FREE *to* PROSPER

A Pro-Growth Agenda for the 116th Congress

COMPETITIVE ENTERPRISE INSTITUTE

CEI

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Edited by Ivan Osorio

Competitive Enterprise Institute

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Introduction

by Kent Lassman
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The governance of American life has been handed over to an operating system that subtly and perversely drives individuals' behavior away from their own decisions. Unaccountable regulatory agencies dominate how we live, work, play, build, travel, prepare food, and heal one another.

Did you know it is a federal crime to sell chewing gum that is more that 0.065 percent beeswax or to sell vegetable spaghetti bigger than 0.11" in diameter? We have all seen the photos of the *Federal Register* that look like mountains of paper. But what do those pages mean for real people? Typically, regulations do not lead the news and are not an issue that will garner much attention. Yet, virtually every aspect of our lives is regulated by the federal government. With that in mind, there are three central arguments for a thoughtful regulatory agenda in the new Congress.

First, there is Article I of the Constitution, which bestows upon Congress the singular power to legislate. For decades, however, Congress has delegated away much of its lawmaking authority to regulatory agencies. When it reasserts its constitutional authority, Congress is better positioned to deal with issues proactively rather than merely receiving whatever comes from the executive and judicial branches of government. Quite simply, we have a good system for how to set the rules of the game for life in America. It is a system that relies on Congress to make the laws and it is well past time to try it once again.

Regulation is not a salve for political, social, or economic tensions. However, it does crowd out the very institutions positioned to address those essential issues of our time. Regulatory reform is necessary to make room for all the good that comes from the institutions that are the fabric of local communities, such as booster clubs, museums, scholarship funds, and food drives. Those things that enrich our lives are slowly crowded out by the time, money, and attention we must devote to things like the diameter of vegetable spaghetti.

The costs of government extend far beyond what Washington taxes, borrows, and spends. Relatively speaking, fiscal policy is quantifiable and visible. By contrast, we make nearly no effort to assess the tradeoffs or effectiveness of regulatory policy. As a result, it is nearly invisible. Yet, the low-end estimates of the federal regulatory burden are $1.9 trillion per year. That is nearly $15,000 for every household. On average, the typical household spends more on regulatory costs than on any other category of its budget save housing. The 116th Congress has a historic opportunity to bring to light an accounting of how the government operates and what values we pursue through Washington's edicts.

We have made some progress recently. Congress rediscovered the Congressional Review Act. Through executive order, executive agencies have displayed more consciousness of benefit-cost reviews and "regulatory dark matter." Regulatory reform ideas proposed by CEI, such as a regulatory budget, have gained acceptance, if not full adoption, in Washington. We will keep pushing for stronger reforms. But we still have a long way to go.

Today we find ourselves in a moment where good ideas—many with bipartisan pedigree—all point toward creating binding limits on the executive branch. Some seek to curtail the current administration. Others would like to see fewer far-reaching rules from unaccountable agencies that receive far too much deference from the courts. Taken together, it is time to move a regulatory reform agenda forward.

This edition of *Free to Prosper* offers some bold, yet practical ideas for regulatory reform that the incoming Congress should tackle. It covers a lot of ground, too much to go into detail here. However, I would like to highlight some key priorities.

Reclaim Congress' prerogative as the lawmaking branch of government. For the past few decades, Congress has delegated much of its lawmaking authority to executive and independent agencies, which get wide latitude to interpret statutes and regulate according to those interpretations. The system is untenable. Under the American constitutional system of government, the people's elected representatives, not unelected agency staff, are in charge of making laws. It is long past time for Congress to reclaim its place as the prime mover in domestic policy making. The need to act is urgent. Those decades of over-delegation to agencies by Congress have led to the unchecked growth of an unaccountable administrative state, which governs most aspects of the nation's economic life, and carries on as with a life of its own. This is neither what the Founders envisioned nor what will work in contemporary America.

Rein in "regulatory dark matter." The administrative state has grown far beyond the limits placed on it by the elected branches of government. Today, agencies often impose rules without going through the notice-and-comment rulemaking process required under the Administrative Procedure Act, via what CEI's Wayne Crews has dubbed "regulatory dark matter." This "dark matter" consists of guidance documents, interpretive bulletins, memos, and other agency issuances that are not officially deemed as "rules," but carry regulatory weight nonetheless. Putting the brakes on this vehicle of runaway overregulation should be a top priority for elected lawmakers.

Rein in *Chevron* deference. Congress can further bolster regulatory accountability by empowering the judiciary vis-à-vis agencies. Under the reigning legal doctrine known as *Chevron* deference, courts generally defer to regulatory agencies' interpretations of enabling statutes, as long as those interpretations are considered "reasonable"—an overly broad standard that gives agencies excessive latitude. Passing legislation instructing the judiciary to junk *Chevron* deference would go a long way toward reining in agencies.

Reassert authority over trade policy. Another area in which Congress has delegated away much of its proper authority is trade policy, in this case to the president. The freedom to trade with businesses and individuals around the world is both key to American prosperity and morally right. For decades, presidents from both parties pursued liberalized global trade as a force for good. With that context, congressional complacency regarding trade policy may be understandable. Complacency is dangerous. As the administration's recently imposed steel and aluminum tariffs on American allies, those nations' retaliatory tariffs, and the resulting economic damage demonstrate, it doesn't take much to disrupt international trade in disastrous fashion.

There are straightforward steps available to lawmakers to prevent more economic damage being brought to the doorsteps of their constituents.

Protect American businesses' and consumers' access to capital. Capitalism could not exist without capital—the resources that entrepreneurs need to launch businesses, for businesses to grow, and for investors to fuel the growth of new industries. Widespread access to capital has helped make the American economy the strongest in the world. But, as investment advisors often warn, past performance is not guarantee of future results. Overreaction by recent congresses to financial scandals, like those at Enron and WorldCom, and the 2008 financial crisis have led to a wave of onerous regulations that have made it increasingly difficult for entrepreneurs to get startup capital, for small businesses to borrow to expand, and for consumers to get credit. The new Congress has an opportunity to fix this state of affairs by removing many of the more burdensome provisions of the Dodd-Frank Act of 2010. Specifically, Congress should abolish, or at least create limits for the Consumer Financial Protection Bureau (CFPB), an unaccountable regulatory agency set up under Dodd-Frank. The bureau is headed by a single director who is not removable by the president, other than "for cause," and is not subject to Congress' power of the purse because its budget comes from the Federal Reserve.

Reassert control over environmental policy. The Environmental Protection Agency (EPA) is one of the most powerful federal regulatory agencies. Its rules affect wide swathes of the American economy and impose considerable costs. Therefore, Congress should clarify what the agency can and cannot do. A major priority in this regard should be repeal of the EPA's Clean Power Plan, for which the agency stretches the definition of "stationary source" for emissions beyond anything found in the Clean Air Act. In addition, lawmakers should seek to prevent rulemaking via treaty, such as the proposed Kigali Amendment to the Montreal Protocol, which would make refrigeration and air conditioning more expensive across the board. Americans hold strong views on natural resources. It is a worthwhile effort to translate those values to policy through an accountable legislative process.

Defend property rights and restore resource production on federal lands. The federal government is the largest landowner in the United States. It directly owns large parts of the Western U.S. and many federal lands are closed to resource extraction. Meanwhile, federal land management agencies hold considerable sway over private landowners' use of their property. Congress should unleash access to America's natural bounty by shrinking the amount of land the federal government owns outright, while opening federal lands to environmentally sustainable resource extraction. In addition, lawmakers should define regulatory takings—when land use restrictions reduce a large part or all of the value of private property—and give landowners access to compensation.

Improve the quality of government science. Federal agencies rely on science to justify regulations. Unfortunately, much of the science on which they rely is either of poor quality or not transparent. For example, the EPA's Integrated Risk Information System has been criticized in Government Accountability Office reports. Congress should require government research programs to meet basic scientific standards—and defund those that do not.

Protect consumer freedom. America is a large and diverse place, with a wide array of tastes and preferences—and an equally wide array of companies and industries to cater to those tastes. There is no "typical" American consumer; individuals are best situated to decide which products or services suit their particular wants and needs. Unfortunately, regulators often restrict consumers' choices, supposedly for their own good—and often without authorization from Congress. To protect consumer freedom, Congress should stop regulators from unilaterally seeking to control consumers' access to innovative product and services, based on hypothetical, unproven risks. From cryptocurrency to vaping to autonomous vehicles, Congress should ensure that overzealous regulators do not stand in the way of the next wave of American innovation.

Protect innovation in telecommunications. The telecommunications revolution has helped transform the way we live, work, and communicate. From the Internet to mobile phones, we have access to a wealth of information and ease of communication unimaginable only a generation ago. America's modern telecommunications industry owes much of that success to its having been able to operate—and thrive—largely free from heavy-handed government regulation. However, its future success is far from guaranteed. Ongoing efforts to impose net neutrality rules—which would regulate the Internet like a Ma Bell-era public utility—threaten to hinder innovation. Lobbying by states to be able to collect sales taxes beyond their borders threaten online retail. Meanwhile, traditional media, including television, remain subject to outdated rules written in an era of broadband scarcity and limited consumer choice. Fortunately, we can build on the progress made by the communications sector. In this volume, we outline some next steps.

Update employment law for the 21st century workforce. The telecommunications revolution has revolutionized the ways we work—with more change on the way. From telecommuting to the sharing economy, new work arrangements unforeseen just a few years ago have helped us work more productively and efficiently, created new sources of revenue for workers, and enabled to rise of new industries and business models. Unfortunately, U.S. labor law remains stuck in the industrial realities of the New Deal era; it has little relevance to the modern workplace, which is characterized by flexible work arrangements and considerable worker mobility. This volume offers some concrete reforms to bring the nation's labor laws closer in line with the modern workplace.

Protect federalism and respect state sovereignty. Under America's federal system of government, the states are the "laboratories of democracy," where different policy ideas can be tried, adopted, or discarded, according to the circumstances and voter preferences of each state. States exercising sovereign authority allows for a better discovery process of trial and error, gives voters greater say in policy decisions, and makes for a less contentious national political climate by decentralizing decision making. Yet, Washington does not always leave states well enough alone. Two areas of recent debate concern gambling and marijuana. Public opinion has shifted toward favoring fewer restrictions on both, as demonstrated by state election results. Washington lawmakers should respect the will of the voters of each state on these matters. Regarding marijuana, it is time to de-schedule it and allow for flexible approaches in the various states.

These, and other ideas offered in this volume, are concrete and positive steps forward to reassert congressional primacy in lawmaking. It is the duty and obligation of Congress to set the parameters of government's behavior, including how intrusive executive branch agencies can be in our economic lives.

An effective regulatory agenda boils down to creating a culture of genuine review and oversight of the executive branch, while redirecting the essential nature of regulation toward being less rigid and therefore less hostile to innovation, less difficult to change as circumstances require, less susceptible to industry capture, and more narrowly constructed to prevent the agencies from expanding their authority.

Regulatory Reform and Agency Oversight

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> *"All legislative Powers herein granted shall be vested in a Congress of the United States."*
>
> *Article I, Section 1, U.S. Constitution*

After decades of growth, the rate of issuance of new federal regulations has slowed under the Trump administration. One notable executive order (E.O.) requires agencies to add zero net costs and to eliminate at least two existing regulations for each new one enacted. The actual ratio of rules eliminated to rules enacted since the E.O. was issued has been closer to five to one. To date, it is difficult to tell whether total costs have merely stopped growing or have actually decreased. A major reason for that is a lack of publicly available agency data and shortcomings in the data that agencies make public. Yet overall regulatory growth has almost certainly slowed, likely saving billions of dollars for consumers and producers over the past two years.

