spent on eligible airport-related projects under 49 U.S.C. § 40117. Currently, the maximum PFC is capped at $4.50 (49 U.S.C. § 40117[b][4]). This cap, which was last raised in 2000, has seen inflation erode its buying power by approximately half. Given the advantages of user charges over general revenue, Congress should strengthen the PFC by eliminating the cap, as had been proposed in the Restoring Local Control of Airports Act of 2016 (H.R. 5563, 114th Congress).

Nearly all developed economies have air navigation surface providers (air traffic managers) that are independent of their national aviation safety regulators. Going further, Canada corporatized its air navigation service provider in 1996, creating a private

Congress should:

- Eliminate the cap on passenger facility charges (PFCs).
- Corporatize air traffic control.
- Provide more stringent oversight of the FAA's ongoing attempt to integrate unmanned aircraft systems into the National Airspace System.

nonprofit, called NAV CANADA, to take over airspace management. That change has allowed for rapid modernization and led to inflation-adjusted user fees that are 30 percent lower than the aviation taxes they replaced. Unfortunately, the U.S. National Airspace System is managed by the FAA's Air Traffic Organization. The ongoing problems facing the air traffic modernization program known as NextGen are largely attributable to obsolete government structures.

The main obstacle preventing us from realizing those benefits is the fundamental conflict between the FAA's role as safety regulator and its role as air traffic control provider, which has led to an overcautious culture within the ATO and an inability to seek and retain top talent. That conflict is compounded by the fact that the ATO faces a number of political oversight constraints, leading it to treat politicians and bureaucrats as its customers, rather than the airports and aircraft crews that rely on its services. Procurement of needed new technologies has slowed to a glacial pace, inducing many observers to question whether the ATO is even capable of modernizing for the 21st century.

A recent study from the Reason Foundation's Robert Poole recommends three actions to bring U.S. air traffic management into the 21st century:

- Separate the ATO from the FAA, with the FAA becoming exclusively an aviation safety regulator with arm's-length oversight of air traffic control;
- Set up a funding mechanism for this new air traffic manager using cost-based customer charges, rather than aviation user taxes subject to annual appropriations; and
- Create and appoint a board of stakeholders to govern this newly independent air traffic control organization. The board could be similar to NAV CANADA's governance structure, where airlines, airports, and air traffic controllers are represented.

In the forthcoming FAA reauthorization debates, Congress should adopt the ATC Corporation proposal of House Transportation and Infrastructure Committee Chair Bill Shuster (R-Penn.) that was contained in the Aviation Innovation, Reform, and Reauthorization Act of 2016 (H.R. 4441 in the 114th Congress). Not doing so risks forgoing the efficiency and safety benefits that other developed nations have already experienced. Air traffic control modernization will allow airspace users and managers to harness new navigation technologies and adopt superior management practices.

These reforms are critical to emerging aircraft technologies, such as unmanned aircraft systems. In the 2012 FAA reauthorization, Congress ordered the agency to "provide for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but not later than September 30, 2015" (Pub. L. No. 112-95, 126 Stat. 73). Unfortunately, the resulting FAA rulemakings to date have done little to complete this integration and have restricted many of the most promising functions and applications of small UAS.

UAS technology could provide large mobility benefits in the future. Although safety, tort liability, and privacy concerns remain, the United States risks falling behind other nations in integrating UAS into the civil airspace. Congress should increase its level of oversight over the FAA's UAS integration process and should examine how to remove current statutory and regulatory barriers.

The FAA's recent final rule on Operation and Certification of Small Unmanned Aircraft Systems imposes extreme limitations on the use of UAS under 55 pounds. Such restrictions include a requirement that UAS operators may operate only one UAS at a time, which prohibits coordinated automated operations and prohibitions on flying beyond the visual line of sight, flying over people, and flying after dark. Such restrictions essentially outlaw advanced surveying, large-scale infrastructure inspection, and parcel delivery, to name a few promising operations. The FAA has promised to review these restrictions in forthcoming rulemakings, but those promises should be accompanied by aggressive congressional oversight.

Further, Congress should exempt the smallest UAS from most FAA operations and certifications rules. In the last session of Congress, both the House and the Senate adopted "micro UAS" amendments that would exempt all UAS under 4.4 pounds from these stringent rules. Going forward, Congress should again adopt this proposal and strengthen it by extending micro UAS exemptions to manufacturer certification.

Another benefit of air traffic control corporatization—assuming it reduces the overcaution caused by the FAA's incentives as a safety regulator—could be a more rapid integration of UAS into the National Airspace System, which would allow for more innovative uses of the technology.

Expert: Marc Scribner

For Further Reading

Marc Scribner, "Air Traffic Control Reform: Frequently Asked Questions," *Web Memo* No. 35, Competitive Enterprise Institute, February 9, 2016, https://cei.org/sites/default/files/Marc%20Scribner%20-%20Air%20Traffic%20Control%20Reform%20Frequently%20Asked%20Questions.pdf.

———, "FAA's Long-Delayed Drone Certification and Operations Rule Disappoints," Competitive Enterprise Institute blog, June 21, 2016, https://cei.org/blog/faas-long-delayed-drone-certification-and-operations-rule-disappoints.

———, "Reps. Jolly, Massie, and Bilirakis Introduce Bill Supporting PFC Modernization," Competitive Enterprise Institute blog, June 24, 2016, https://cei.org/blog/reps-jolly-massie-and-bilirakis-introduce-bill-supporting-pfc-modernization.

———, "Up in the AIRR, Part 2: Unmanned Aircraft Systems," Competitive Enterprise Institute blog, February 24, 2016, https://cei.org/blog/airr-part-2-unmanned-aircraft-systems.

Glen McDougall and Alasdair Roberts, "Commercializing Air Traffic Control: Have the Reforms Worked?" *Canadian Public Administration*, Vol. 51, No. 1, March 2008, pp. 45-69.

Robert W. Poole, Jr., "Organization and Innovation in Air Traffic Control," Hudson Institute, November 2013, http://www.hudson.org/content/researchattachments/attachment/1199/poole_hi_res.pdf.

REFORM SURFACE TRANSPORTATION

Surface transportation policy has become less rational and more ideological in recent years. Environmentalists, ideologically motivated urban planners, and their political allies have succeeded in diverting resources from improving highways to mass transit, even as road congestion has dramatically increased—now imposing at least $180 billion annually in economic costs nationwide. The increased use of discretionary grants has further politicized the process and has enabled increased funding to high-cost, low-value projects. The current prohibition on states tolling their own Interstate segments restricts experimentation in revenue collection and financing that could usher in better funding and management practices. New and existing pilot programs that allow state-based funding alternatives to fuel taxes should be promoted and monitored.

In light of the September 2016 release of the *Federal Automated Vehicles Policy* by the National Highway Traffic Safety Administration (NHTSA), Congress should maintain tight oversight over the agency's policies regarding that technology. Many of the nonbinding recommendations are welcome and help fill a vacuum that previously threatened to produce a patchwork of conflicting state laws and regulations. In addition, NHTSA recommends that its Federal Motor Vehicle Safety Standard exemption authority should be expanded to allow more exempted vehicles for lengthier production periods.

However, NHTSA's guidance document also suffers from a number of flaws. Although NHTSA repeatedly and correctly states that the guidance contained in the document is nonbinding and voluntary, the agency also recommends that states mandate its vehicle safety performance and reporting guidelines as a condition of vehicle permitting. NHTSA cannot credibly say it is merely recommending voluntary, nonbinding actions and then turn around and tell other government agencies to mandate them. If NHTSA wishes to mandate automated vehicle performance safety assessments, it should go through the normal rulemaking process as required under the Administrative Procedure Act. Trying to coax state governments into mandating "nonbinding" federal policy does not inspire confidence that NHTSA is planning to play aboveboard.

Congress should:

- Provide oversight of state-based mileage-based user fee pilot programs authorized under the Surface Transportation System Funding Alternatives Program, Section 6020 of the Fixing America's Surface Transportation (FAST) Act of 2015.
- Streamline surface transportation programs by eliminating discretionary grant programs, such as Transportation Investment Generating Economic Recovery (TIGER).
- Hold hearings on NHTSA's treatment of automated vehicle technology to ensure that the agency is not pursuing counterproductive precautionary approaches that could threaten innovation and lead to additional preventable traffic crashes, injuries, and fatalities.

Expert: Marc Scribner

For Further Reading

Marc Scribner, "A Free Market Response to the Federal Automated Vehicles Policy," Competitive Enterprise Institute blog, September 20, 2016, https://cei.org/blog/free-market-response-federal-automated-vehicles-policy.

———, "Memo to Road Socialists: There Is Nothing Unlibertarian about Road Pricing," Competitive Enterprise Institute blog, November 5, 2013, https://cei.org/blog/memo-road-socialists-there-nothing-unlibertarian-about-road-pricing.

Baruch Feigenbaum, "Evaluating and Improving TIGER Grants," *Policy Brief* No. 99, Reason Foundation, July 2012, http://reason.org/files/improving_transportation_tiger_grants.pdf.

Food, Drugs, and Consumer Freedom

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Few matters are as important to consumers as the foods they eat, the medicines they put in their bodies, and the ways they choose to spend their time and money. Fortunately, the number of choices we have as consumers has never been greater. The quality and affordability of foods, medicines, and other consumer products have never been better. Nevertheless, many self-described consumer activists insist that government do more to control the availability, safety, and cost of the products we want and need. Consumers have exacting demands for the products they buy and use, and they, not government, are generally the best judges of the value and quality of individual products and services.

Consumers want products that are safe and effective, along with a broad range of choices and affordable prices. Government regulation of food, drugs, and other consumer products is generally intended to ensure safety, but one-size-fits-all regulation is often poorly suited for ensuring safety for a wide range of consumers with highly individualized needs. Other rules are explicitly intended to reduce choices or to discourage consumers from choosing particular goods or services. Whatever the rationale, government regulation necessarily reduces choice and imposes costs on producers and consumers, leading to higher prices in the marketplace.