The reforms so far have mostly come via executive order rather than legislation. That means that the next president can undo most Trump-era reforms with the stroke of a pen. Congress' job now is not merely to keep this momentum going, but to carry its own weight in pushing reform. To do that, it must reassert the legislative authority it has over-delegated to regulatory agencies. Although Congress has played a role in eliminating certain individual regulations, no measures yet enacted address the systemic problem. The rules of the rulemaking game have allowed the federal regulatory state to grow larger than Canada's entire gross domestic product (GDP)—

and will allow it to keep growing without further reform. The rulemaking process itself is where Congress most needs to act.

Congress should:

- Defund unapproved agency initiatives, and, where applicable, use the Congressional Review Act to rein in agency overreach.
- Improve regulatory disclosure, transparency, and cost analysis of regulations and guidance. A first step could be to implement a regulatory report card to tally regulatory costs and flows in a user-friendly way and promote more accurate reporting to enable analysis of the regulatory enterprise by third parties.
- Implement a bipartisan regulatory reduction commission and regulatory sunsetting procedures.
- Require votes on major 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 (H.R. 26, 115th Congress).
- Implement a limited regulatory cost budget.

There are two main areas in which Congress can enact meaningful reform. One is to rein in regulatory guidance documents, which we refer to as "regulatory dark matter." When an agency issues a new regulation, it is required to go through a notice-and-comment period, as specified in the Administrative Procedure Act (APA). Agencies sometimes dodge that requirement by regulating instead through *Federal Register* notices, guidance documents, memoranda, bulletins, administrative interpretations, and other means outside standard rulemaking procedure.

The other area is a variety of reforms to increase agency transparency and accountability of all regulation and guidance. The fact that the *Code of Federal Regulations* now exceeds 180,000 pages and contains more than 1 million individual regulatory restrictions, with annual estimated costs of around $2 trillion, is an indictment of the current rulemaking process. To encourage better agency behavior, Congress should require:

- Annual regulatory report cards for rulemaking agencies;
- Regulatory cost estimates from the Office of Management and Budget (OMB) for more than just a small subset of rules; and

- Retrospective review of existing rules that have real-world data by which to gauge their effectiveness.

To improve regulatory cost accountability, in 1996 Congress passed the Congressional Review Act (CRA), which set up a period of 60 legislative days after agency publication of a regulation during which the rule will not take effect. That pause affords Congress an opportunity to pass a resolution of disapproval to repeal the regulation. To its credit, the 115th Congress invoked the Congressional Review Act to overturn agency rules for the first time since early in the first term of the George W. Bush administration. Congress should keep this power in mind for when agencies issue regulations without authorizing legislation.

Although there is little bipartisan appetite for working with the Trump administration on reforms, the environment could change, particularly concerning certain low-hanging-fruit reforms, such as better disclosure.

To put those recommendations into context, specific shortcomings in oversight of the ordinary, everyday rules and regulations should be noted.

First, the central review process conducted by the White House Office of Management and Budget to ensure that rule benefits exceed their costs is lacking. This 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 the Table 1.1 shows, of the more than 3,000 rules issued by agencies annually, cost–benefit analyses reviewed by OMB typically exist for only about a dozen, with a handful of other rules accompanied by a reviewed cost analysis.

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

Third, aside from rarely defunding agency actions, Congress rarely uses its most powerful accountability tool, the Congressional Review Act, to pass resolutions of

Table 1.1 Proposed Breakdown of Economically Significant Rules

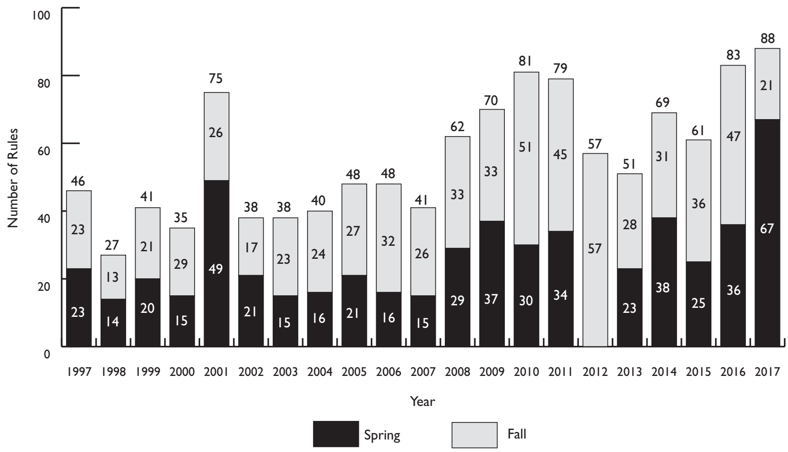
Year	Rules with costs and benefits	Rules with costs only	Grand total, rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	13	3	16	3,554
2015	21	6	27	3,410
2016	16	32	48	3,853
2017	n/a	n/a	n/a	3,281
Total	**197**	**124**	**321**	**64,382**

Sources: Costed rule counts: OMB, various editions of *Report to Congress* on regulatory costs; Federal Register Final Rules: author search on Federalregister.gov advanced search function.

disapproval of costly or controversial agency rules. Its 2017 invocation to repeal 15 rules from the end of Barack Obama's presidency was the first time Congress had invoked the CRA since the 2001 repeal of a Department of Labor (DOL) ergonomics rule.

Fourth, even if Congress were more inclined to assert its legitimate authority over the regulatory enterprise, the Congressional Review Act has long been undermined by agency nonobservance of its procedures. As Curtis W. Copeland demonstrated in a paper prepared for the Administrative Conference of the United States, many final

Figure 1.1 Annual Completed Economically Significant Rules in the Unifed Agenda, 1997–2017



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2017 edition, https://cei.org/10kc2017.

rules were not properly submitted by agencies to the GAO's Comptroller General and to Congress, as required under the CRA. That submission is 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 for Congress to go on the record frequently regarding the merits of particular regulations. This matters because although the number of rules has decreased overall from about 3,500 per year during the Obama administration to about 3,300 per year during the Trump administration, that still averages to a new regulation roughly every two and a half hours, 24 hours a day, seven days a week. That is a lot of activity for anybody to be able to monitor.

At root, overregulation results from a breakdown of checks and balances under the Constitution's separation of powers. Overdelegation by Congress has enabled regulatory agencies to assert control over wide swathes of the American economy through both rules and guidance. On one hand, regulatory streamlining requires far more congressional oversight of agency regulatory actions, including hearings, better information disclosure, and slashing of agencies' budgets when they exceed their bounds. On the other hand, Congress needs to grapple with the reality that it has relinquished much of its legitimate authority to the executive branch.

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

IMPROVE REGULATORY OVERSIGHT AND ACCOUNTABILITY

Recent years have seen increasing overreach by the executive branch, as several administrations and regulators have increasingly attempted to impose policy while circumventing Congress. Yet Congress often has stood by in the face of this power grab. Such regulatory excess has led to (a) labor force participation that remains low despite numerous job openings and a low overall unemployment rate, (b) reduced business ownership, (c) lower self-employment rates among the young, (d) declining rates of small business formation, and (e) more businesses closing than are being created.

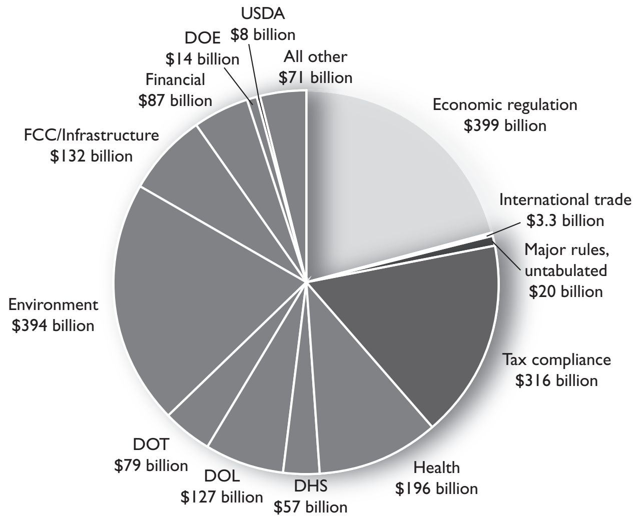
The Office of Management and Budget, in its 2016 *Information Collection Budget of the U.S. Government*, estimates that 9.78 billion hours were required to complete regulatory paperwork requirements in FY 2015. In addition, OMB's *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates*, which surveys regulatory costs and benefits, pegs the cumulative costs of 120 selected major regulations from 2004 to 2014 at between $68.4 billion and $102.9 billion annually (in 2010 dollars). The report is chronically published late; the 2015 and 2017 reports were not even published in their assigned calendar year, and the 2018 draft report remains unpublished as of this writing.

Federal spending is the squeaky wheel that gets attention from lawmakers, the media, and the public, particularly because the federal debt has more than doubled since 2008. But decades of cumulative regulation may have even greater effects. Official disclosures fail to adequately capture the regulatory state's magnitude, with its interventions, bans, uncertainty, wealth destruction, job loss, stifling of entrepreneurship, and loss of liberty. Government solutions to perceived market failures can have consequences that are

Congress should:

- Hold oversight hearings on aggressive agency initiatives.
- Insist that agencies adhere to the Administrative Procedure Act's notice-and-comment rulemaking process.
- Defund appropriations for agency initiatives that have not been approved by Congress.
- Introduce resolutions of disapproval under the Congressional Review Act for overly burdensome or controversial rules.

Figure 1.2. 2018 Estimate for the Annual Cost of Federal Regulation and Intervention, $1.9 Trillion



Source: Clyde Wayne Crews Jr., *Ten Thousand Commandments*, 2017 edition, https://cei.org/10kc2017.

worse than the problem they seek to address. Regulators cannot respond rapidly to changes in fields such as health care, finance, infrastructure, and cybersecurity. Central, bureaucratic regulation can undermine actual regulation and discipline. Agency pursuit of benefits imposes costs of its own when agencies interfere with the improvements in health, safety, and environmental and economic health that are driven by competitive processes and by consumer and social demands.

Policy makers' choice is not between regulation and no regulation, but over which institutional frameworks are more appropriate to advancing health, safety, efficiency, and innovation. For every market failure cited to justify government intervention, one can find offsetting political and bureaucratic failure. Price regulation increases prices or creates shortages. Internet net neutrality regulation would undermine communications infrastructure's potential. Much environmental regulation came about because of the lack of property or use rights in certain resources—again, government failures.

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

Experts: Clyde Wayne Crews Jr., Ryan Young

For Further Reading

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REIN IN OVERREGULATION AND REGULATORY "DARK MATTER"

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

Congress should:

- Ensure that the oft-neglected Administrative Procedure Act's notice-and-comment requirement for rules is appropriately applied.
- Abolish, downsize, reduce the budgets of, and deny appropriations to agencies, subagencies, and programs that pursue regulatory actions that are not authorized by Congress.
- Repeal or amend enabling statutes that sustain a regulatory enterprise or program.
- Subject regulatory guidance, alongside ordinary rules, to greater scrutiny by the Office of Management and Budget. Exposing the costs of guidance can provide a public record for future legislative reforms of guidance-as-regulation. President Reagan's Executive Order 12291 provides a model to follow in that it put the onus of demonstrating the need for a new rule on agencies. 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.