Legislators and regulators also respond to political pressures, so rules are often motivated by fear-driven activist agendas, rather than basic principles of science, or by a desire to control the choices consumers make "for their own good." In such cases,

governments too often tend to restrict the use of products and technologies that activists consider risky, but are nevertheless safer than the alternatives. When that happens, genuine safety can be compromised. The result of politically driven regulation is not a safer, more secure, and more prosperous world, but one that is poorer, less fair, and often less safe. Consumers are best helped not by heavy-handed restrictions but by vigorous competition in the marketplace by producers competing with one another to supply consumer demands and needs.

It is essential then, that government regulation of consumer choices be limited to policing the marketplace to ensure that consumers are not misled by false claims. Product safety and labeling regulations should be designed with maximum flexibility to allow producers to offer the products and use the production methods that best meet their customers' demands. Where safety restrictions are truly needed to protect consumers or the environment, quality standards should be based on the best available scientific data, while allowing producers and consumers the widest possible range of choice.

PROTECT CONSUMER FREEDOM BY ENSURING ACCESS TO GENETICALLY ENGINEERED FOODS

The safety of genetically engineered organisms—also known as biotech, bioengineered, and genetically modified organisms (GMOs)—has been studied extensively by dozens of the world's leading scientific bodies. Every one of them has concluded that the techniques give rise to no new or unique risks compared with conventional breeding methods, and that the ability to move individual genes between organisms makes the characteristics of genetically engineered (GE) products more precise and predictable, and therefore safer, than comparable products developed with more conventional breeding methods. Furthermore, the consensus among scientists who have studied genetic engineering holds that the evaluation of these products "does not require a fundamental change in established principles of food safety; nor does it require a different standard of safety" than those that apply to conventional foods (Institute of Food Technologists, *IFT Expert Report on Biotechnology and Foods* [Chicago: Institute of Food Technologists, 2000], p. 23).

Nevertheless, genetically engineered plants and animals, and foods derived from them, have been subject to extensive regulatory requirements imposed by three different agencies in the United States: the U.S. Department of Agriculture (USDA), Environmental Protection Agency (EPA), and Food and Drug Administration (FDA). Nearly all new GE crop plants must undergo rigorous testing and be vetted by those agencies before they can be put on the market, even though conventionally bred plants with identical characteristics are subject to no regulation at all.

The expensive and lengthy review process is scientifically unjustified, but it adds millions of dollars to the development costs for each new GE variety. The cost and complexity of complying with these regulatory strictures have concentrated GE product development in the hands of just six major seed corporations, and has made it uneconomical to use genetic engineering to develop improved varieties of all but major commodity crops, such as corn and soybeans. Small startup firms and university-based researchers can rarely afford the regulatory costs associated with bringing a new GE crop to market.

The unfounded concerns that some GE products may not be regulated stringently enough prompted the Obama administration, in July 2015, to initiate a comprehensive review of the way the USDA, EPA, and FDA regulate GE organisms. Although

Congress should:

- Monitor the Biotechnology Working Group's review of existing genetically engineered product regulations, and reject any recommendation to add regulatory hurdles.
- Reform the USDA and EPA approval processes for GE plants to exempt low-risk GE traits from premarket regulation and to focus regulatory scrutiny solely on traits known to pose potential hazards to humans or the environment, as well as traits that are genuinely novel, but for which the risks are unknown.

the memorandum ordering that review notes that one of its purposes is to "prevent unnecessary barriers to future innovation," most observers expect the Biotechnology Working Group of senior government officials that is conducting the review to recommend increased regulatory scrutiny, even as the scientific community is calling for regulatory reduction and streamlining.

Despite the overwhelmingly positive record of environmental and human safety, and the substantial burden of mandatory testing and regulatory review, some critics have demanded special labeling for GE foods. They argue that, even if GE foods are safe and nutritious, consumers want the additional information and have a right to choose products that are not produced using genetic engineering.

By 2014, Vermont, Connecticut, and Maine had enacted legislation that would require labeling certain GE foods as containing genetically engineered ingredients—and several other states have considered such laws. Such mandatory labeling would create a patchwork of conflicting, onerous, and expensive labeling rules throughout the country, needlessly raising the cost of all foods, whether or not they contained GE ingredients. Mandatory labels also send a false signal to consumers that they should be concerned about eating GE foods. They are unnecessary because a thriving market exists for voluntarily labeled non-GE foods, providing plenty of choices to those who wish to avoid genetically engineered ingredients. And mandatory labeling laws also raise First Amendment questions, if they are not enacted to advance a government interest more substantial than satisfying consumer curiosity.

To head off the threat of conflicting state laws, in July 2016, Congress enacted the National Bioengineered Food Disclosure Standard to create a uniform national labeling policy for genetically engineered foods and ingredients (Pub. L. No. 114-216, en-

acted as S. 764, 114th Cong., amending 7 U.S.C. 1621 *et seq*., https://www.congress.gov/114/bills/s764/BILLS-114s764enr.pdf). The law instructs the U.S. Department of Agriculture to require food producers to disclose whether their products include GE ingredients. Producers will be given an option to disclose the information with on-package labeling or by directing consumers to a website or telephone number, from which they can learn about individual products.

Despite creating a new nationwide regulatory burden, the bill received overwhelming support from food and agriculture interests, because it also preempts state labeling requirements that differ from the national standard, thereby alleviating some of the concerns about inconsistent state laws. Unfortunately, this uniform national standard will prove to be little better than state mandates. Although it will prevent states from enacting multiple, conflicting policies, it (a) will still prove expensive for food producers to implement, (b) will falsely suggest that there is some reason for consumers to be concerned about GE ingredients, and (c) may run afoul of the First Amendment's prohibition on compelled speech that does not further a substantial government interest.

At the very least, Congress should monitor the USDA's implementation of the National Bioengineered Food Disclosure Standard to ensure that the rule it promulgates provides for the greatest amount of flexibility and the lowest burden for producers. Better still, Congress should in future years consider eliminating the disclosure requirement altogether, while still preempting state labeling laws. Instead, Congress should codify the FDA's longstanding policy that reserves mandatory labeling for food products with characteristics that have been changed in a way that affects safety and nutrition. Where a food product has been changed in a material way—such as an

Congress should:

- Monitor the implementation of the National Bioengineered Food Disclosure Standard to ensure that the USDA rule provides for the greatest amount of flexibility and the lowest burden for producers.
- Lay the groundwork for repealing the National Bioengineered Food Disclosure Standard by codifying the FDA's longtime labeling policy for food products, under which special labeling is necessary only when a food's characteristics have been altered in a material way.

increase or decrease in vitamins, the addition of an allergen, or some other change that affects safety or nutritional value—the product label must note the specific change.

Expert: Gregory Conko

For Further Reading

Gregory Conko, "Shoppers Already Have a Choice Regarding Biotech Foods," *Food Chemical News*, February 17, 2012, pp. 23–24.

Gregory Conko, Drew L. Kershen, Henry Miller, and Wayne A. Parrott, "A Risk-Based Approach to the Regulation of Genetically Engineered Organisms," *Nature Biotechnology*, Vol. 34, No. 5 (2016), pp. 493–503.

Henry I. Miller and Gregory Conko, *The Frankenfood Myth: How Protest and Politics Threaten the Biotech Revolution* (Westport, Conn.: Prager, 2004).

American Association for the Advancement of Science, "Statement by the AAAS Board of Directors on Labeling of Genetically Modified Foods," October 20, 2012, http://www.aaas.org/sites/default/files/AAAS_GM_statement.pdf.

National Research Council, *Genetically Engineered Crops: Past Experience and Future Prospects* (Washington, DC: National Academies Press, 2016).

Martina Newell-McGloughlin, Bruce Chassy, and Gregory Conko, *Food and You: A Guide to Modern Agricultural Biotechnology* (New York: American Council on Science and Health, 2013).

Alessandro Nicolia, Alberto Manzo, Fabio Veronesi, and Daniele Rosellini, "An Overview of the Last 10 Years of Genetically Engineered Crop Safety Research," *Critical Reviews in Biotechnology*, Vol. 34, No. 1 (2014), pp. 77–88.

STREAMLINE REGULATION OF GENETICALLY ENGINEERED PLANTS AND FOODS

Dozens of scientific organizations—including the U.S. National Academy of Sciences, American Association for the Advancement of Science, and Institute of Food Technologists—have carefully studied the safety of genetic engineering for consumers and the environment. All have concluded that the use of modern biotechnology, or gene-splicing techniques, gives rise to no new or unique risks compared with more conventional forms of breeding. In fact, say the experts, GE plants and foods derived from them will in many cases be safer than their conventionally bred counterparts, because the tools of genetic engineering are more precise and predictable.

In each of six studies conducted from 1989 to 2016, the National Research Council of the U.S. National Academy of Sciences, Engineering, and Medicine concluded that no scientific justification exists for regulating genetically engineered organisms any differently from conventionally bred varieties. The safety of a new plant variety has to do solely with the characteristics of the plant that is being modified, the specific traits that are added, and the local environment into which it is being introduced, regardless of whether genetic engineering or a more conventional breeding method is used to modify the plant. Nevertheless, to ameliorate public concerns about gene splicing, the U.S. Department of Agriculture and the Environmental Protection Agency each developed regulatory frameworks during the 1980s that require premarket approval for nearly all new GE plant varieties, regardless of the safety of traits incorporated into individual plants (7 CFR Parts 340 and 360; and 40 CFR Parts 152 and 174).

In 2015, the Obama administration established a Biotechnology Working Group to conduct a comprehensive review of the way the USDA, EPA, and FDA regulate genetically engineered organisms, in part to ensure that no "gaps" existed that would allow products to go unregulated.

The working group would be wise to recommend streamlining and reducing the regulatory burdens facing genetically engineered products and to promote a revised regulatory framework that focuses only on new plant traits known to or suspected of posing unique risks, rather than subjecting all GE products to the same level of heightened scrutiny. However, many scientists fear that the working group's recommendations will reinforce the current, flawed regulatory framework and will lead to increased regulation for many,

Congress should:

- Monitor the Biotechnology Working Group's review of existing GE product regulations, and reject any recommendation to add unnecessary regulatory hurdles.
- Reform the USDA and EPA approval processes for GE plants to exempt low-risk GE traits from premarket regulation, and focus regulatory scrutiny solely on traits known to pose potential hazards to humans or the environment.

if not all, engineered plants and foods. Specifically, they fear that the working group will recommend bringing more products under the USDA's and EPA's regulatory purview and increase regulatory scrutiny for many or all GE products.