The basis of the modern regulatory process is the Administrative Procedure Act of 1946 (P.L. 79-404), which set up the process of public advance notice of rulemakings. It gave the public the opportunity to provide input and comment before a final rule is published in the *Federal Register*, subject to a 30-day period before it becomes effective. However, the APA has a huge loophole that regulators often exploit. Agencies can avoid notice and comment for "good cause," as determined by the agencies themselves. 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 allows agencies to avoid scrutiny of a wide array of rules. Agencies' declarations face insufficient oversight, yet they are binding. Congress has several options for enforcing adherence to the APA, and thus affirm the separation of powers.

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** (SEC) interpretive "Commission Guidance Regarding Disclosure Related to Climate Change"
- **Education Department** series of guidance documents imposing new mandates on colleges and schools on issues ranging from bullying and harassment to gender identity
- **U.S. Department of Agriculture's Forest Service** "Notice of Final Directive" on permanent Ecosystem Restoration policy
- **Department of Labor Wage and Hour Division's** "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

Amendments to the Administrative Procedure Act have intended to subject complex and expensive rules to additional analysis. Those reforms include:

- Paperwork Reduction Act of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521);
- Regulatory Flexibility Act (to address small business impacts, Pub. L. 96-354); and
- Congressional Review Act, which enables Congress to vote on a resolution of disapproval to reject agency regulations (5 U.S.C. § 801–808).

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 E.O. 12291 set up central review of agency rules by OMB. However, President Bill Clinton's E.O. 12866 restored "primacy" to agencies, thereby weakening the process. Although President Obama issued several orders ostensibly to streamline regulation, his underlying "pen and phone" approach to policy making eclipsed any regulatory curtailment.

Moreover, the APA's "good-cause"-weakened requirement to publish notice of proposed rulemaking and allow public comment does not apply 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 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. (P.L. 79-404, § 553)

With respect to significant guidance, some executive (not independent) agencies comply with a 2007 OMB memo on "Good Guidance Principles"—in effect, guidance for guidance. "Significant" guidance includes those agency issuances estimated to have an annual economic effect of $100 million or more, 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 continue to invoke the 2007 OMB memo and follow its directive of maintaining Web pages devoted to their significant guidance. Unfortunately, the directive is a suggestion rather than a command; it allows, for example, for the Food and Drug Administration (FDA) to report no significant guidance, even though it has issued hundreds of thousands of pieces of acknowledged final guidance documents since the 1970s.

Experts: Clyde Wayne Crews Jr., Ryan Young

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STRENGTHEN DISCLOSURE WITH A "REGULATORY REPORT CARD"

Regulatory information is often publicly available but difficult to compile or interpret. A regulatory report card that makes such information more accessible would go a long way toward increasing transparency. Since the early 1980s, regulatory oversight has been governed primarily by the semi-formal 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 only a fraction of the federal regulatory enterprise—less than 1 percent of rules have "audited" cost–benefit analysis. By requiring a periodic publication that summarizes available but scattered data, Congress could make complex regulatory data more user friendly and encourage public accountability.

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, one-location, online disclosure of economically significant guidance from both independent and executive agencies, augmenting what a few agencies already voluntarily publish on the basis of 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 they are published at all.

The Reagan and first Bush administrations formalized such disclosure in a document that accompanied 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 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 sometimes 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 that affect 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 a grand total
- Numbers and percentages lacking cost estimates, with reasons for the 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 (possibly divided by sector, for example, financial or communications), social, health and safety, and environmental
- *Federal Register* analysis, including numbers of pages and breakdowns of final rules by agency
- Number of major rules reported by GAO in its database of reports on regulations
- Rankings of the 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 only
- Number of rules that are new to the Unified Agenda
- Number of rules that are carryovers from previous years
- Numbers and percentages of rules that face 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 OMB and action taken

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

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

Such additional disclosure is also needed for regulatory guidance documents, memoranda, and other regulatory dark matter that have been neglected in the regulatory oversight process.

Experts: Clyde Wayne Crews Jr., Ryan Young

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IMPLEMENT A REGULATORY REDUCTION COMMISSION AND SUNSETTING PROCEDURES

Much concern gets expressed over agencies' issuing of new regulations, but Congress should also seek to prune those regulations already on the books that have accumulated over decades. An option is to create a Regulatory Reduction Commission and task it to convene periodically to comb through the federal rulebook and compile a package of obsolete or burdensome rules for repeal.

Congress should:

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

Modeled on the military Base Closure and Realignment Commission (BRAC), the Commission on Regulatory Relief and Rollback was first proposed in 1995 by Sen. Phil Gramm (R-TX). 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 Congress take on the politically difficult 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 that does not require legislation could be implemented by the president. 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," thus providing political cover all around.

International precedent for streamlining exists. 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 U.K. Both sought to reduce regulatory burdens by 25 percent over a four-year period, and they achieved some success.

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

Experts: Clyde Wayne Crews Jr., Ryan Young

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REQUIRE VOTES ON MAJOR OR CONTROVERSIAL RULES

Congress passed 97 laws in 2017, but agencies issued 3,281 rules—a ratio of 34 rules for every law. As administrative law has replaced the representative republican version our founders envisioned, congressional overdelegation to bureaucrats has widened the disconnect between the *power* to establish regulatory programs and *responsibility* for the results of those programs. As Columbia University law professor Philip Hamburger notes, the emergence of an unaccountable regulatory state enabled regulators to create "laws" in defiance of the Constitution, which "expressly bars the delegation of legislative power."

The Congressional Review Act, with its resolutions of disapproval, represents a tilt back toward the principle of congressional accountability, but it has rarely been used. Further, 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.

Congress should:

- Pass the Regulations from the Executive in Need of Scrutiny Act, which would require major rules with annual costs of $100 million or more to be voted on by Congress before they become effective.
- Once passed, expand the REINS Act to cover:
  - Any controversial rule, whether tied to a cost estimate or not.
  - Guidance documents and other agency decrees.

Public accountability for Congress and agencies should require that no major or controversial agency rule becomes effective *until* it receives an *affirmative* vote by Congress. This is crucial, because:

1. The potential for abuse of the "good cause" exemption is always high;
2. Most agencies do not quantify most rules' costs; and
3. Costly rules can escape the "significant" classification by bringing their cost estimates in below the $100 million threshold.

The REINS Act passed the House of Representatives in the 113th, 114th, and 115th Congresses, and should be revisited. Democratic accountability is most important. Cost–benefit analyses matter less when every elected representative goes on record as either supporting or opposing a particular regulation.

Experts: Clyde Wayne Crews Jr., Ryan Young

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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* government expenditures. The concept is both bipartisan and not new. For example, former Sen. Lloyd Bentsen (D-TX) proposed an annual regulatory budget in 1979. Recent legislative offerings include Sen. Marco Rubio's (R-Fla.) National Regulatory Budget and Sen. Mike Lee's (R-Utah) Article I Regulatory Budget Act, introduced in May 2016.

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

Congress should:

- Require agencies to present annual regulatory cost projections to Congress as part of the appropriations process. This would enable Congress to better 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. A regulatory budget would make this possible beyond the executive order now in place. Like the regulatory reduction commission, this idea holds bipartisan appeal. For example, Sen. Mark Warner (D-Va.) has recommended 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.

A comprehensive regulatory cost budget would include individual tallies from agencies that would parallel 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 mandates save more lives per dollar or correct some alleged market imperfection better than those of another agency. That should improve decision making and adherence to congressional intent. A comprehensive budget poses political risks, so limited versions should be implemented first.

Agencies would concentrate on assessing costs, much as the fiscal budget focuses on costs, not just benefits. Benefits are what Congress must supervise in the first place via its lawmaking and budgetary authority. Although compliance costs are difficult to calculate, they would be easier to manage than 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:

1. The risk of creating perverse incentives to expand the size of government due to the elevation of utilitarianism over individual rights in the pursuit of social benefits;
2. The reality that, apart from raw compliance, cost calculations are subjective and involve mere estimations; and
3. The temptation to generate a phony net benefit budget.

The latter 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, rule sunsetting, one in–one out procedures, and congressional approval of rules all would lay the needed foundation for more comprehensive versions of a regulatory cost budget. Regulatory budgeting can only really work atop a solid foundation of accountability. In particular, an accountable Congress that answers for uncalculated regulatory cost is a prerequisite for a properly functioning regulatory budget.

Experts: Clyde Wayne Crews Jr., Ryan Young

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RESTRAIN THE RUNAWAY ADMINISTRATIVE STATE BY REINING IN CHEVRON DEFERENCE

Chevron deference is the legal doctrine under which 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 considered reasonable by the court to pass legal muster. So, although a court may believe that its own interpretation is a superior reading of the law, under *Chevron* deference, it would have to give way to the agency's interpretation.

From an institutional perspective, *Chevron* deference 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' interpretation 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."

Congress should:

- Pass the Separation of Powers Restoration Act (SOPRA, H.R. 76, S. 1577, 115th Congress), which would direct courts to stop giving controlling deference to agency interpretations of rules' enabling statutes.
- In expectation of a possible increased administrative burden on Article III courts, complement passage of SOPRA with a modest appropriation to support another 36 appellate judges and 140 district court judges plus the accompanying clerks and assistants.

The U.S. Supreme Court established this doctrine in its seminal 1984 ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* In that ruling, the court set up a now widely used two-step test 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 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 than judges, to interpret statutes, because of the former's comparative expertise and accountability. In making that assumption, the Supreme Court overlooked the possibility that Congress' intent may run counter to that of the executive branch. For that reason, Congress should look to provide a judicial check on the powers of the executive, regardless of administrative agencies' supposed expertise in interpreting statutes.

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

Experts: Iain Murray, Myron Ebell, Marlo Lewis

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Trade

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Protectionism, long a byword in politics for economic folly, has recently regained currency under the Trump administration. To safeguard America's prosperity, one of the new Congress' most urgent priorities should be to rein in the executive branch's protectionist policies. President Trump, without input from Congress, has enacted multibillion-dollar tariffs on steel and aluminum and on more than 6,000 different goods from China, from circuit boards to peanut butter and jelly, covering more than $200 billion of exports. Other countries, including allies such as Canada, Mexico, and the European Union (EU), have responded with retaliatory tariffs on U.S. goods, including pork, cheese, motorcycles, bourbon, and blue jeans.

U.S. producers such as Harley-Davidson are offshoring some of their production to avoid the tariffs, while downstream domestic industries such as construction, automobiles, and canned goods are facing inescapable cost increases of up to 25 percent. They have little choice but to pass those costs on to consumers. Affected companies are also laying off employees, canceling multimillion-dollar deals, and adapting to reduced demand. Futures markets are more volatile than usual, due both to the tariffs themselves and to the frequent and unpredictable twists and turns in how the administration has gone about imposing them.

In the short term, the Trump tariffs have displaced hundreds of thousands of workers, who must now seek different employment, according to a June 2018 analysis by the Tax Foundation. The tariffs' costs to consumers—some of them freshly out of a job—

may well outweigh any savings from the 2017 income tax cut. In the long term, the tariffs will lead to higher producer costs, higher consumer prices, less competition, less innovation, and slower economic growth. Going forward, our allies may also credibly threaten to withhold their cooperation on other foreign policy issues.

The president's unilateral protectionist behavior cuts against 75 years of ongoing trade liberalization that pushed the United States' tariff rate on dutiable goods from a peak of more than 59 percent in the aftermath of the 1930 Smoot-Hawley tariff bill down to about 5 percent when the Trump administration took office—more than a 90 percent reduction. Given the harm that tariffs cause to the U.S. economy and to American foreign policy, Congress must work to ensure that the Trump administration's protectionist stance turns out to be an aberration, not a full-on reversal of decades of bipartisan policy toward more open international trade.