Under the Plant Protection Act, the USDA treats essentially all GE plants as potential plant pests—organisms that may be harmful to agriculture—until they have been extensively tested under stringent rules, found not to be pests, and then "deregulated" by the department (7 CFR Part 340). New GE plants may also be regulated under the USDA's authority to restrict the planting of so-called noxious weeds if the department believes they may be injurious to public health, agriculture, recreation, wildlife, or property (7 CFR Part 360). The EPA, on the other hand, regulates the testing and cultivation of GE plants modified to prevent, destroy, repel, or mitigate a pest under the same legal authority it uses to regulate chemical pesticides (7 U.S.C. §§ 136–136r). Note that weeds and plant diseases are considered pests. So even plants modified to resist diseases but that produce no new substances that could be considered pesticides are regulated as pesticides by the EPA.

Two decades of practical, commercial experience with GE crops has shown early concerns about genetic engineering to be unwarranted, and that approved varieties have an admirable record of consumer and environmental safety. But regulatory hurdles add years of unnecessary delay to the development process and an estimated $6 million to $15 million or more to development costs for each new variety, a burden that can be justified only for major commodity crops bred by large corporate seed companies. Small startup firms and university-based researchers can rarely afford even to test new GE varieties in field trials, let alone bring them to market.

The current regulatory system for GE crop varieties cannot be justified scientifically. It singles out the more precise techniques of genetic engineering for added scrutiny,

even as crops bred using less precise, and arguably less safe, methods—such as induced DNA mutation and forced hybridization of different plant species—go entirely unregulated. Crops bred to withstand herbicides or with added resistance to certain pests are heavily regulated if they are produced with genetic engineering techniques. But the very same traits are not regulated at all if the crop was, for example, exposed to radiation in order to mutate the plant's DNA in unknown and unpredictable ways.

Four decades' worth of formal risk assessments and observations of real-world use by millions of farmers on hundreds of millions of acres around the world have failed to show any new or incremental risks associated with GE crops. The time is ripe for significant rationalization and reduction of the regulatory burden placed on GE products. Nevertheless, because breeders are beginning to use innovative techniques that, in some cases, allow GE crops to escape regulation under the USDA's plant pest authority, some critics are calling for new rules that would increase the stringency of agency oversight. That was the primary motivation for the Obama administration's decision to reevaluate the adequacy of current regulations for GE organisms.

The Biotechnology Working Group established to conduct this review of genetic engineering regulation should recommend comprehensive reform of the USDA and EPA approval processes for GE plants. It should recommend exempting low-risk GE traits from premarket regulation entirely and should advise the agencies to focus solely on traits known to pose potential hazards to humans or the environment, as well as traits that are genuinely novel, and for which the risks are unknown.

Expert: Gregory Conko

For Further Reading

Gregory Conko, Drew L. Kershen, Henry Miller, and Wayne A. Parrott, "A Risk-Based Approach to the Regulation of Genetically Engineered Organisms," *Nature Biotechnology*, Vol. 34, No. 5 (2016), pp. 493–503.

Institute of Food Technologists, *IFT Expert Report on Biotechnology and Foods* (Chicago: Institute of Food Technologists, 2000), p. 23.

Nicholas Kalaitzandonakes, Julian M. Alston, and Kent J. Bradford, "Compliance Costs for Regulatory Approval of New Biotech Crops," *Nature Biotechnology*, Vol. 25, No. 5 (2007), pp. 509-511.

National Research Council, *Genetically Engineered Crops: Past Experience and Future Prospects* (Washington, DC: National Academies Press, 2016).

Martina Newell-McGloughlin, Bruce Chassy, and Gregory Conko, *Food and You: A Guide to Modern Agricultural Biotechnology* (New York: American Council on Science and Health, 2013).

Alessandro Nicolia, Alberto Manzo, Fabio Veronesi, and Daniele Rosellini, "An Overview of the Last 10 Years of Genetically Engineered Crop Safety Research," *Critical Reviews in Biotechnology*, Vol. 34, No. 1 (2014), pp. 77–88.

REPEAL THE NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD

When the first food products developed with genetic engineering were introduced in the United States in the early 1990s, the Food and Drug Administration, following the advice of major scientific bodies, determined that special labeling for GE foods and ingredients was unnecessary. What determines the safety, wholesomeness, and nutritional value of a food is its characteristics, not the breeding method used to develop it. All breeding methods—from simple hybridization to the most modern biotechnology-based techniques—have the potential to introduce significant changes in the composition of foods. But well-known and simple-to-perform testing methods are sufficient to determine a food's nutritional value and safety.

According to the FDA's longstanding policy, food producers have a legal obligation to note on labels any time a food has been changed in a way that might be material to consumer safety or nutrition. Such changes might include a higher or lower level of vitamins or other nutrients, fats, carbohydrates, and other components beyond the normal variability present in conventional counterparts. Material changes could also include the introduction of an allergen or other potentially harmful substance, or even a change in a food's taste, smell, or texture or its storage, handling, or preparation requirements.

If a new food product has been changed in any of those ways, its label must alert consumers to the modification, regardless of whether that change was made using genetic engineering or another breeding method. Importantly, under the FDA's policy, it is not sufficient merely to state what breeding method was used to develop the product; the label must state what change has been made, so consumers are informed of relevant information about the foods they eat.

Because the agency relies on mandatory labeling to alert consumers about important safety and nutritional changes, it concluded that mandatory GE-specific labeling would falsely lead consumers to believe there is an important safety concern regarding genetic engineering when there is none. As the American Association for the Advancement of Sciences points out, "Legally mandating such a label can only serve to mislead and falsely alarm consumers."

Mandatory GE labeling also raises food costs, both for products that include genetically engineered ingredients and for those that do not. Adding information to labels is only one source of cost. When such labeling policies are implemented, all producers must track the provenance of every ingredient, bear the burden of segregating GE and non-GE ingredients, and take special precautions to ensure that every product they sell carries an accurate label. For that reason, mandatory GE labeling would raise the cost of producing nearly every food product—including costs for producers who wish to sell only non-GE products.

Such laws are also unnecessary because a thriving market exists for voluntarily labeled non-GE foods, providing those who wish to avoid genetically engineered ingredients a choice of many thousands of affirmatively labeled "non-GMO" foods. Nevertheless, by 2014, the states of Vermont, Connecticut, and Maine had enacted special labeling laws, and public support for labeling mandates in several other states appeared strong. To prevent the proliferation of a patchwork of burdensome and potentially conflicting state laws, in 2016, Congress enacted and President Obama signed S. 764, legislation that will create a National Bioengineered Food Disclosure Standard (Pub. L. No. 114-216, 114th Congress).

The new law instructs the U.S. Department of Agriculture to develop a uniform national labeling policy by 2018 that will require food producers to disclose whether their products include GE ingredients. Unlike the state laws, producers will not be required to indicate on package labels whether a product includes GE ingredients, although they have the option to do so. Instead, producers will be given the option to use text, a symbol, an electronic or digital link—such as Web address or QR (quick response) code—or a telephone number from which consumers can learn whether individual products contain such GE ingredients.

Congress should:

- Monitor the implementation of the National Bioengineered Food Disclosure Standard to ensure that the USDA rule provides for the greatest amount of flexibility and lowest burden for producers.
- Lay the groundwork for repealing the National Bioengineered Food Disclosure Standard by codifying the FDA's longtime labeling policy for food products, under which special labeling is necessary only when a food's characteristics have been altered in a material way.

Like the state labeling laws, the new national labeling standard does not cover every food product produced with genetic engineering. It specifically exempts milk, meat, eggs, and other foods derived from animals given GE feed. The disclosure requirement applies only to foods that contain "genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques," which should exempt many other products, such as cheeses made with the GE enzyme chymosin, beer and wine fermented with GE yeasts, and processed foods like corn and canola oil from GE plants. The processing of such foods removes or denatures DNA and proteins added by the genetic engineering, so they no longer "contain" such genetic material.

Although the National Bioengineered Food Disclosure Standard will create a new nationwide regulatory program, the bill received overwhelming support from food and agriculture interests, because it also preempts state labeling requirements that differ from the national standard, thereby alleviating some of the concerns about inconsistent state laws. Unfortunately, this national standard will still be quite burdensome. Like the state laws it replaces, it will still prove expensive for food producers to implement, it will falsely suggest that some reason exists for consumers to be concerned about GE ingredients, and it may run afoul of the First Amendment's prohibition on compelled speech that does not further a substantial government interest.

Federal courts have held that government cannot compel commercial speech merely to satisfy consumer curiosity. Although a federal district court refused to stop or delay implementation of the Vermont labeling law, concluding that it did not violate the First Amendment, the U.S. Second Circuit Court of Appeals has ruled in the past that states could not require labeling of GE foods merely because some consumers wished to have the information. Absent a more substantial government interest, states cannot overcome a producer's First Amendment rights not to include the information on labels. Enactment of the national law preempts the Vermont labeling law, so the legal challenge to it is now moot. However, it is possible that the National Bioengineered Food Disclosure Standard may one day be declared unconstitutional.

Expert: Gregory Conko

For Further Reading

Gregory Conko, "Shoppers Already Have a Choice Regarding Biotech Foods," *Food Chemical News*, February 17, 2012, pp. 23–24.

American Association for the Advancement of Science, "Statement by the AAAS Board of Directors on Labeling of Genetically Modified Foods," October 20, 2012, http://www.aaas.org/sites/default/files/AAAS_GM_statement.pdf.

Food and Drug Administration, "Statement of Policy: Foods Derived from New Plant Varieties," *Federal Register*, Vol. 57, May 29, 1992, pp. 22,983–23,005.

Karen A. Goldman, "Labeling of Genetically Modified Foods: Legal and Scientific Issues," *Georgetown International Environmental Law Review*, Vol. 12, No. 3 (2000), pp. 717-769.

International Dairy Foods Association v. Amestoy, 92 F.3d 67 (2nd Cir. 1996).

Martina Newell-McGloughlin, Bruce Chassy, and Gregory Conko, *Food and You: A Guide to Modern Agricultural Biotechnology* (New York: American Council on Science and Health, 2013).