Some of America's trading partners, such as China, do not always act in good faith. Policies and practices that China and other autocratic countries must change include weak intellectual property protections and theft of trade secrets. Congress should pursue sound policy no matter what other countries do. This means not only refraining from enacting new trade barriers but getting rid of existing barriers. Tariffs not only will fail to change such bad behavior but will hurt the U.S. economy.

A more effective approach would combine bilateral negotiations with multilateral international pressure. In the case of China, this could mean negotiating a binding bilateral agreement with the Chinese government. The Trans-Pacific Partnership (TPP), from which the Trump administration pulled out on its third day in power, would have accomplished many of Trump's policy goals with China. It is not too late to attempt a revival, with Congress' help. Other countries and regions, such as Japan and the European Union, have similar concerns about the Chinese government's trading policies and can be natural allies on that issue. The Trump administration's trade policies to date are preventing such a potentially effective alliance from forming, and other countries are pursuing their own policies without U.S. involvement. It was encouraging, however, that President Trump and EU President Jean-Claude Juncker were able to step back from mutually damaging policies and agree on a common approach to Chinese practices when they met in July 2018. The relative lack of changes in renegotiating the North American Free Trade Agreement (NAFTA) into the new United States–Mexico–Canada Agreement (USMCA) was also welcome.

A word of caution about pursuing trade agreements is in order. Congress has many international policy priorities, but it is important to restrict trade agreements to trade issues only. Separate issues should be treated separately. Trade-unrelated issues, such as labor and environmental regulations and intellectual property standards, should be negotiated in separate agreements. Lumping trade-unrelated issues into trade agreements makes negotiations slower and more contentious and gives protectionists more opportunities to torpedo liberalization efforts. The section of the USMCA that instructs Mexico to raise auto workers' wages is a terrible precedent for infringing on other nations' sovereignty in trade agreements, and we should not be surprised when other nations make such trade-unrelated demands of America. Such demands also increase the possibility of future renegotiations or outright repeal of the agreements over issues that have nothing to with trade.

Finally, greater engagement with the World Trade Organization (WTO) provides another effective avenue for improving other countries' bad behavior. The WTO lacks binding authority, but the norms of international cooperation give its rulings substantial heft, which the United States can use to its advantage. Countries with legitimate grievances, of which the United States has many, have a roughly 90 percent success rate in the WTO's dispute resolution system. The tradeoff is that other countries would bring their own legitimate grievances against the United States, but working within a rule-based system requires such cooperation. By removing protectionist policies, those rulings would actually help the United States in the long run and can hardly be called concessions. Congress should prevent the president from leaving the WTO, as he has occasionally threatened to do.

Trade is an ongoing policy issue but usually a dormant one, far down Congress' priority list. The current administration has changed that, and Congress must act swiftly and decisively to nip in the bud policies that could cause immense economic and political harm—in the short term and the long term, both here and abroad.

RECLAIM TARIFF AUTHORITY FROM THE EXECUTIVE BRANCH

Article I, section 8 of the United States Constitution gives taxing and spending power to Congress alone. Regarding tariffs, that situation changed in the aftermath of the Smoot-Hawley Act of 1930. The passage process was a mess of special interest favors, vote trading, and mutual back scratching. It caused public outrage that still affects tariff policy today. Congress realized how dysfunctional the situation had become and delegated some of its tariff-making authority to President Franklin Roosevelt in 1934, on the thinking that the president represented the country as a whole, rather than a narrow constituency, and was thus less prone to influence by special interests.

Since then, the United States has slowly but steadily reduced its tariffs and other trade barriers—until the Trump administration took office in 2017. Unlike past presidents from both parties who more or less used their delegated power responsibly (if inconsistently), Trump has repeatedly and haphazardly raised tariffs, thereby harming America's economic and political interests. The time has come for Congress to reclaim the power it delegated to the president. It can accomplish this by repealing three clauses.

Congress should:

- Repeal Section 232 of the Trade Expansion Act of 1962.
- Repeal Sections 201 and 301 of the Trade Act of 1974.

Section 232 of the Trade Expansion Act of 1962 empowers the president to enact tariffs for national security reasons. That makes some intuitive sense; it is important to have viable domestic industries in steel and energy, for example, so that if the United States is cut off from supplies during a war, it will not harm the military's ability to fight. The national security argument does not hold up under scrutiny, however. In a world market, a country simply cannot be cut off from a commodity. If a hostile country refuses to sell steel or oil to the United States, then somebody else will be more than happy to either supply that commodity directly or act as a middleman and sell the blockaded commodity to the United States at a profit.

In fact, protectionist measures often cause more long-term security harm than they help the protected industries. Obsolete technologies, inferior quality control, and higher prices that result from less competition can hurt military capabilities. And to the extent that tariffs slow economic growth, the country will have fewer resources to devote to national security than it would under a policy of free trade.

Finally, domestic industries do not need protection. Manufacturing output in 2018 is near the all-time high set in 2014. Worries about foreign steel, for example, are misplaced. Imports account for roughly 30 percent of U.S. steel consumption; that means 70 percent is made domestically. The U.S. military, the world's largest by a wide margin, uses roughly 3 percent of total steel production, or less than 1/20th of domestic output alone. So even if a complete blockade were enacted tomorrow and succeeded, it would have no impact on military capabilities.

When President Trump used Section 232 authority to enact steel and aluminum tariffs and Canadian Prime Minister Justin Trudeau asked him what the national security justification was for those tariffs, Trump's response involved the War of 1812. Congress should protect the president from such embarrassments by repealing Section 232, thus taking away the flawed national security justification for security-unrelated tariffs.

Section 201 of the Trade Act of 1974 gives the president the power to offer relief to businesses affected by increased competition from imports. That policy is practically an open invitation to abuse. An increased flow of imports can enter a market that is growing at a faster rate than domestic producers can keep up with. Trade-unrelated factors such as changing consumer tastes and technological change also negatively affect many businesses. How does one determine whether international competition or new technology are what harmed a company? If both factors are in play, how much blame does each deserve?

As far as job churn goes, a 2015 Ball State University study estimates that innovation and changing tastes have more influence than does foreign competition by about a factor of six. Why do companies adversely affected by imports get special treatment, when other causes are far more impactful? The best policy would be an open competitive market with no special treatment for anyone. Section 201 allows the president to subvert that policy goal on a whim, and therefore should be repealed.

Section 301 of the Trade Act of 1974 gives the president the authority to retaliate against countries that violate treaties they have signed with the United States. Because the president seems to think that a large percentage of international trade rules are unfairly stacked against the United States, he has abused this grant of power beyond recognition. There are many valid grievances against other countries' trade practices, from arbitrary antidumping duties to import quotas. The proper forum for resolving such disputes is the WTO's dispute resolution process, as well as similar mechanisms under bilateral and multilateral agreements to which the United States is a party. Congress should repeal Section 301 and work with the president on more appropriate and effective policies in the proper venues.

Experts: Iain Murray, Ryan Young, Marc Scribner

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REJECT RETALIATORY TARIFFS

Countries with high trade barriers have economies that are essentially running with a flat tire. As previously stated, trade barriers mean less competition, higher producer costs, higher consumer prices, less choice, and slower innovation. Trying to get other countries to reduce their trade barriers by raising our own is essentially reacting to their flat-tire economies by flattening our own economic tires. Nobody wins, and everyone loses.

In some cases, Congress can prevent such harm by essentially doing nothing. In others, there are positive measures it can and should take. Closing the Section 232 and Section 201 and 301 presidential loopholes is wise policy. So is enacting a blanket ban on giving the president unilateral taxing authority or raising trade barriers without congressional approval. But the most important policy here is self-discipline.

Congress should:

- Refuse to pass legislation enacting retaliatory trade barriers.
- Institute a rule explicitly forbidding the president from enacting retaliatory trade barriers.

If another country raises trade barriers against the United States, whether for economic or diplomatic reasons, it is hurting its own economy. We should not compound other countries' mistakes with our own by responding in kind. To paraphrase the renowned Cambridge economist Joan Robinson, when other countries dump rocks into their own harbors, the solution is not to dump rocks into our own harbors. This is a case in which discretion is the better part of valor. Doing nothing might be hard, but given the emotions and the heated rhetoric involved, doing something often means enacting policies that make matters worse. If such proposals are the only politically viable ones, the best response is no response.

Experts: Iain Murray, Ryan Young, Marc Scribner

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PURSUE NEW TRADE AGREEMENTS WITH THE UNITED KINGDOM, THE EUROPEAN UNION, AND CHINA

Congress should:

- Pursue a bilateral trade agreement with the United Kingdom.
- Pursue a bilateral trade agreement with the European Union.
- Pursue either a bilateral or a multilateral trade agreement with China.

U.S.–U.K. Agreement

With the United Kingdom leaving the European Union in 2019, America's closest ally should regain control over its trade policy. That would enable the United States to negotiate a free-trade agreement with the U.K. that reflects the affinity of the two countries' legal systems and shared cultural understandings of the value of commerce. Such an agreement should reduce tariffs on both goods and services to virtual nonexistence.

Furthermore, this presents an opportunity to develop a new form of trade agreement based on mutual recognition of regulatory systems. By acknowledging that each party's regulatory system has broadly similar goals and effects, such an agreement would sweep away many regulatory nontariff barriers. That would spur regulatory competition, as problems with one party's system that stood in the way of trade would be laid bare.

Further enhancements could be made by enacting provisions that guarantee regulatory review of new regulations for their trade effects, and mutually agreed standards for cost–benefit analysis. Those provisions would have the effect of reforming regulatory practices that have resisted reform efforts. Sector-specific agreements on topics such as financial services could help prompt competitive solutions to problems that have so far been tackled mainly by restrictive regulation, such as the problem of too-big-to-fail financial institutions.

Finally, such an agreement could be drawn up to allow accession by other parties. It is likely that the agreement would be attractive to common-law nations such as Canada, Australia, and New Zealand, as well as to other Trans-Pacific Partnership parties such as Singapore, Malaysia, and Chile. This could form the basis of a new trading alliance based on shared principles of economic freedom.

U.S.–EU Agreement

The arguments are similar for a trade agreement between the United States and the European Union. In addition to imparting mutual recognition and lower tariffs, a trade agreement gives both parties an opportunity to reform their illiberal agricultural policies. The EU's Common Agricultural Policy (CAP), which consumes roughly 40 percent of the EU's budget, provides an array of subsidies, trade barriers, and regulatory obstacles that make life difficult—and expensive—for farmers, importers, exporters, and consumers. Anti-GMO (genetically modified organism) activists and other anti-technology ideologues have also used CAP to pursue their anti-science policy agendas, whereas producers who compete with such products have happily played along. Development economists have noted that heavily subsidized EU agricultural exports price many farmers in developing countries out of the world market and thus make it harder for many of the world's poor to rise out of poverty. A more compassionate approach would liberalize or eliminate CAP.

American farm policy is also a mess. Subsidies, production quotas, price supports, and government-subsidized marketing raise prices for families and have similar effects on farmers in developing countries. Congress makes the problem worse with a fresh farm bill every few years. President Trump even gave farmers a $12 billion aid package to counteract the harms his tariffs have caused them. America's agricultural protectionism has caused international friction with the EU and other allies, such as Canada, and should be repealed. A U.S.–EU trade agreement to lessen or eliminate agricultural trade barriers would benefit both economies and improve international relations. A trade agreement could also defuse tensions over other products, such as cars, aircraft, and designer clothing.

What about China?

China is the elephant in the room. Although a much freer place than it was under Mao Zedong, China still suffers from living under a thoroughly authoritarian government. The Chinese government often engages in actions that are anathema to free markets and democratic governance. It steals intellectual property and technology, expropriates assets, insists on state ownership—or at least state control—of many industries, and often changes policies or reneges on deals at the last minute, after investors have already committed millions or even billions of dollars.

And of course, there is the Chinese government's appalling human rights record, which Congress should always keep in mind. Even though China poses no immediate military threat to the United States, a free and open China is an important foreign policy objective. Not only would the United States economy benefit from lower trade barriers and easier access to a thriving 1.3 billion-person market, but freedom is its own goal. The Chinese people deserve the right to free speech, economic opportunity, freedom of religion, and other basic freedoms that much of the rest of the world takes for granted. A free China would also be an ally, giving the United States another partner with whom to face potential global threats.

Increasing tariffs will not achieve any of those policy goals. The tariffs that President Trump has enacted, without congressional input, on more than 6,000 Chinese goods that are worth more than $200 billion, will prompt China to close its economy, not open it further. China's swift retaliatory tariffs will also make that country less open and less free and its people less prosperous. Ultimately, China's liberalization must come from within. But there is a role for Congress to play. Pursuing a bilateral agreement with the Chinese government would put pressure on it to liberalize, with the knowledge that the United States will respond positively. A multilateral agreement that includes China's neighbors and biggest trading partners would put further international pressure on the Chinese government to improve its behavior.

In fact, just such an agreement, the Trans-Pacific Partnership, was on the cusp of being implemented until the Trump administration withdrew from it on Trump's third day in office. Other countries are pursuing a TPP-style agreement but without the United States or its input. It is not too late to rejoin this liberalization effort or for the United States to pursue its own.

Experts: Iain Murray, Ryan Young, Marc Scribner

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RENEGOTIATE EXISTING TRADE AGREEMENTS TO REMOVE TRADE-UNRELATED PROVISIONS

The Trump administration has long expressed a desire to renegotiate the North American Free Trade Agreement and other existing trade agreements. Other countries have expressed a willingness to listen. Congress should take a seat at the discussion. President Trump seems less interested in the *absolute* level of trade barriers than their *relative* level; he might see a victory as the United States "conceding" less than its trading partners. Congress should use this to America's advantage.

The larger policy goal here is to treat separate issues separately. Environmental, labor, intellectual property, and regulatory policies have no place in trade agreements; they are separate issues that should be treated separately. If the United States and its trading partners decide to renegotiate any trade agreements, getting other countries to "concede" on weakening or removing trade-unrelated provisions might well justify lower U.S. tariffs in the president's mind. Congress should work to remove from existing trade agreements—and negotiate them separately, if it wishes—provisions that address certain issues.

Congress should oppose industries in future trade agreements with provitions on:

- Environmental policy.
- Labor policy.
- Intellectual property protection.
- Provisions for harmonized regulation.

The United States has one of the world's most expensive regulatory compliance systems; many countries would be happy to follow their own, less expensive domestic policies instead. As long as President Trump is in office, it is in their interest—and Congress's and America's—to give the president a victory in this regard. All sides would benefit from removing trade-unrelated provisions from trade agreements and treating separate issues separately. The president has opened the possibility of renegotiating agreements. If such negotiations happen, Congress should ensure that the right things get negotiated, which will require appealing to the president's view of his relationship with his voters.

Experts: Iain Murray, Ryan Young, Marc Scribner

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ENGAGE WITH THE WORLD TRADE ORGANIZATION TO REMOVE UNFAIR TRADE BARRIERS

President Trump has repeatedly expressed a desire to leave the World Trade Organization. Although the WTO and its dispute resolution are imperfect mechanisms, on balance they are a force for good. And because its verdicts are nonbinding, complaints that the WTO impinges on national sovereignty do not hold water. Instead, the WTO relies on diplomatic norms, commitments to good behavior, and countries' credible threats to punish bad behavior. That means that when a country files a grievance with the WTO, it only does so if it has a good case.

Congress should:

- Oppose President Trump's threat to leave the World Trade Organization.
- Use the WTO's dispute resolution mechanism to prompt other countries to remove their trade barriers.
- Cooperate with other countries' efforts to remove our own unfair trade barriers.

Because the majority of complaints brought before the WTO are valid, it rules in the complainer's favor roughly 90 percent of the time. Countries who lose the case usually respect the verdict because doing so improves the chance that their own grievances will succeed and the resulting admonitions will be obeyed. Frivolous filings happen, but they are rare.

To some extent, personnel is policy. Here, Congress can play a role. The Senate must confirm nominees for the United States Trade Representative, Secretary of Commerce, and dozens of other trade-related officials at a variety of agencies. The Senate should confirm only nominees who demonstrate a knowledge of and commitment to sound economic policy. Many current Senate-confirmed presidential economic advisers, including United States Trade Representative Robert Lighthizer and Secretary of Commerce Wilbur Ross, have failed to meet this test and for that reason should not have been confirmed.

Congress must work to ensure that the United States remains in the World Trade Organization. It should encourage the president to file valid complaints to get trading partners to lower their trade barriers—anti-dumping duties are fertile ground here—

and see to it that the United States respects adverse verdicts. Likewise, Congress should discourage the administration from pursuing frivolous or politically motivated trade disputes. Other players will usually repay cooperative gestures in kind and punish dishonest behavior. Congress and the WTO can improve trade policy in the United States and abroad if they can keep the executive branch in check.

Experts: Iain Murray, Ryan Young, Marc Scribner

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Banking and Finance

3

Access to capital is fundamental to the operation of a free society. It allows for the formation, expansion, and smooth running of the enterprises that make up the private 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 for the benefit of their employees and customers. Placing too many restrictions on the financial system hinders both the efficient allocation of capital and innovation that can benefit consumers.

In the modern global economy, 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, cryptocurrency, and crowdfunding most prominent among them. At the household level, a variety of companies offer small-dollar loans that often help individual consumers pay the bills and keep the lights on in times of financial need.

The smooth running of this system was disrupted by the financial crisis, now more than a decade old. A variety of government interventions, such as the Community Reinvestment Act and the actions of the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac, led lenders to overextend themselves by extending credit to a variety of borrowers who were unlikely to pay back the debt. Political convenience replaced sound economic judgment in capital provision decisions. A multitude of 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, the federal government's reaction was to prop them up with taxpayer bailouts, thereby socializing their losses and undermining the incentives for avoiding such problems.

The Dodd-Frank Act of 2010 was meant to help prevent a similar financial crisis, but it did nothing to change the situation and made the problem that led to the crisis worse. In fact, it doubled down on the bank regulatory regime that failed to prevent the financial crisis. Worse, Dodd-Frank imposed costly regulations addressing extraneous issues that had nothing to do with the crisis, such as debit card interchange fees, arbitration agreements in credit card contracts, and accounting for conflict minerals.

Dodd-Frank was intended to address the problem of too-big-to-fail; it has failed to do so. Dodd-Frank took aim at Wall Street, but it hit Main Street the hardest. The big banks are more dominant than they were before the crisis. The vastly increased regulatory burden imposed on smaller banks has led many of them to merge to become bigger, in order to be able to withstand the increased regulatory costs. Some have closed. Worse, banking regulators have abused their authority by cracking down on legal businesses that regulators find distasteful.

Such overregulation has made banks wary of lending to people without perfect credit or to small businesses and startups. Those parties have turned to a burgeoning industry of alternative funds but are finding those attacked by regulators as well. Even worse, Dodd-Frank created an unconstitutional, overly powerful regulator, the Consumer Financial Protection Bureau, which lacks proper oversight by elected officials.

Although the 115th Congress successfully passed an important financial reform bill—the Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155)—most of the Dodd-Frank regulatory framework remains intact.

Lawmakers need to do more to allow for the emergence of a competitive, safe, and sound financial system. Congress must further rein in these regulators and pass laws to 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, which passed the House in 2017, would:

- Assist in capital formation by allowing banks to swap less stringent regulation for holding more capital.
- Reduce the regulatory burden by repealing several provisions of Dodd-Frank, such as the mandate for publicly traded companies to disclose whether their products contain "conflict minerals" from certain areas of the Congo, as well as the economically destructive Volcker Rule, which bars banks from engaging in broadly defined "proprietary trading."
- Make regulators accountable by reforming the Federal Reserve, the CFPB, and other regulators by subjecting them to Government Accountability Office audits.
- 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" established under Dodd-Frank to seize and bail out financial firms.

Further reforms will be needed, including legislation to allow financial technology (FinTech) firms to pursue innovation in financial services without having to deal with the regulatory burdens faced by banks. The Jumpstart Our Business Startups (JOBS) Act, Investor Confidence Act (which passed the House in 2018), and other pieces of legislation described in detail in this section could enable those reforms.

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, Dodd-Frank gave the CFPB far more power than the CPSC has ever had. In fact, Dodd-Frank deliberately set up the CFPB to operate free from the oversight faced by independent agencies. As a result, it is not accountable to Congress, the president, the courts, or voters.

Congress should:

- Pass sections of the Financial CHOICE Act that deal with the Consumer Finance Protection Bureau or the Financial Product Safety Commission Act.
- Pass motions expressing its sense that the CFPB is unconstitutional in its current form.

Congress exercises no power of the purse over the CFPB because the agency's budget—administered essentially by one person, its director—comes from the Federal Reserve. That amounts to approximately $600 million that Congress cannot touch or regulate. The president cannot carry out his constitutional obligation to "take care that the laws be faithfully executed" because he cannot remove the CFPB director except under limited circumstances. Dodd-Frank, going beyond the "for cause" standard for removal from most independent agencies, says that the president may remove the director only "for inefficiency, neglect of duty, or malfeasance in office." Judicial review of the CFPB's actions is limited, because Dodd-Frank requires the courts to give extra deference to the CFPB's legal interpretations.

The only meaningful checks on the CFPB's actions have come from congressional disapproval of its regulations. The 115th Congress, for example, successfully used the Congressional Review Act to block rules that govern arbitration agreements in financial contracts and fair lending laws in auto lending.

Despite Congress' efforts, the bureau has promulgated other harmful rules, such as the regulation of short-term, small-dollar loans—a move that threatens to deprive some of the most vulnerable American consumers of desperately needed credit.

The Financial CHOICE Act contains provisions that would restructure the CFPB as an executive agency. It would change the CFPB's mandate to provide for both consumer protection and competitive markets, make the director removable by the president, and require rigorous cost–benefit analysis of all its promulgated regulations. It requires the bureau to conduct comprehensive cost–benefit analyses before adopting regulations and affords Congress the opportunity to approve significant agency-issued regulations before they take effect. Alternatively, the bipartisan Financial Product Safety Commission Act also restructures the bureau as a typical independent agency, with a five-person bipartisan commission.

Experts: John Berlau, Iain Murray, Daniel Press

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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 rate of closure and merger has doubled since the Act's passage. Only a dozen new banks nationwide have been authorized during the past decade. The result is a lack of choice for consumers and a loss of the personal connection between banker and customer.

Congress should:

- Pass the Protecting Consumers' Access to Credit Act (H.R. 3299, S. 1642, 115th Congress), which would explicitly make the "valid when made" doctrine the law of the land.
- Pass the Modernizing Credit Opportunities Act (H.R. 4439, 115th Congress), which would codify the FinTech–bank partnership model into law.
- Pass the Financial Services Innovation Act, to create a "regulatory sandbox" to allow new innovative firms a period of relaxed regulation.
- Repeal the Durbin Amendment to Dodd-Frank.

Fortunately, Congress has begun to move. The 115th Congress passed and President Trump signed the Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155), which lowered the regulatory burden for hundreds of community and regional banks across the country. But this is only a start. The vast majority of Dodd-Frank's regulatory structure remains, strengthening the biggest banks and hampering small and newly formed firms, such as financial technology companies.