PROTECT CONSUMER FOOD CHOICE BY OPPOSING FDA OVERREGULATION OF FOOD ADDITIVES

Fueled by hubris and demands by public health advocates to "do something," federal agencies—primarily the Food and Drug Administration and Department of Agriculture—have imposed a flurry of rules designed to control Americans' dietary choices, going beyond the bounds of their authority to protect public health. Most of those policies qualify as "nudges" rather than outright directives, but the goal is the same: to guide consumers and industry to make the "right" food choices by making it as difficult and expensive as possible to go against government dietary wisdom. Yet most of the government's programs have proved ineffective and misguided. Individuals and their health professionals are better at determining what is best for their health than government bureaucrats.

In June 2015, the FDA revoked the "generally recognized as safe" (GRAS) status of partially hydrogenated vegetable oils, more commonly known as trans fats. Without GRAS status, producers need to prove their products are "safe" before the FDA will allow them to use trans fats as an additive—a hurdle that is likely impossible, given that the agency has indicated that it believes there is no safe level of trans fat consumption. Thus, it constitutes a de facto ban on this ingredient. Since finalizing the trans fat rule, it has become clear that activists have no intention of stopping there and have already moved on to pressuring the FDA into using its GRAS authority to restrict additional ingredients, including sugar, sodium, caffeine, and others.

In 2002, Americans consumed an average of 4.6 grams of trans fats per day. But by 2012, that number had fallen to 1 gram a day (0.5 percent of daily calories). Although

Congress should:

- Stop the FDA's march toward invasive control by amending the Federal Food, Drug, and Cosmetic Act to clarify that the agency has authority to limit or ban only those ingredients that:
  - Are either acutely harmful to human health or have health risks that are cumulative;
  - Cannot be identified by consumers; and
  - Cannot be mitigated through other dietary and lifestyle choices.

evidence shows that very high levels of trans fat consumption (much higher than typical consumption in the U.S.) may increase the risk of cardiovascular disease, little research has examined risks associated with low-level consumption, and those that have found no adverse effects. Yet the FDA contends that any level increases the risk of death, and therefore it is justified in eliminating trans fats from the American diet.

Under the Federal Food, Drug, and Cosmetic Act, the FDA has the authority to approve additives for use in food if it determines that they are safe. Revoking the GRAS status of trans fats because long-term overuse may lead to an increased risk of developing certain health conditions would be a significant shift in policy. By attempting to stop individuals from consuming ingredients that could be unhealthful if overused, the agency is trying to protect consumers not from dangerous foods, but from what it sees as bad choices.

The FDA appears to have based its policies on the wishes of extremist public health activists rather than on sound scientific evidence. Beginning almost immediately after the trans fat ban, activists and the FDA began to push for policies that would limit added sugars and sodium in foods. It seems that trans fats were a test case in the agency's broader effort to establish its authority to limit or ban ingredients that are not harmful, but that may be unhealthful if overconsumed.

Expert: Michelle Minton

For Further Reading

Michelle Minton, "FDA's Trans Fat 'Ban': A First Foray into Controlling Americans' Diets," Competitive Enterprise Institute blog, July 14, 2014, https://cei.org/blog/fda%E2%80%99s-trans-fat-%E2%80%9Cban%E2%80%9D-first-foray-controlling-americans%E2%80%99-diets.

Stanley Feldman, *Panic Nation: Unpicking the Myths We're Told about Food and Health* (London: John Blake, 2005).

Denise Minger, *Death by Food Pyramid: How Shoddy Science, Sketchy Politics and Shady Special Interests Ruined Your Health . . . and How to Reclaim It* (Malibu, CA: Primal Blueprint Publishing, 2014).

PROTECT CONSUMER FOOD CHOICE BY OPPOSING THE FDA'S "VOLUNTARY" SODIUM LIMITS

Fueled by hubris and demands by public health advocates to "do something," federal agencies—primarily the Food and Drug Administration and Department of Agriculture —have imposed a flurry of rules designed to control Americans' dietary choices, going beyond the bounds of their authority to protect public health. Most of those policies qualify as "nudges" rather than outright directives, but the goal is the same: to guide consumers and industry to make the "right" food choices by making it as difficult and expensive as possible to go against government dietary wisdom. Yet most of the government's programs have proved ineffective and misguided. Individuals and their health professionals are better at determining what is best for their health than government bureaucrats.

For decades, activists have fixated on lowering salt intake as the key to addressing our worryingly high rates of hypertension. Apparently convinced by their rhetoric, in May 2016, the Obama administration announced plans to set limits on the amount of salt in processed foods. A few weeks later, the FDA unveiled proposed "voluntary" sodium limits for food manufacturers, hoping that reducing sodium in processed foods will reduce total consumption and improve health. Instead, this obsession with sodium has diverted energy and resources away from strategies that could actually work.

Congress should:

- Hold hearings to examine the FDA's authority to issue these guidelines, seeking information on whether such guidelines would result in improved public health outcomes, on the compliance costs for food manufacturers, and on alternative approaches. Specifically, Congress should ask FDA officials:
  - To justify whether their agency, which is charged with protecting the public health from adulterated foods and drugs—not their own dietary choices—has the authority to attempt to limit the use of a generally recognized as safe (GRAS) food ingredient.
  - Whether the FDA plans to revoke the GRAS status of added salt or other ingredients currently recognized as safe, so that it may implement mandatory restrictions in prepared foods.
  - To explain the possible unintended side effects of, scientific basis for; and
  - Offer possible alternatives to the FDA's approach regarding salt.

Although the theory that excess salt leads to hypertension seems like long-settled science, in reality, sodium reduction has a negligible effect for the vast majority of people. Yet for the 25 percent who are "salt sensitive," large reductions can moderately reduce blood pressure. So lowering salt in processed foods—from which Americans get 75 percent of their sodium—is an attractive plan, but one that hinges on people not adding the salt back in or seeking out sodium in other salty foods. Clinical studies have shown that people unconsciously alter their diets in order to satisfy their salt appetite, the physiologically set level of sodium they crave. And for the vast majority of the human population, that level is remarkably similar.

Recent worldwide surveys of salt intake found that, apart from a few remote tribes, most people consume between 2,600 and 4,800 milligrams (mg) of sodium a day for an average of 3,700 mg. That is almost the exact amount the average American consumes, at 3,400 mg, a level that has been stable for at least 50 years, despite the fact that we consume more processed foods now than ever before.

Even if we assume that people won't add salt or eat other salty foods, would the proposed sodium reduction in processed foods make Americans healthier? The answer is unclear. Numerous large population studies have shown that death is more likely for populations that consume excessively high or excessively low levels of salt, with the best outcomes associated in the middle range that most of us eat. In 2013, an Institute of Medicine panel found no evidence of health benefits from reducing sodium below the FDA-recommended 2,300 mg a day.

Certainly, salt reduction can be one aspect of hypertension control for some, but additional approaches might be more effective for a wider range of individuals. For example, increasing vitamins from fruits and vegetables, particularly potassium, can be nearly as effective at lowering blood pressure as halving daily salt intake, in addition to having other health benefits. And of course, exercise helps as well.

The FDA appears to be basing its policies not on sound scientific evidence but on the wishes of extremist public health activists. For example, in 2012, Robert Lustig, a pediatric endocrinologist at the University of California, San Francisco, declared that sugar was a toxin and that the agency should consider removing its GRAS status, thus treating it like an additive that companies would need to prove is safe before they can add it to their products. If the FDA continues on this path unchecked, public health

advocates will continue to push toward greater control of our diets. Congress should remind the agency that its charge is to protect the public from acutely dangerous products—not to protect us from our own choices. What constitutes a healthy diet should be left to individuals to decide.

Expert: Michelle Minton

For Further Reading

Michelle Minton, "Lawmakers' Salt Fixation Harms Our Nation's Health," RealClearPolicy, May 11, 2016, http://www.realclearpolicy.com/articles/2016/05/11/lawmakers_salt_fixation_harms_our_nations_health_1620.html.

American Association for the Advancement Science, "Sodium's Influence on Blood Pressure Statistically Insignificant," news release, EurekAlert!, September 8, 2014, http://www.eurekalert.org/pub_releases/2014-09/oupu-sio090814.php.

Adam M. Bernstein and Walter C. Willett, "Trends in 24-h Urinary Sodium Excretion in the United States, 1957–2003: A Systematic Review," *American Journal of Clinical Nutrition*, Vol. 92, No. 5 (November 2010), pp. 1172–1180, http://ajcn.nutrition.org/content/92/5/1172.abstract?ijkey=38216a8487a7c61cb0e275a6c9f77084902ed960&keytype2=tf_ipsecsha.

Stanley Feldman, *Panic Nation: Unpicking the Myths We're Told about Food and Health* (London: John Blake, 2005).

J. M. Geleijnse, F. J. Kok, and D. E. Grobbee, "Blood Pressure Response to Changes in Sodium and Potassium Intake: A Metaregression Analysis of Randomised Trials," *Journal of Human Hypertension*, Vol. 17, No. 7 (2003), pp. 471–180, http://www.ncbi.nlm.nih.gov/pubmed/12821954.

Niels Graudal, Gesche Jürgens, Bo Baslund, and Michael H. Alderman, "Compared with Usual Sodium Intake, Low- and Excessive-Sodium Diets Are Associated with Increased Mortality: A Meta-Analysis," *American Journal of Hypertension* 27 (2014), pp. 1129–1137, http://ajh.oxfordjournals.org/content/early/2014/03/26/ajh.hpu028.1.full.

Denise Minger, *Death by Food Pyramid: How Shoddy Science, Sketchy Politics and Shady Special Interests Ruined Your Health… and How to Reclaim It* (Malibu, CA: Primal Blueprint Publishing, 2014).

Martin O'Donnell et al., "Urinary Sodium and Potassium Excretion, Mortality, and Cardiovascular Events," *New England Journal of Medicine*, Vol. 371, No. 7 (2014), pp. 612–623, http://www.nejm.org/doi/full/10.1056/NEJMoa1311889#t=article.