FinTech firms that are unable to navigate the regulatory maze of gaining a federal charter must incorporate in their home states. As a result, they suffer from a patchwork of inconsistent regulations. They cannot lend to customers in other states at the same interest rates as their in-state customers if the borrower's state caps the interest at a lower amount. This means that a FinTech lender looking to operate nationwide would have to become licensed and regulated in all 50 states. That severely limits consumer choices, including the choice to get a loan at an interest rate lower than that of a federally chartered bank.

In addition, 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 declined to hear *Madden vs. Midland*, in which the Second Circuit Court of Appeals reversed a century of "valid when made" precedent. The Second Circuit ruling created massive uncertainty in the lending market that could devastate FinTech innovations such as peer-to-peer lending. In 2015, when the case was decided, the number of loans made to less creditworthy borrowers in the Second Circuit declined by 52 percent from the previous year, whereas it increased by 124 percent outside the Second Circuit during the same time period. Congressional legislation codifying "valid when made" as law could boost borrowers' and investors' opportunities everywhere.

Finally, the Dodd-Frank Act gave the Federal Reserve the power to impose a price cap on interchange fees, which banks charge merchants when a customer uses the bank's debit card to make a purchase. Interchange fees had nothing to do with the financial crisis, but the cap was included in the Act at the last minute in a provision known as the Durbin Amendment, after its sponsor, Sen. Dick Durbin (D-Ill.). The rationale was that merchants would pass along the cost savings to customers, but research shows that those cost savings never materialized, while banks passed along the loss of revenue to all customers in the form of higher fees. The result of the Federal Reserve's price controls has been 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.

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ALLOW CONSUMERS GREATER ACCESS TO INNOVATIVE NEW FINANCIAL SERVICES THROUGH THE GROWTH OF FINTECH, CROWDFUNDING, BLOCKCHAIN, AND CRYPTOCURRENCY

The rise of sharing economy platforms such as 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, so do new financial service providers face a number of antiquated rules that keep their innovations from growing or even getting off the ground.

Congress should:

- Build on the Jumpstart our Business Startups 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. Those provisions were in the original Fix Crowdfunding Act in 2016. Unfortunately, they were dropped for the bill to get bipartisan support in the House.
- Allow special-purpose acquisition companies, in which lead investors negotiate on behalf others, to utilize crowdfunding for ordinary investors. This is a preferred investing method among angel investors and venture capitalists and would likely bring benefits to ordinary investors as well. This provision was part of the JOBS and Investor Confidence Act, which the House passed overwhelmingly in 2018.
- Expand the "accredited investor" definition beyond the wealth threshold to include those who have proven their sophistication in other ways, such as by passing exams for financial advisers and brokers. This would be accomplished by the Fair Investment Opportunities for Professional Experts Act, which passed the House with strong bipartisan votes in 2016 and 2017 and was included as part of the JOBS and Investor Confidence Act in 2018.
- Strip the Securities and Exchange Commission of the 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 cryptocurrency from overregulation, particularly from the SEC. Pass legislation to make clear that neither cryptocurrency nor offerings of it are "securities" and should not be regulated by the SEC. Ensure that government

has the tools to punish crypto-fraud through traditional anti-fraud agencies such as the Federal Trade Commission, but otherwise preserve the culture of "permissionless innovation" that has allowed for the dynamic growth of the Internet and other technologies to proceed largely unimpeded.

- Repeal the Durbin Amendment. Short of that, make sure it applies only to physical debit cards and not all electronic methods of payment.

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

The JOBS Act attempted to change this. It has had some success in allowing entrepreneurs more freedom to solicit and advertise to accredited investors—those who meet the Securities and Exchange Commission's threshold of $1 million in assets or $200,000 a year in earnings. The growth of portals that match entrepreneurs with such wealthy investors, portals such as CircleUp and Israel-based OurCrowd, has exploded.

Unfortunately, after much delay, the JOBS Act provisions recently implemented by the SEC to allow equity crowdfunding from ordinary investors fell woefully short of their stated goal. Although the rules exempt small public companies from some of the more onerous mandates of the Sarbanes-Oxley and Dodd-Frank financial regulation laws, they contain their own thicket of new red tape. 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.

Increasingly, crowdfunding has come to rely on offerings of new cryptocurrency—sometimes called "initial coin offering"—to fund new business ventures. In reward-based crowdfunding, funders receive products such as t-shirts or a sample of the item produced. In equity-based crowdfunding, by contrast, the funders are investors who receive a share in the business or a note with a promised rate of return.

Even though digital coins may grow in value more than do t-shirts, which often are the rewards for crowdfunding offerings for movies and recordings, those offerings fall into the rewards-based crowdfunding category, as they do not offer funders either a share of the company or a promised return on investment. Yet the SEC, without congressional authority, is increasingly claiming jurisdiction by labeling digital currency products as "securities." Such overreach from the SEC, and the threat of overregulation from other agencies, could chill innovation in this sector and related development in improving blockchain-distributed ledger technology that holds promise in everything from health care to land titling. Cryptocurrency creators could suddenly become subject to the thickets of red tape that face public companies, such as the mandates of Sarbanes-Oxley and Dodd-Frank. Securities registration rules could also prove highly impractical for blockchain technology if, for instance, now-anonymous individuals who maintain the blockchain have to register as investors or securities issuers.

Peer-to-peer lending has expanded credit options for consumers and small businesses, but its growth has been 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, there is almost no peer-to-peer lending by ordinary investors to small businesses.

The SEC is one of several regulatory agencies vying—or being pushed—to regulate Bitcoin, Ethereum, and dozens of new cryptocurrencies, which offer benefits from currency hedging to faster payments. Such new payment technologies may also be stifled by Dodd-Frank's Durbin Amendment, which puts price controls on what debit card issuers can charge the retailers for 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, or FinTech, some consumers and providers will always value personalized service. Whether to use automated or personal service should be a choice, not a mandate. The Department of Labor's fiduciary rule mandated that financial professionals serve savers' "best interests"—as defined by DOL. That rule threatened to impose so many costly mandates on brokers and insurance agents that it would have made it cost-prohibitive for them to work with middle- and low-income savers, who would have been be stuck with untested "robo-advice" as a result of this flawed regulation. Fortunately, in 2018, the Fifth Circuit Court of Appeals threw out the DOL rule as "arbitrary and capricious," and the Trump administration declined to appeal. Congress should make sure that the Department of Labor and other agencies, such as the SEC, do not promulgate new rules that similarly raise costs and reduce choices for middle-class investors.

Experts: John Berlau, Iain Murray

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ADDRESS TOO-BIG-TO-FAIL

The 2010 Dodd-Frank "financial reform" law was intended to protect taxpayers against the prospect of future bailouts by ending the phenomenon of too-big-to-fail financial institutions. Yet many of its provisions enshrine too-big-to-fail and the potential bailouts for such large financial institutions.

Congress should:

- End the Financial Stability Oversight Council's (FSOC) exemption from the Freedom of Information Act, and mandate that it open its meetings to the public.
- Repeal the FSOC's power to declare firms as too-big-to-fail SIFIs under Dodd-Frank. The Financial Choice Act would accomplish this. Short of that, grant designated firms and their competitors expedited avenues to challenge a SIFI designation in court.
- Phase out Fannie Mae and Freddie Mac and replace them with nothing.
- Until Fannie and Freddie are phased out, end the Third Amendment profit sweep and ensure that Fannie and Freddie maintain adequate capital.
- 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.

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

The Financial Stability Oversight Council, a secretive bureaucracy created by Dodd-Frank, designates firms as SIFIs through an arbitrary process that lacks rules for so designating the firms and that is closed to the public. Some firms embrace the designation of a SIFI, whereas others fight it because of the added regulation it entails. MetLife has successfully challenged its SIFI designation in federal court, and AIG was de-designated as a SIFI in late 2017.

In spite of all this, the government-sponsored enterprises 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—which began in 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.

Fannie and Freddie should be phased out and replaced with nothing. There should be no government-sponsored enterprise for mortgages any more than there should be for other types of credit, such as car loans. This phaseout can be done through the method laid out in the Protect American Homeowners and Taxpayers (PATH) Act, which passed the House Financial Services Committee in 2013. Under the PATH Act, the GSEs sell off parts of their portfolios every year until they are completely liquidated. The phaseout 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.

Under the Third Amendment, implemented by the Obama administration in 2012, the government confiscates any profit the GSEs make—even after they have paid the government back. That leaves the GSEs with no capital reserves, which makes them vulnerable to even the slightest hiccup in the economy. Although 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, it is still ongoing. 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 homebuyers.

Both shareholders and taxpayers suffer from the Third Amendment's raid of all the GSEs' profits for the U.S. Treasury. Shareholders see their assets taken without government compensation, and the taking of that capital leaves the GSEs less financially stable and more prone to a potential bailout. The Housing Finance

Restructuring Act of 2016 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.

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 because 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.

Innovative new entrants should be allowed to compete in the financial services industry. Since passage of Dodd-Frank in 2010, federal regulators have allowed only a dozen new banks to open for business. Well-managed nonfinancial 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 such restrictions to entry. For example, the retail giant Tesco runs one of the largest banks in the United Kingdom. Keeping banking as an "old boys' club" with few new entrants makes the financial system less competitive and less safe.

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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 did the privileged elites of former times. Carbon fuels—coal, oil, and natural gas—provide 80 percent of U.S. energy and 87 percent of global energy. They are the world's dominant energy sources because, in most markets, they beat the alternatives in both cost and performance.

Critics claim that carbon fuels have hidden costs that make them unsustainable. In the 1970s and 1980s, experts often depicted carbon-based 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 prophecies, as energy supplies increased while the air and water got much cleaner.

Today, critics claim that unchecked carbon energy use will cause catastrophic climate change. However, the climate models producing scary impact assessments project about twice as much global warming as has actually occurred. 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, power health-improving innovation, 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. Energy costs already impose real burdens on low-income households, including reduced expenditures for food, medicine, and 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-based fuels. Putting the developing world 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.

REPEAL THE EPA'S CLEAN POWER PLAN

The so-called Clean Power Plan (CPP) promulgated by the Environmental Protection Agency during the Obama administration is an unlawful power grab that will (a) increase consumer electricity prices, (b) reduce U.S. job growth and gross domestic product, and (c) have no discernible effects on global warming or sea-level rise.

Congress should:

- Enact legislation approving the Clean Power Plan Repeal Rule's legal rationale, including the rule's interpretation of "stationary source," "best system of emission reduction," and "emission performance standard."

The CPP is unlawful in several ways, but the central flaw is the rule's novel concept of "stationary source." Section 111 of the Clean Air Act (CAA) defines *stationary source* as "any building, structure, facility, or installation which emits or may emit any air pollutant." Accordingly, every previous rule issued under Section 111 based emission performance standards on a "best system of emission reduction" (BSER), consisting of specific technologies applicable to and at the source.

The Obama administration refused to base CPP performance standards on such "inside the fence" measures because affordable technologies to reduce carbon dioxide emissions from existing power plants do not exist. The closest facsimile would be equipment upgrades that improve operational efficiency. However, increasing the efficiency of fossil-fuel power plants could make them more competitive, thwarting President Obama's political goal to "finally make renewable energy the profitable kind of energy in America."

The EPA came up with a plan to establish performance standards that no existing—already built—power plant can afford to meet through actions taken inside the fence. To comply, owners and operators must purchase power from, invest in, or cede market share to lower- and zero-emission facilities elsewhere on the grid. Such "generation shifting" is the CPP's principal BSER.