PROTECT CONSUMERS' ACCESS TO LIFE-SAVING DRUGS AND MEDICAL DEVICES

Patients benefit from the thousands of available medical drugs and devices on the market today. But the Food and Drug Administration's overly cautious testing and approval requirements, and demands that such treatments meet a near-perfect level of safety, are often counterproductive. That approach often leads to extensive delays in the availability of new treatment options and high prices.

Patients can be injured if the FDA approves a treatment that is later found to be unsafe, but they can also be harmed when needed treatments are delayed by regulatory hurdles, or when the cost and complexity of securing approval mean that promising new treatments are never presented for agency evaluation. Safety concerns that arise after a drug or device is approved result in startling headlines and congressional hearings. That incentivizes the FDA to be overly cautious in its decision making, demanding more trials with more patients, raising costs, and prolonging development times. Far too little attention is paid to sick patients who are denied treatment options that may save their lives or improve their quality of life. And the combination of high development costs and lengthy approval times contributes to high prices for the drugs and devices that do make it to market.

Fortunately, many of these concerns are now recognized by a bipartisan group of legislators, who began to address them during the 113th and 114th Congresses. Reps. Fred Upton (R-Mich.) and Diana DeGette (D-Colo.) assembled a comprehensive list of reform proposals into the 21st Century Cures Act, which was approved by the full House in 2015. The Senate considered a package of 19 bills addressing many of the same proposals, but none of that legislation has been enacted into law. Congress should make comprehensive FDA reform a priority in the 115th Congress. Although real reform would require changes much more substantial than those contained in the 21st Century Cures Act, that legislation would be a good place to start.

The bill's proposals include much-needed updates to the FDA's decades-old rules for evaluating the safety and effectiveness of new drugs. Updates include (a) a requirement that the agency consider patients' views on the desirability of a new drug's benefits and their willingness to tolerate certain risks associated with the treatment, (b) the evaluation of evidence from real-world clinical use when considering new indications

Congress should:

- Modernize the FDA's rules for evaluating new drugs and medical devices by enacting the 21st Century Cures Act.
- Encourage the use of adaptive clinical trial designs, which let researchers incorporate active learning into study methodologies, by making the rules governing their use more flexible.
- Consider evidence from real-world clinical use when evaluating new indications for already-approved drugs.
- Consider patients' views on the risks and benefits of new drugs when making approval decisions.

for already-approved drugs, and (c) encouragement of more adaptive clinical trial designs that let researchers modify ongoing studies to reflect what they are learning during the course of a given trial.

The FDA's one-size-fits-all approval process means that some decisions will be too cautious for some and not cautious enough for others. Individual patients disagree about how much risk they are willing to tolerate in order to obtain a new treatment's potential benefits. But those who view the FDA's approval process as too quick may freely choose to use only products that have been on the market for several years with a well-established record of safety and efficacy. Those who seek access to medical products before the agency has approved them have little or no choice.

In theory, the FDA's expanded access, or "compassionate use," program provides an option for terminally ill patients who cannot be enrolled in a clinical trial to access treatments that have not yet been approved. In practice, however, the process for seeking a compassionate use exemption is complicated, time-consuming, and burdensome, which means that many patients are denied a genuine opportunity to choose. More must be done to expand patients' access to not-yet-approved drugs when they cannot enroll in a clinical trial.

Congress should:

- Reform the Expanded Access process by streamlining the paperwork burden and removing the FDA's discretion to deny compassionate use to patients who meet basic qualifications.
- Explore other options for giving patients access to not-yet-approved drugs and devices.

Expert: Gregory Conko

For Further Reading

Bipartisan Policy Center, "Using Real-World Evidence to Accelerate Safe and Effective Cures Advancing Medical Innovation for a Healthier America," June 2016, http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Health-Innovation-Safe-Effective-Cures.pdf.

FDA Science Board, "FDA Science and Mission at Risk: Report of the Subcommittee on Science and Technology," November 2007, http://www.fda.gov/ohrms/dockets/ac/07/briefing/2007-4329b_02_01_FDA%20Report%20on%20Science%20and%20Technology.pdf.

President's Council of Advisors on Science and Technology, "Report to the President on Propelling Innovation in Drug Discovery, Development, and Evaluation," September 2012, https://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-fda-final.pdf.

Eugene Volokh, "Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs," *Harvard Law Review*, Vol. 120, No. 7 (2014), pp. 1813-1846.

MODERNIZE THE RULES FOR EVALUATING NEW DRUGS AND MEDICAL DEVICES

First developed more than 50 years ago, the U.S. Food and Drug Administration's approach to clinical testing—which relies on multiple trials in three phases of testing—is premised on the belief that most patients will have similar responses to medical interventions and that a drug's benefits and side effects will be easy to identify, given a large enough test population of patients with similar health and physical characteristics. However, we now know that similar patients often respond quite differently to the same medications, and that the homogeneous patient pools and tightly controlled clinical environments associated with randomized trials do not reflect real-world practice and outcomes very well. Such methods are ill-suited for detecting and testing subtle differences that occur in small patient subpopulations, which makes them poor tools for fast-paced, adaptive learning.

A 2007 report by the FDA Science Board concluded that "FDA's evaluation methods have remained largely unchanged over the last half-century," and that the agency's "inadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or even worse, the wrong decision on regulatory approval or disapproval."

To minimize the occurrence of hindsight bias in data analysis, clinical trials begin with a hypothesis and a carefully constructed methodology for testing that hypothesis. When an unexpected or idiosyncratic effect is detected among a subpopulation of the test group, the FDA typically demands that the manufacturer form a new hypothesis and initiate an entirely new trial. In the process, adaptive learning is short-circuited, the development process is prolonged, and the costs of drug development rise. The FDA must be more willing to allow flexibility in trial designs and conduct and to approve new drugs based on fewer trials with fewer patients.

Today, new computational tools, a better understanding of disease pathways, the development of biomarkers to predict drug effects, and other technological advances are enabling the use of innovative methods that could improve clinical trial quality. Those tools, combined with adaptive clinical trial designs—which allow researchers to learn as trials are in progress and, in turn, change dosing regimens or isolate patient subpopulations that respond especially well or poorly to the test drug—could help trial

sponsors collect better, more robust data from fewer patients and in a shorter amount of time. Thus, use of adaptive trial methodologies could lead to significant efficiencies in drug development, accelerate testing, and reduce the cost and time it takes to bring a new medicine to market.

In theory, the FDA has been open to adaptive trial proposals, but it insists that such trials be designed more carefully than conventional ones in order to prevent biases from being introduced into the statistical analysis. Among other things, the agency asks trial sponsors to predict what idiosyncratic results may occur during the course of a trial and decide at the outset how they will change the trial's direction when those results occur. Such rigid constraints have prevented researchers from reaping the full benefits of the innovative methodologies, and many have been reluctant to experiment with adaptive trials until they have greater assurance that the FDA will accept their results and not penalize researchers for using them. It is imperative, then, that the FDA develop more flexible guidelines for using adaptive trial methods and encourage drug developers to use them.

Similarly, the FDA has long been reluctant to consider evidence of a drug's safety or efficacy derived from real-world use in treating patients outside the tightly controlled confines of a clinical trial. When the FDA approves new drugs, they are approved at a specific dosage to treat a specific condition, such as a particular type of cancer. But once approved for any indication, physicians may legally prescribe drugs in varying doses for other safe and effective uses. These "off-label" uses are very common, and for many diseases, the first line treatment is an off-label drug. But doctors and patients often lack sufficient information about off-label indications because manufacturers may not disseminate certain kinds of information about unapproved uses. Consequently, both the FDA and the medical community encourage manufacturers to pursue supplemental FDA approvals for off-label uses.

However, testing approved drugs and pursuing a supplemental FDA approval is expensive. It is also difficult, and in some cases unethical, to enroll patients in placebo-controlled trials when doctors are already free to prescribe the drugs. Furthermore, in many cases, the expense of securing a new FDA approval would not prove economical—such as when a drug is off patent and available from many generic firms. In such cases, a manufacturer that paid tens or even hundreds of millions of dollars for clinical trials to support a supplemental approval application would not be ensured of recoup-

ing the costs. Therefore, the FDA should consider real-world evidence from clinical use to support approvals for supplemental indications for drugs.

The FDA already considers real-world evidence to support medical device approval decisions, as a supplement to other evidence generated through clinical trials. And it relies almost exclusively on evidence of adverse effects from clinical use to justify decisions to withdraw, or recommend withdrawing, a drug from the market. It makes little sense then for the FDA to refuse to consider real-world clinical evidence in evaluating drugs for supplemental approvals.

Nor are the views of patients given adequate consideration when the FDA makes approval decisions. No drug is perfectly safe, in the sense that it has no negative side effects. Patients facing critical illnesses and those with otherwise unmet treatment needs are often willing to tolerate significant side effects in order to receive the life-saving or quality-of-life-improving benefits of new drugs and devices. Historically, patient views regarding the value of new treatment options have been given short shrift in the drug and biologics approval process.

For patients, medicines do more than simply treat or cure disease. They can produce uncomfortable, disabling, or embarrassing side effects, but they can also improve patients' quality of life by reducing pain, discomfort, or other symptoms caused by the underlying medical condition. New or improved products can improve mental function or physical performance compared with alternative treatment options. And even a seemingly simple change in dosing frequency should not be discounted as trivial if it improves patient compliance with prescribed treatment protocols. Formally incorporating patients' views into the agency's evaluation of the safety and efficacy of drugs and devices will result in improved FDA decision making and give patients more and better treatment options.

Enacting the 21st Century Cures Act with the proposals above would vastly improve the conduct of clinical trials and FDA approval decisions, and it would help bring the agency's decades-old rules for evaluating the safety and effectiveness of new drugs into the modern age.

Congress should:

- Modernize the FDA's rules for evaluating new drugs and medical devices by enacting the 21st Century Cures Act.
- Encourage the use of adaptive clinical trial designs, which let researchers incorporate active learning into study methodologies, by making the rules governing their use more flexible.
- Consider evidence from real-world clinical use when evaluating new indications for already approved drugs.
- Consider patients' views on the risks and benefits of new drugs when making approval decisions.

Expert: Gregory Conko

For Further Reading

Bipartisan Policy Center, "Using Real-World Evidence to Accelerate Safe and Effective Cures Advancing Medical Innovation for a Healthier America," June 2016, http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Health-Innovation-Safe-Effective-Cures.pdf.

Mart oude Egbrink and Maarten IJzerman, "The Value of Quantitative Patient Preferences in Regulatory Benefit-Risk Assessment," *Journal of Market Access and Health Policy*, Vol. 2 (2014), p. 22, 761.

FDA Science Board, "FDA Science and Mission at Risk: Report of the Subcommittee on Science and Technology," November 2007, http://www.fda.gov/ohrms/dockets/ac/07/briefing/2007-4329b_02_01_FDA%20Report%20on%20Science%20and%20Technology.pdf.

John A. Kairalla, Christopher S. Coffey, Mitchell A. Thomann, and Keith E. Muller, "Adaptive Trial Designs: A Review of Barriers and Opportunities," *Trials*, Vol. 13 (2012), pp. 145-153.

President's Council of Advisors on Science and Technology, "Report to the President on Propelling Innovation in Drug Discovery, Development, and Evaluation," September 2012, https://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-fda-final.pdf.

EXPAND PATIENT ACCESS TO EXPERIMENTAL TREATMENTS

When making safety evaluations, the U.S. Food and Drug Administration is required, by statute, to determine the appropriate balance between patient safety and medical product effectiveness. The FDA cannot know what the optimal risk–benefit balance is for every patient. Each patient will have different views about how much risk and how many side effects he or she is willing to bear in order to use a new treatment that could alleviate symptoms or cure a disease. Therefore, it is important that individual patients have more opportunities to choose a medical treatment that meets their unique health status and risk tolerance. Currently, however, few patients ever have the option of choosing a drug or medical device that has not satisfied the FDA's risk–benefit preferences.

Some patients with unmet medical needs may be eligible to enroll in a clinical trial to test a new medicine or medical device. But because of the need for homogeneous patient populations in clinical trials, many simply do not qualify for enrollment because of their age, comorbidities, prior treatments, and/or the progression of their disease. Under current law, the FDA may grant expanded access, known as compassionate use exemptions, for patients with serious or life-threatening diseases and no other viable treatment alternatives to use experimental treatments outside of a clinical trial (Expanded Access to Investigational Drugs for Treatment Use, 21 C.F.R. § 312 subpart I, 2013). But the process for seeking expanded access is complicated and time-consuming.

Although guidance documents published by the FDA in June 2016 purport to "facilitate the availability" of expanded access use by clarifying the procedures for obtaining the FDA's authorization, they do little to streamline the process. Such permision requires the patient's physician to submit a detailed application, which, before the issuance of the FDA's 2016 guidance, was estimated to take 100 hours to complete. Under the terms of this guidance, physicians may satisfy some of the submission requirements by referring to information in the drug manufacturer's Investigational New Drug (IND) application to conduct clinical trials—which would reduce the amount of time it takes to complete the submission—but only if the manufacturer consents and provides a letter authorizing the FDA to reference that IND.

The manufacturer must also consent to provide the drug for close to zero price, while still agreeing to fulfill burdensome paperwork and monitoring requirements. Manufacturers may charge patients only the direct costs "incurred by a sponsor that can be specifically and exclusively attributed to providing the drug," so many are understandably reluctant to agree to expanded access use (Charging for Investigational Drugs under an Investigational New Drug Application; Expanded Access to Investigational Drugs for Treatment Use; Final Rules, 21 CFR Parts 312 and 316, August 31, 2009). In addition, many manufacturers are concerned that granting expanded access to large numbers of patients could jeopardize their ability to enroll in the clinical trials needed for FDA approval.

Although the FDA does eventually grant nearly all expanded access requests that are submitted by patients and manufacturers, that authorization often comes months after the process is initiated, jeopardizing the patient's best opportunity to treat the disease at a stage early enough to be effective. In the end, the hurdles involved with seeking such an expanded access exemption mean that few patients ever even try to use this route. Despite substantial demand for early access to not-yet-approved drugs, only about 1,000 to 2,000 patients each year navigate the process and complete an expanded access request.

The FDA's standard response to demands for broader preapproval availability is that critically ill patients will grasp at straws trying to seek access to drugs that remain experimental and about which too little is known. But individual patients and their doctors are in a far better position than the FDA to judge whether the uncertain risk and benefit of new treatments are warranted. The FDA should focus on providing them with the information on what is and is not known about experimental treatments and permit patients and their doctors to weigh the potential risks on their own, rather than on restricting patient choice.

Congress should:

- Reform the Expanded Access process by streamlining the paperwork burden and removing the FDA's discretion to deny compassionate use to patients who meet basic qualifications.
- Explore other options for giving patients access to not-yet-approved drugs and devices.

Congress has previously examined proposals to reform the expanded access process by streamlining the paperwork burden and removing the FDA's discretion to deny compassionate use to patients who meet basic qualifications. One such example is the Compassionate Access Act (H.R. 4732), introduced in 2010 by Rep. Diane Watson (D-Calif.). That bill, and others like it, have never reached a floor vote, but they provide Congress with a template to use as the starting point to develop legislation to make it easier for patients to be granted Expanded Access exemptions. Congress should consider that proposal and other options for giving patients access to not-yet-approved drugs and devices.

Expert: Gregory Conko

For Further Reading

Abigail Alliance v. Von Eschenbach, 495 F.3d 695, 715 (D.C. Cir. 2007) (en banc) (Rogers, J., dissenting).

Food and Drug Administration, "Expanded Access to Investigational Drugs for Treatment Use—Questions and Answers: Guidance for Industry," June 2016, http://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm351261.pdf.

———, "IND Applications for Clinical Treatment (Expanded Access): Overview" FDA website, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/InvestigationalNewDrugINDApplication/ucm351748.htm.

Food and Drug Administration, "Individual Patient Expanded Access Applications: Form FDA 3926 Guidance for Industry," (June 2016), http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM432717.pdf.

Eugene Volokh, "Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs," *Harvard Law Review*, Vol. 120, No. 7 (2014), pp. 1813–1846.

PROTECT CONSUMERS' ACCESS TO TOBACCO SUBSTITUTES AND VAPING PRODUCTS

After nearly a decade of intense research, there is no doubt that vaping—while maybe not harmless—is vastly less harmful for smokers than combustible tobacco products and is an effective aid in helping smokers quit their deadly habit. Yet the U.S. Food and Drug Administration is threatening to regulate vaping products out of existence—which can only result in higher cancer incidences and more smoking-related deaths as more people find it harder to quit.

Although other countries' health experts now promote vaping as a safer alternative to smoking and encourage regulators to ease the regulatory burden on vape manufacturers, U.S. health advocates are working overtime to portray vaping as similarly dangerous to traditional tobacco cigarettes and to make those products harder and more expensive for consumers to purchase. Anti-vaping activists scored a major victory last year, when the FDA created new onerous regulations for vaping products. Despite the massive difference in risk, the new rules treat vapes—which help millions quit smoking and appear to have minimal, if any, long-term health risks—functionally the same way as regular cigarettes, which kill almost half a million Americans each year.

Congress should:

- Amend the Tobacco Control Act (TCA) to direct the FDA to create an easier path to approval for tobacco products that are demonstrably less harmful or can be reasonably assumed to have a net positive effect on public health. Rather than forcing companies to wait for prior approval, the agency should create "file-and-use" rules that require companies to submit ingredient and safety disclosures to the agency, but not force them to wait for prior approval before bringing products to market.
- Amend the TCA to allow less harmful nicotine products to be advertised as such.
- Modify the TCA's "predicate" date (the grandfather date) to 2016 so that products currently available to consumers can remain on the market. In the 114th Congress, Reps. Tom Cole (R-Okla.) and Sanford Bishop (D-Ga.) introduced an amendment to the Agriculture Appropriations bill that would change the predicate date to August 2016, which could serve as a model.

Over the next two years, the manufacturers of all vaping products and components (including every flavor and nicotine level of vaping liquid) will be required to file premarket tobacco applications (PMTAs) and receive approval from the FDA, to conform to new labeling requirements, and to adhere to restrictions on sales and advertising. Those requirements will cost producers millions of dollars in compliance, which only the largest will be able to afford. By the agency's own admission, this process will result in the near total destruction of the market, eliminating 99 percent of currently available products. The options that remain for vapers will be more expensive and less attractive, meaning fewer smokers will make the switch, and more Americans will die from smoking-related illnesses, unless Congress intervenes.

Amend the Tobacco Control Act. In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, which vested the U.S. Food and Drug Administration with the authority to regulate the manufacture, sale, and advertising of tobacco products (Pub. L. No. 111-31, 114th Congress). In 2014, without direction from Congress, the FDA announced it would begin regulating all packaged nicotine products as tobacco under the TCA. That "deeming rule" essentially lumped all nicotine products under the same onerous rules as traditional tobacco cigarettes—rules designed to reduce and ultimately eliminate use of traditional cigarettes—without accounting for relative risks or benefits of the various product categories.

The premarket tobacco applications that companies must now file for every product will cost upward of $1 million for each application. For the vast majority of companies, the compliance costs will force them to either exit the market or drastically reduce their product lines. Only large tobacco companies will likely be able to successfully move their products through the FDA's PMTA process, leading one public health expert to deem the rule "the Cigarette Protection Act of 2015." But there is no guarantee that the FDA will approve *any* PMTAs at all. In the agency's history, it has only ever approved eight products—all tobacco "dip" products from one large Swedish company that submitted an application that was more than 100,000 pages long.

If any vape products manage to receive FDA approval, they still will have to comply with sales and advertising restrictions and add new warning labels to their products. Because of the huge compliance costs and reduced competition, products that remain on the market will likely be much more expensive and less attractive to smokers, who will continue to use much more deadly traditional cigarettes.

Clearly, the effects of these new rules were not what Congress intended when it enacted the TCA—which, in addition to giving the FDA oversight of tobacco products, instructed the agency to promote cessation in order to "reduce disease risk and the social costs associated with tobacco-related diseases." Instead, the FDA's actions will reduce access to and use of safer tobacco alternatives and thus result in some number of Americans who will continue to smoke and who will become ill and die prematurely.