To make it appear legal, the CPP reimagines "source" to include power plant owners and operators in their capacity as marketplace actors. More fundamentally, the CPP imagines the entire U.S. electricity system to be a single source—a vast machine in which individual power plants are mere cogs. All of that clashes with the statute's plain words. Generation shifting is an unlawful BSER because owners and operators are not sources, and neither are economic sectors.

Moreover, producing less power or investing in renewables does not improve the environmental performance of a coal or gas power plant. CPP performance standards are, in reality, unlawful nonperformance mandates.

Adding insult to injury, the CPP puts immense pressure on states to implement the rule via emission cap-and-trade programs—the same unpopular climate policy Congress has repeatedly rejected.

The CPP purports to deliver up to $20 billion in climate benefits in 2030. In reality, 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—according to the agency's own climate policy calculator. The amount of warming averted in 2030 would be even more minuscule and undetectable.

The CPP estimates that utility companies will spend $5.1 billion to $8.4 billion in 2030 to comply with its so-called performance standards. The total economic cost could be much higher. By 2030, the CPP would reduce average annual employment by nearly 300,000 jobs, reduce cumulative gross domestic product growth by $2.5 trillion (inflation adjusted), and reduce cumulative household purchasing power by $7,000 per person, according to an estimate by the Heritage Foundation.

The EPA is in the process of repealing the CPP—a policy certain to be challenged in court. Congress could avert years of litigation by approving the Clean Power Plan Repeal Rule's legal rationale.

Experts: Myron Ebell, Marlo Lewis

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END FEDERAL EFFICIENCY STANDARDS FOR CONSUMER PRODUCTS

It is hard to dispute that the private sector is more efficient than the government and that consumers know their own interests better than does any central planner. Nonetheless, the federal government has gotten in the business of setting energy efficiency standards for a variety of energy-using consumer goods, from cars to refrigerators to light bulbs. It is time to pull the plug on those decades-old Washington efficiency mandates and give consumers more choice in the products they buy and the way they use energy.

Congress should:

- Sunset all federal energy efficiency standards for consumer products.

Consider corporate average fuel economy (CAFE) standards for cars and trucks. Congress created CAFE in 1975 in response to the OPEC oil embargo and fears of rising dependence on foreign oil. That was an ill-advised solution to a problem that is fast disappearing with America's fracking revolution. The result has been to force Americans into more efficient but also costlier vehicles. Worse yet, the National Academy of Sciences and others have documented that CAFE has compromised vehicle safety.

After three decades, it would have been tough to make the CAFE program any worse, but the Obama administration managed to do so by essentially hijacking the program for use as a vehicle for climate policy. Whereas once one federal agency ran the program, the Department of Transportation's National Highway Traffic Safety Administration (NHTSA), we now have NHTSA working with the Environmental Protection Agency and the State of California to set fuel economy and overlapping greenhouse gas emissions standards.

Those standards are scheduled to get more stringent each year through 2025. The EPA even concedes that sticker prices could rise nearly $3,000 by then, while outside estimates claim much larger effects. And the standards continue to lead to additional highway fatalities due to its downsizing effect on cars.

Any consumer who wants to buy a highly efficient or alternatively fueled vehicle is free to do so, with or without CAFE. This program only serves to foist this choice on everyone.

Fortunately, the Trump administration has recognized the growing problems with the program and has sought to make it far less stringent. Even better would be sunsetting the program entirely.

Consumers face similar problems with a range of home appliances, which are subject to equally problematic standards—part of the same obsolete 1975 law that gave us CAFE. Since then, just about everything that plugs in or fires up around the house has been subjected to federal efficiency standards, in some cases up to five rounds of successively tighter mandates.

Even the Department of Energy, which sets the standards, has had to admit that in several cases they may boost the purchase price of appliances by more than is likely to be earned back in the form of energy savings. Appliance quality suffers as well, through reduced reliability, fewer features, and compromised performance. Perhaps worst of all are the dishwasher standards that have greatly extended the time it takes to do a load; apparently efficiency with regard to people's time is not a consideration.

There is no reason for the feds to dictate consumer choices for cars or any other products. The buyers of these products are perfectly capable of balancing energy use (for which federally required labels provide all the needed information) against purchase price and other attributes. Although repeal of this program would be best, at the very least it should be reformed so that marginal efficiency gains are not achieved at the cost of reduced product quality, and so that the rise in purchase price does not make the standards a money loser for consumers.

Experts: Sam Kazman, Ben Lieberman, Marlo Lewis, Myron Ebell

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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.

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, combined with 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.

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, increasing food and feed 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 (NOx); 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 the 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 that instead of enacting renewable volume obligations for refiners, Congress enacted input volume obligations, compelling corn farmers to purchase annually increasing quantities of specific types of seeds, fertilizers, and farm machinery. The howls from RFS supporters would be loud and furious, and justifiably so.

Experts: Marlo Lewis, Ben Lieberman, Myron Ebell

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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 be economically harmful, driving capital out of industries that provide 80 percent of all the energy that Americans consume. Moreover, even the most aggressive feasible carbon tax would have negligible climate effects.

Congress should:

- Reject legislative proposals to establish a carbon tax.

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. The Heritage Foundation, using a clone of the Energy Information Administration's National Energy Modeling System, estimated that a carbon tax starting out at $25 per ton in 2012 and rising 5 percent annually (after adjusting for inflation) would cut the income of a family of four by $1,900 in 2016, raise the family's annual household energy costs by $500, increase gasoline prices by 10 percent, and lead to an aggregate loss of more than 1 million jobs by 2016 alone. Yet even a carbon tax that eliminates all U.S. carbon dioxide emissions would avert less than 0.14°C of global warming by 2100, according to the Model for the Assessment of Greenhouse Gas Induced Climate Change (known by its acronym MAGICC), developed by the Environmental Protection Agency during the Obama administration.

A carbon tax would most likely not be revenue neutral but would be used to increase spending rather than cut other taxes dollar-for-dollar. But even if it could be revenue neutral, such a carbon tax would still 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 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 nearly all carbon tax bills introduced to date have been designed to reinforce rather than replace greenhouse gas regulations. The one partial exception, the Market Choice Act (H.R. 6463, 115th Congress), sponsored by Rep. Carlos Curbelo (R-Fla.), would only suspend Clean Air Act regulation of greenhouse gases through 2033 and only if the carbon tax achieves equivalent emissions reductions in 2024 and 2028. Moreover, the bill would not preempt any state climate policies.

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 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.

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PROHIBIT USE OF THE SOCIAL COST OF CARBON TO JUSTIFY REGULATION

The social cost of carbon (SCC)—the cumulative damage supposedly caused by an incremental ton of carbon dioxide emitted in a given year—is an unknown quantity. It is not an objective magnitude but a range of guesstimates produced by "integrated assessment models" (IAMs)—computer models that combine speculative climatology with speculative economics. By fiddling with nonvalidated climate parameters, made-up damage functions, and discount rates, SCC analysts can get pretty much any result they desire. By turning the knobs, social cost modelers can make the benefits of "climate action" look large compared with the costs of compliance and make fossil fuels look unaffordable no matter how cheap.

Congress should:

- Prohibit agencies from using social-cost-of-carbon analysis to justify regulatory decisions and defund SCC modeling programs.

The social cost of carbon is not discernible in economic, meteorological, or public health trends. For example, try spotting the greenhouse "fingerprint" in the following data:

- Weather-related damages as a share of global GDP have declined by one-third since 1990.
- Globally, there has been no trend in the frequency and strength of land-falling hurricanes since 1970.
- Global deaths and death rates related to extreme weather have declined by 93 percent and 98 percent, respectively, since the 1920s.

The Obama administration inflated SCC estimates by using below-market discount rates to calculate the present value of future climate damages. In addition, it inflated the perceived benefit–cost ratios of its climate policies by comparing U.S. compliance costs with the supposed global benefits of greenhouse gas emission reductions rather than with the putative (and smaller) domestic benefits.

The Office of Management and Budget has put a stop to those accounting gimmicks; however, other obvious biases remain uncorrected. Federal agencies still rely on an obsolete climate sensitivity study (Row-Baker 2007) that likely overestimates how much warming results from a doubling of atmospheric carbon dioxide concentrations. Worse, two of the three IAMs used by federal agencies ignore the abundantly documented agricultural and ecological benefits of carbon dioxide emissions.

More important, even if such biases are removed, SCC analysis will still be too conjectural to serve as a basis for regulatory justification for the following reasons:

- IAMs estimate cumulative damages over long stretches of time—typically from the year of an emission's release until 2300. No one can forecast the baseline emission trajectory of the global economy over the next 280 years; only in relation to an assumed baseline can the incremental effects of the next ton of carbon dioxide possibly be estimated.
- Scientists do not know the relative strength of the positive and negative feedbacks that amplify or constrain the climate's response to rising carbon dioxide concentrations, which means that there is still no "consensus" about the key variable: climate sensitivity.
- IAMs also make nonvalidated assumptions about how rising temperatures will affect weather patterns, ice-sheet dynamics, and other natural phenomena and how such physical changes will affect agriculture, other climate-sensitive industries, and consumption absent adaptive responses.
- IAM "damage functions"—projections of how climate change will affect the GDP and the public health—depend on assumptions about how adaptive technologies develop as the world warms. Nothing is harder to forecast than long-term technological change.

In *Center for Biological Diversity v. National Highway Traffic Safety Administration* (2007), the Ninth Circuit Court of Appeals argued that although IAMs yield only a range of SCC values, "the value of carbon emissions reduction is certainly not zero." In fact, under some reasonable assumptions, SCC values are negative, which implies that carbon dioxide emissions produce net benefits.

Experts: Marlo Lewis, Myron Ebell

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RECLAIM CONGRESS' AUTHORITY TO DETERMINE CLIMATE POLICY

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

Congress should:

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

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 greenhouse gases 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 Clean Air Act 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 both environmental enforcement and economic development.

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 greenhouse gases 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 often has 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 Clean Power Plan has egregious legal flaws beyond the Court's errors in *Massachusetts v. EPA*, and the agency is currently in the process of repealing it. Nonetheless, as long as Congress treats *Massachusetts v. EPA* as settled law, future executives will be tempted to usurp legislative power. Congress should curb the EPA's ability to overreach by clarifying that it has no power under the CAA to make climate policy.

Experts: Myron Ebell, Christopher Horner, Marlo Lewis

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REJECT THE KIGALI AMENDMENT TO THE MONTREAL PROTOCOL

Beginning in the 1970s, concerns that the refrigerants used in most air conditioners and refrigerators were leaking into the air and depleting the Earth's ozone layer led to the negotiation and signing of the Montreal Protocol, a 1987 United Nations treaty that phases out the use of those chemicals. Since then, a number of ozone-safe substitutes have been developed and are now used in most residential and vehicle air conditioners and residential and commercial refrigerators.

However, governments and environmental advocacy groups are now targeting those substitutes for phaseout because of their alleged role as contributors to global warming. In 2016 in Kigali, Rwanda, the parties to the Montreal Protocol agreed to an amendment to the treaty, known as the Kigali Amendment, which restricts production of those second-generation refrigerants. U.S. ratification of the Kigali Amendment requires a two-thirds Senate vote.

Congress should:

- Oppose the Kigali Amendment or similar legislative measures that would drive up the cost of air conditioning and refrigeration.

The Kigali Amendment would raise the cost of air conditioning and refrigeration across the board. Some manufacturers of Kigali-compliant refrigerants and equipment stand to benefit from the amendment. They have joined forces with environmental activists to lobby for the Kigali Amendment's ratification and have made a number of far-fetched claims that such government interference in air conditioning and refrigeration markets will actually create jobs. In truth, the Kigali Amendment is very likely to be a net jobs killer, particularly for the millions of small businesses that rely on this equipment and will have to shoulder the increased expense.