Modify regulations based on the relative harm of a product. Putting the same regulatory burden on vapes as the FDA applies to traditional tobacco—for which the goal is to reduce use—runs counter to the agency's purported goal of protecting public health. Though the FDA insisted in its May 10, 2016, final rule that "there have not yet been long-term studies conducted to support" the claim that vaping will have a net benefit on or will harm public health, most of the existing research indicates that the availability of vaping products will significantly improve public health. According to a July 2016 study by David T. Levy and other tobacco control experts, the presence of vaping could lead to a 21 percent decline in deaths from smoking-related diseases for people born after 1997, even after accounting for any potential negative health effects from vaping by people who would otherwise not have smoked at all.

Though some advocates fear vaping will "renormalize" smoking, evidence shows that at most only 2.3 percent of vapers were "never smokers." Of those who vape, about 35 percent quit tobacco entirely, with another 32 percent significantly reducing tobacco use.

Allow noncombustible products to advertise reduced harm. Not only are vapes now required to acquire FDA sanction, manufacturers are also prohibited from telling customers that they are safer than cigarettes, contain no tobacco, and produce no smoke, and that vapor has been shown to have fewer toxins than cigarette smoke—all of which are true. The Tobacco Controls Act's Subsection 911—which prevents one tobacco product from advertising its relative safety compared with others—was intended to stop companies from using such terms as "light" or "low tar" that falsely contend that the products are safer than normal cigarettes. It also bars manufacturers from advertising that vapes have fewer toxins than traditional cigarettes because the TCA, which vapes must now comply with, also explicitly bars companies from advertising products as being "free" of a certain ingredient or having "less" of a particular ingredient. So in addition to being more expensive, having fewer customizable op-

tions, and having fewer flavors, the new vaping market will not even be able to attract consumers away from cigarettes by *truthfully* advertising products as significantly less harmful.

Move the "grandfather" date to 2016. When Congress enacted the Tobacco Control Act in 2009, it included a "predicate date" that allowed tobacco products on the market—or similar products on the market before February 15, 2007—to bypass the FDA's prior approval process (the 2007 date was a leftover from a previous version of the TCA). As the FDA itself noted, there were no vaping products on the market comparable to today's products before 2007. If Congress changes that date to 2016 or 2018—when the law is fully in effect—it will reduce the number of products its new rules will eliminate from the market. Although not a perfect solution, grandfathering in most of the products now on the market would only bring innovation in the tobacco substitute market to a screeching halt, instead of throwing it back nine years.

The FDA's mission is to protect and enhance consumer health. Although it asserts the new regulations on vapes will "improve public health and protect future generations from the dangers of tobacco use," nothing could be further from the truth. The limitless flavors, styles, levels of nicotine, and general customizability provided by the current vape market are what has made them so popular—almost any smoker can find a device and juice combination to satisfy his or her needs, making switching from cigarettes easier, cheaper, and more likely to result in permanent smoking cessation. The new rules will, by the FDA's own admission, eliminate almost all of these products, whicht even experts within the FDA recognize are "good for public health." It seems the FDA would rather eliminate life-saving products than allow them to be available without its explicit permission.

Expert: Michelle Minton

For Further Reading

Michelle Minton, "FDA's Asinine Vaping Rule Costs Lives," *Las Vegas Sun*, August 14, 2016, https://www.congress.gov/bill/111th-congress/house-bill/1256/text.

———, "Q&A on the FDA's New E-Cigarette Rules," Competitive Enterprise Institute blog, August 5, 2016, https://cei.org/blog/qa-fdas-new-e-cigarette-rules?page=1&gclid=CjwKEAjwiru9BRDwyKmR08L3iS0SJABN8T4vySh1HLtkzfBhZOe_g90qwDQSCQLPFf4KBJOHXTmRBhoCAMbw_wcB.

David B. Clissold, "FDA's Final Deeming Regulation Covers All Tobacco Products," FDA Law blog, May 10, 2016, http://www.fdalawblog.net/fda_law_blog_hyman_phelps/tobacco/.

"E-Cigarettes around 95% Less Harmful than Tobacco Estimates Landmark Review," news release, Public Health England, August 19, 2015, https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review. For the study, see A. McNeill et al., "E-Cigarettes: An Evidence Update: A Report Commissioned by Public Health England," https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457102/Ecigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf.

"Regulating Tobacco: Q&A with FDA's Mitch Zeller," Robert Wood Johnson Foundation Culture of Health (blog), November 6, 2013, http://www.rwjf.org/en/culture-of-health/2013/11/regulating_tobacco.html.

Michael Siegel "FDA is Out of Its Mind," Tobacco Analysis (blog), November 9, 2015, http://tobaccoanalysis.blogspot.com/2015/11/fda-is-out-of-its-mind-deeming.html.

———, "First PMTA Approvals by FDA Demonstrate Why Treating E-Cigarettes like Tobacco Products Makes No Sense and Will Decimate the Industry," Tobacco Analysis (blog), November 12, 2015, tobaccoanalysis.blogspot.com/2015/11/first-pmta-approvals-by-fda-demonstrate.html.

Jeff Stier, "Comment on the Food and Drug Administration (FDA) Proposed Rule: Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products," National Center for Public Policy Research, September 2, 2012, https://www.regulations.gov/document?D=FDA-2014-N-0189-79941.

Berin M. Szoka et al. "Brief of *Amici Curiae*: The National Center for Public Policy Research and TechFreedom in Support of Plaintiff," August 5, 2016, http://www.nationalcenter.org/Nicopure_Labs_v_FDA_amicus_0816.pdf.

IMPROVE OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION'S REGULATION OF PHTHALATES

Actions by the Consumer Product Safety Commission (CPSC) related to plasticizers designed to make soft and pliable plastics—collectively known as phthalates—should raise concerns among members of Congress. In 2015, the CPSC released the Chronic Hazard Advisory Panel (CHAP) report, which was designed to assess the risks of those chemicals, which the agency may use to issue regulations.

The CPSC's process for assessing the risks of phthalates has proved highly suspect. Key concerns include:

- A lack of transparency in regard to the peer review process of the CHAP report;
- The refusal to allow public comment on a draft version of the CHAP report; and
- Reliance on outdated exposure data, and questionable approaches employed for a cumulative exposure assessment.

The CHAP report authors did not adequately consider the public health effects that might result from inferior substitute products. In any case, the science outlined in the CHAP report and elsewhere does not support regulatory action on any of the phthalates.

Such regulatory actions will have unanticipated effects on the markets for a variety of products beyond those regulated under this rule. Forced reformulations of children's products regulated under the rule, along with resulting market deselection of other products, threaten to undermine the public health, innovation, and economic well-being. In the case of children's toys, the CPSC did not consider whether product failures associated with substitute products might increase risks for children. For example,

Congress should:

- Conduct oversight hearings regarding the Consumer Product Safety Commission's regulatory actions on phthalates.

substitute products might increase choking hazards because they make many plastics more brittle and prone to breaking into small parts.

Expert: Angela Logomasini

For Further Reading

Angela Logomasini, "Public Comment to the Consumer Product Safety Commission (CPSC) on the Proposed Rule: Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates," March 16, 2015, https://cei.org/content/public-comment-consumer-product-safety-commission-cpsc.

IMPROVE OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION'S RESPONSE TO CALLS TO BAN ORGANOHALOGEN FLAME RETARDANTS

In July 2015, a coalition of environmental activist groups petitioned the Consumer Product Safety Commission to ban the use of all organohalogen flame-retardant products in upholstered furniture sold for home use, in mattresses and mattress pads, and in the plastic casing of all electronic devices. The CPSC has received comments and held hearings. It is now deliberating on whether such bans are necessary.

The petitioners claim that trace exposures of these chemicals pose health risks, and that products that contain them provide no benefits. Both claims fall apart under scrutiny. Evidence is scant that trace human exposures to organohalogens through consumer products pose a significant public health risk, whereas fire risks are real, verifiable, and substantial. Moreover, because not all organohalogens are the same, banning that entire class of chemicals makes no scientific sense.

Banning even a limited number of uses for an entire category of flame-retardant chemicals not only is unwarranted but will eliminate currently valuable uses and market development of future uses. The regrettable result could be unnecessary and preventable loss of life from fires that expand faster in the absence of these products.

Congress should:

- Conduct oversight hearings on regulatory actions by the Consumer Product Safety Commission related to organohalogen flame-retardant chemicals.

Expert: Angela Logomasini

For Further Reading

William P. Kucewicz, "Brominated Flame Retardants: A Burning Issue," American Council on Science and Health, August 2006, http://acsh.org/news/2006/08/09/brominated-flame-retardants-a-burning-issue.

Angela Logomasini, "Fanning the Flames: How Banning Flame Retardant Chemicals Puts Consumers at Risk," *Issue Analysis* 2016 No. 1, Competitive Enterprise Institute, March 23. 2016, https://cei.org/content/fanning-flames.

IMPROVE OVERSIGHT AND DEFUND ACTIVIST RESEARCH

Although we all would like to believe that researchers' motives are unbiased and pure, the reality is that incentives and personal opinions can have a huge effect on study design and results. When researcher bias combines with political agendas, it can evolve into "activist science" designed to achieve political objectives, rather than provide valid information. Unfortunately, politically active researchers are also adept at lobbying for government-funded activist research, and the resulting activist research can have adverse effects on public policy.

Some of the worst examples of government-funded activist science are found within the National Institute of Environmental Health Sciences (NIEHS). Consider the agency's research program related to the chemical bisphenol A (BPA), which is used to make clear hard plastics and the resins that line metal food containers. The activist campaigns against BPA have been fueled by taxpayer-funded research of questionable value, much of it supported by NIEHS grants. Between 2000 and 2014, the National Institutes of HH Health doled out $172.7 million for BPA research grants, according to a tally compiled by Citizens against Government Waste. That group estimated that 70 percent of those funds were spent between 2010 and 2014, coinciding with the appointment of Linda Birnbaum as director of NIEHS. Birnbaum and other anti-BPA activists have lobbied for and distributed government funds as part of a coordinated effort to promote bans.

Although this government-funded activist science is weak and runs contrary to comprehensive research that has demonstrated BPA's safety, those faulty studies promote alarming news headlines and generate unwarranted fear. As a result, state governments

Congress should:

- Conduct oversight hearings on activist science in the federal government, particularly at the National Institute of Environmental Health Sciences (NIEHS) within the National Institutes of Health.
- Defund activist science to save taxpayer dollars, or reallocate funds to more worthy causes, such as research to develop cures for cancer.

are advancing bans and other regulations, while industry is voluntarily removing BPA from its products.

Unfortunately, replacement products may prove more dangerous. For example, elimination of BPA resins in food packaging could lead to food waste, spoilage, and food-borne illnesses. BPA is just one example of how activist science undermines consumer freedom and public welfare, which underscores why Congress should work to prevent government-funded activist science.

Expert: Angela Logomasini

For Further Reading

Angela Logomasini, "Government's Unfounded War on BPA," *OnPoint* No. 210, Competitive Enterprise Institute, October 7, 2015, https://cei.org/content/government%E2%80%99s-unfounded-war-bpa.

Elizabeth Wright, "Dueling Agencies," *WasteWatcher*, Citizens against Government Waste, November 2014, http://www.cagw.org/media/wastewatcher/dueling-agencies.

PROTECT FEDERALISM AND AMERICAN ADULTS' ACCESS TO ONLINE GAMBLING PLATFORMS

The morality of gambling has long been decided in the United States. All but one state has some form of gambling, all but six have lotteries, and as of 2016, 28 states have gambling online. With a few exceptions, the regulation of intrastate gambling activities has been left to the states, as is their right under the Tenth Amendment of the Constitution. Yet for the few antiquated federal gambling statutes that do exist, modern technologies and business models—unanticipated by previous Congresses—have provoked legal conflicts and regulatory uncertainties. States have moved swiftly to modernize their laws in response to changing market conditions and the attitudes of their populations, taking illegal activities out of the shadows, implementing consumer protections, and bringing in new revenue for the states. However, some in Congress want the federal government to impose and maintain unconstitutional national prohibitions on some gambling activities.

Although states have traditionally regulated intrastate gambling, some members of Congress are trying to block state laws regarding online gambling. They are doing so by amending the Wire Act, a law from the 1960s that was only ever meant to regulate *sports* betting, over fears that states will be unable to keep such gambling within their borders. Yet for a number of years, states have had online gambling—including online lotteries, casino-style games, and daily sports betting. State regulation has proved effective with few, if any, violations of age or geographic restrictions and no evidence of using licensed online gambling sites as conduits for money laundering or other crimes. But some in Congress would rather push such activities back into the black market, where between 2003 and 2010, Americans spent more than $30 billion gambling on foreign-operated websites.

The Restoration of America's Wire Act (RAWA), sponsored by Rep. Jason Chaffetz (R-Utah) in the 114th Congress, would rewrite the 1961 law, creating a sweeping online gambling prohibition. Proponents claim that RAWA is necessary to "restore" the Wire Act to its original intent—to protect consumers and preserve federalism. In reality, it would do exactly the opposite. Amending a 53-year-old law to create a national prohibition now would do profound damage to the principle of federalism, undermine state sovereignty, and undercut the protections for online gamblers instituted by states, thereby forcing players into the black market.

Congress should:

- Protect the principle of federalism, Internet freedom, and consumer safety by rejecting the Restoration of America's Wire Act or any other proposals to prohibit or limit Internet gambling or that interfere in any way with state-based regulation of online gambling.

The original intent of the Wire Act is unambiguous. Attorney General Robert Kennedy, his assistants, and Congress understood that the law was meant to target organized crime, "to assist the various States in enforcement of *their* laws," and only to prohibited wire transmissions of "certain gambling information in interstate and foreign commerce," not *all* gambling information. Furthermore, subsequent Congresses recognized that the Wire Act did not prohibit online gambling, as evidenced by the fact that between 1995 and 2003, Congress considered no fewer than 23 bills to establish such a ban, and none were accused of being unnecessary because a ban already existed. In 2011, the Justice Department's Office of Legal Counsel restored that original understanding of the Wire Act—a move some in Congress saw as a "unilateral" reinterpretation. In 2013, a group of mostly Republican members of Congress, led by Rep. Chaffetz, introduced RAWA in response.

RAWA proponents claim to worry about online gambling increasing problem gambling, but a series of studies conducted at Harvard Medical School's Division on Addiction shows that online gambling is no more addicting than traditional forms of gambling, and that its availability will not increase problem gambling. In fact, the rate of gambling addiction has remained stable or has slightly declined, despite the increase in the availability of gambling—including on the Internet, which is legal in most Western nations. Online sites may even be better equipped to identify and help players who exhibit signs of disordered behavior, because unlike at a brick-and-mortar casino, a person's online behavior can be monitored and analyzed by sophisticated algorithms.

RAWA proponents also insist that the nature of the Internet makes it impossible to contain online gambling within state boundaries. Should some states be allowed to offer online gambling, those wishing to prevent residents from gambling online will be unable to block access. Therefore, Internet gambling is necessarily interstate, they claim. That concern is without merit, and such logic—should it prevail—sets a

dangerous precedent for other forms of online commerce. Technology exists to track users' location and block them if necessary, as the states with legal online gambling and the dozens of countries with legal online gambling have shown.

States have proved that they are more than capable of regulating these activities. Federal laws and mechanisms already exist to regulate or prosecute operators that violate the laws of other states or nations. And should Congress eventually enact a prohibition on Internet gambling, there is no doubt that Americans will simply return to the foreign-operated illegal market, with few or no consumer protections.

Clearly, there is no justification or pressing need to rewrite a 50-year-old law and to create a national Internet gambling prohibition that will merely strengthen the online gambling black market and weaken the principle of federalism that protects states from federal overreach. Congress should reject any attempts to constrain states from passing gambling laws that serve and protect citizens within their own borders.

Expert: Michelle Minton

For Further Reading

Michelle Minton, "The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling," Center for Gaming Research Occasional Paper No. 29, University of Nevada, Las Vegas, September 2014, http://gaming.unlv.edu/papers/cgr_op29_minton.pdf.

———, "Republicans' Bad Bet," *OnPoint* No. 193, Competitive Enterprise Institute, May 6, 2014, https://cei.org/onpoint/republicans-bad-bet.

Michelle Minton and Steven Titch, "Game Changer: Rethinking Online Gambling Regulation in the Age of Daily Fantasy Sports," *Issue Analysis* 2016, No. 2, Competitive Enterprise Institute, May 10, 2016, https://cei.org/content/game-changer.

REPEAL THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Although Washington generally defers to states on matters of intrastate gambling, as is states' prerogative under the Tenth Amendment to the Constitution, a notable exception is the regulation of sports gambling. The 1992 Professional and Amateur Sports Protection Act (PASPA) prevents states from legalizing and regulating sports gambling. As a dozen states considered laws regulating sports gambling in the late 1980s and 1990s, some members of Congress feared that betting on amateur and professional games jeopardized the integrity of sports—and the public perception thereof. PASPA, endorsed by the major sports leagues, thwarted the expansion of sports betting and created a government-granted monopoly on sports betting, exempting from the ban only the four states that had some form of sports gambling prior to the law.

Since then, a robust black market has emerged with Americans spending hundreds of billions on illegal sports gambling even as states sue for the right to regulate it. PASPA clearly violates the spirit of the Tenth Amendment, and many scholars believe that should the U.S. Supreme Court ever take up a challenge to the law, it likely would not survive.

Apart from four states—Delaware, Nevada, Montana, and Oregon—federal law prohibits states from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling unless they had already done so by 1993 (Professional and Amateur Sports Protection Act, 1992, 28 U.S. C. Chapter 178, https://www.law.cornell.edu/uscode/text/28/part-VI/chapter-178). The law, however, has not stopped Americans from wagering on sports, online or off. It is estimated that Americans illegally wager upward of $400 billion on sports annually. Unsurprisingly, in the wake of the late-2000s economic downturn, lawmakers grasping for new sources of revenue to fill gaps in state budgets would like to tap into the billions being wagered illegally in their states, with at least five—California, Delaware, New Jersey, New York, and Pennsylvania—challenging the federal statute. As New Jersey phrased it in its recent court

Congress should:

- Repeal the Professional and Amateur Sports Protection Act to reverse the damage done to the principles of federalism and individual rights, and allow states to regulate intrastate gambling activities as they see fit.

challenge to the law, it would "conscript and commandeer states into instrumentalities of the federal government."

In addition to its unconstitutionality, the ban is also counterproductive. Although lawmakers hoped the ban would protect the perceived integrity of sports, all it really did was protect illegal sports bookies and gambling rings. In contrast, allowing states to legalize and regulate the activity would give regulators and sports leagues the ability to track betting behavior and identify signs of corruption. More important, it would give states the opportunity to establish consumer protections, prevent fraud, protect privacy, and institute safeguards for minors and those with addiction.

If the purpose of PASPA was to protect the integrity of sports and uphold the nation's moral values by preventing a "culture of gambling" among our youth, it has utterly failed. In 1991, illegal sports betting was just a $40 billion a year industry, but 23 years later, the market for illegal sports betting is nearly 10 times that amount.

America's perspective on the morality of gambling has shifted. Where once there was reluctance to expand legal gambling, surveys now indicate that an overwhelming majority do not oppose or strongly favor the legalization of sports betting. Regardless of the outcome of any future Supreme Court case on the constitutionality of PASPA, it is high time Congress rectified the damage it did to federalism when it enacted the Professional and Amateur Sports Protection Act in 1992.

Expert: Michelle Minton

For Further Reading

Michelle Minton, "Let Chris Christie Legalize Sports Gambling. It Won't Ruin the Game," *New Republic*, October 22, 2014, https://cei.org/content/let-chris-christie-legalize-sports-gambling-it-wont-ruin-game.

Michelle Minton and Steven Titch, "Game Changer: Rethinking Online Gambling Regulation in the Age of Daily Fantasy Sports," *Issue Analysis* 2016, No. 2, Competitive Enterprise Institute, May 10, 2016, https://cei.org/content/game-changer.

Jeffrey Roeske, "Doubling Down on Sports Gambling: Why PASPA Would Fail a Constitutional Challenge," *Marquette Sports Law Review*, Vol. 24, No. 2 (Spring 2014), pp. 463-483, http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1624&context=sportslaw.

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