The Trump administration should not submit this ill-advised United Nations measure to the Senate, but if it does, the Senate should vote it down. Any bills from the House or Senate to legislatively achieve the same ends should be opposed as well.

Experts: Ben Lieberman, Myron Ebell

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ADDRESS UNACCOUNTABLE ENVIRONMENTAL RESEARCH PROGRAMS

A number of non-regulatory environmental research programs have both regulatory and market effects. Those programs enable the U.S. Environmental Protection Agency to act with little accountability, and even run afoul of basic principles of scientific integrity. Two such problematic programs include the EPA's Integrated Risk Information System (IRIS) and its Safer Choice Program.

Congress should:

- Move responsibilities of the Integrated Risk Information System to program offices that implement environmental laws, and require those offices to rely on the best available science for developing chemical assessments.
- Eliminate the EPA's hazard-based Safer Choice program, and use the funds to reduce federal spending.

IRIS is a nonregulatory research program that assesses chemical toxicity. EPA program offices use it to develop regulations under federal laws, such as the Safe Drinking Water Act, Clean Air Act, Superfund, and others. Yet operating outside the regulatory framework, there are limited systems to ensure the scientific integrity of IRIS assessments. Many of its findings have tended toward excessive caution and are based on questionable and incomplete science. That approach has helped advance counterproductive regulations that impose needless regulatory burdens.

The Government Accountability Office raised concerns about IRIS' productivity and procedures more than a decade ago. Since then, IRIS reform has continued to be the subject of GAO reports, an Inspector General report, and congressional hearings. A 2011 National Academy of Sciences (NAS) report on IRIS' formaldehyde assessment criticized the agency for "recurring methodologic problems," including repeated failures to provide "clarity and transparency of the methods," among other problems. The NAS report included suggestions on how IRIS could improve its science.

In early 2018, the Trump administration proposed significant budget cuts for the EPA's Office of Research and Development (ORD), where IRIS is housed, and the Senate omnibus spending bill proposed eliminating ORD. In an effort to revive the program, EPA staff arranged for a National Academy of Sciences workshop, during which they briefed an NAS committee on reform efforts. EPA staffers asked the working group to consider whether that agency was on the right track with reform. The NAS report explains that the committee "was not asked to evaluate the overall value of the IRIS program" and "was not tasked with conducting a comprehensive review of the IRIS program." Given its limited charge, the NAS committee provided little information. Its follow-up report—mostly a republication of EPA presentations—noted that the EPA has made some procedural improvements. That does not mean that IRIS has been fixed because the NAS did not really address the quality of IRIS's science.

After the EPA received what amounts to a rubber stamp from the NAS, the omnibus compromise bill continued funding for ORD and IRIS at 2017 levels. Fortunately, some members of Congress understand that the IRIS process remains seriously flawed because it operates outside the law. Rep. Andy Biggs (R-Ariz.) recently introduced the Improving Science in Chemical Assessments Act (H.R. 6468 115th Congress), which would move most IRIS functions to the program offices. The EPA's Office of Research and Development would continue to maintain a database using the assessments from the program offices. That approach makes more sense because those offices must operate under the scientific standards set within the laws they implement. In addition, H.R. 6468 requires such assessments to use best available practices and deploy practices that promise to greatly improve the quality of the resulting science.

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 based on hazard classifications rather than on actual risk assessments. Yet hazard alone is inadequate for making decisions about chemicals, because it fails to consider actual risks related to real-life exposures or weigh benefits against risks. Yet Safer Choice is encouraging companies to deselect valuable products based on hazard alone. Congress should eliminate Safer Choice altogether because it falls outside the scope of the EPA's mandate to implement laws passed by Congress.

Expert: Angela Logomasini

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IMPROVE THE QUALITY OF GOVERNMENT-FUNDED RESEARCH

We all would like to believe that researchers' motives are unbiased and pure, but in reality, incentives and personal opinions can have a huge effect on study design and results. When researcher bias is joined with political agendas, it can become driven to achieve political objectives rather than to provide valid information. Unfortunately, politically active researchers are also adept at lobbying for government-funded-activist research, and resulting activist research can have adverse public policy effects.

Congress should:

- Mandate that research funded by federal agencies meet basic transparency guidelines, modeled after the U.S. Environmental Protection Agency's proposed transparency rule, to enable others to access and replicate underlying data to see if results can be reproduced.
- Mandate that government-funded studies comply with good laboratory practices (GLPs) whenever applicable.

Some of the worst examples of government-funded activist science are found at the National Institutes of Environmental Health Sciences (NIEHS), housed within the National Institutes of Health (NIH). Consider the NIEHS research program related to the chemical bisphenol A (BPA), which is used to make hard clear plastics and the resins that line metal food containers. Environmental activist campaigns against BPA have been fueled by taxpayer-funded research of questionable value, producing dozens of studies that report weak associations between BPA and adverse health effects.

The FDA and numerous government agencies around the world have not found those studies compelling or conclusive. Instead, they have relied on weighing of the evidence and higher quality studies to determine that BPA is safe at current exposure levels. Yet activists use these government-funded studies to push for bans and regulations on BPA. Such bans could undermine food safety because BPA lines metal containers to prevent the development of deadly pathogens, such as *E. coli*.

If government is going to fund chemical safety research, the studies should meet some basic standards to improve the quality of results. Increased transparency would greatly help improve the science. The proposed transparency rule currently under consideration at the U.S. Environmental Protection Agency could be used as a model for other agencies. Although the EPA's rule would apply only to science underlying major regulations, Congress could demand that transparency requirements be extended to cover government-funded research. Positive associations can occur by mere chance, which makes it important that data be available so that others can try to validate findings by reproducing the results.

In addition, government grants should require that private research recipients follow good laboratory practices when applicable. GLPs were originally established by the FDA in 1978 to address fraudulently produced results submitted by industry to government agencies for drug approvals. The Organization for Economic Cooperation and Development issued its own GLP guidelines, and other world bodies and government agencies, including the U.S. EPA, followed suit. Thus, GLPs have become an internationally recognized method of ensuring data quality control. As a result, it is common worldwide for industry to apply GLPs when conducting research for submission to regulatory bodies. The World Health Organization's *Handbook: Good Laboratory Practices* (2009) explains that GLPs help ensure "the quality, reliability and integrity of studies, the reporting of verifiable conclusions, and the traceability of data." Government-funded research should meet the same sound science standards.

Expert: Angela Logomasini

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ELIMINATE U.S. FUNDING FOR THE INTERNATIONAL AGENCY FOR RESEARCH ON CANCER

Government regulations—at the federal, state, and local levels—can be influenced by scientific bodies from around the world that assess the risks of chemicals. In particular, the International Agency for Research on Cancer (IARC) classifies chemicals based on cancer-causing potential, but its faulty standards produce misleading results. Unfortunately, its findings have effects on public policy, promoting regulations that do more harm than good.

Congress should:

- Eliminate all U.S. funding of the International Agency for Research on Cancer.
- Cut funds to the National Institutes of Health that support IARC research.
- Prohibit any grants or other funding to IARC from any U.S. governmental entity.

Launched in 1965, the International Agency for Research on Cancer is a self-governing division of the World Health Organization. According to its website, the group is funded by member states and has a two-year budget of €43.4 million ($50.4 million), of which the United States was assessed to pay nearly €3.2 million (nearly $4 million) for 2016–2017. Its mission is to "promote international collaboration in cancer research." IARC focuses on assessing cancer risks associated with environmental risks, which include any nongenetic causes of cancer. IARC indicates in its mission statement that its classifications are supposed to inform lawmakers and regulators to promote policies that will reduce cancer risks.

IARC's classification is faulty for one fundamental reason: IARC does not actually assess risk. IARC focuses on determining whether a chemical or activity poses a "hazard," which is just the first step in risk assessment. A hazard assessment simply considers whether a substance might pose a risk at some exposure level and under some circumstances. The next steps consider dose and exposure and whether actual human exposures are significant enough to matter.

Classifying chemicals based on hazard alone makes no sense because everything in life poses a hazard. Even water can make your brain swell and kill you if you drink excessive amounts. But we do not classify water as dangerous because most people do not guzzle gallons at a time.

IARC's hazard-based approach makes its classifications meaningless and nonsensical. Consider that IARC lists smoking tobacco and plutonium in the same carcinogenic category with wood dust, house paint, salty fish (Chinese style), and processed meat. Yet you cannot even begin to compare the theoretical risks associated with eating bologna sandwiches and the actual risks associated with smoking cigarettes, which produces nearly half a million fatalities annually in the United States.

IARC's faulty process is compounded by the fact that its decisions seem to be tainted by anti-chemical ideologies and conflicts of interest. IARC's decision in 2015 to classify the weed killer glyphosate as "probably carcinogenic" offers a clear example. Anti-pesticide activists have targeted glyphosate, the active ingredient of Monsanto's Roundup brand, for elimination, claiming that it causes cancer. Yet the science does not warrant such concerns, and IARC's conclusion is at odds with all other major scientific reviews, including reviews done by the U.S. Environmental Protection Agency (2017 draft risk assessment), the European Food Safety Authority (2015), Health Canada (2017), the U.N. Food and Agriculture Organization (2016), and others.

Absent a scientific basis, IARC's decision seems to have been influenced by anti-pesticide activism. For example, the IARC panel enlisted Christopher Portier of the Environmental Defense Fund to serve as an "adviser," which itself seems inappropriate. Portier also seems to have serious financial conflicts of interest. Within days of the classification, Portier became a highly paid witness and consultant to trial lawyers who were planning use the IARC classification as a basis for suing Monsanto.

IARC's process is fundamentally flawed. The potential that politics may have tainted the IARC process provides even greater reason to eliminate all its U.S. funding.

Expert: Angela Logomasini

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Private and Public Lands

5

Private property and secure property rights are essential conditions of freedom and prosperity. Contrary to propaganda from environmental advocacy groups, environmental stewardship by private landowners has proven to be far superior to that of public land managers. Private land ownership provides the right incentives to protect the value of land, including its environmental resources. However, federal regulations—primarily the Endangered Species Act (ESA) and Clean Water Act wetlands regulation—increasingly undermine private conservation by threatening property rights. This chapter makes several recommendations to reduce heavy-handed federal land-use regulation of private property and thereby increase freedom, promote prosperity, and better protect the environment.

Federal land ownership does massive environmental damage in the Western states, Alaska, and other states where the federal government owns or controls large areas of land. Mismanagement of the vast federal estate is the work of many decades, but the negative environmental and economic consequences have become obvious only in the past few years to people who do not live in rural areas with lots of federal land, as catastrophic fires over millions of acres have darkened the sky and fouled the air across the West. Those fires are the inevitable result of colossal fuel buildup, which is the direct result of severely reducing timber production in the National Forests. This chapter makes recommendations for improving federal land management, increasing resource production on federal lands, and radically reducing the amount of land the federal government controls.

Finally, planning for the speculative effects of potential climate change began to permeate federal land management policy and planning during the Obama administration. That is bad enough, but planning for climate change 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 policy preferences of federal bureaucrats, was starting to be used in federal environmental permitting decisions. Although the Trump administration is doing what it can administratively to eliminate climate planning and climate programs, including use of the SCC, legislation is needed in many areas. For example, Congress should prohibit the use of the SCC in federal land management and environmental permitting and abolish certain climate programs that were created by secretarial order in the previous administration.

REFORM AND REDUCE ENVIRONMENTAL REGULATION OF PRIVATE LANDS

The Endangered Species Act and wetlands regulations under Section 404 of the Clean Water Act provide no incentives for regulators to contain costs because the costs are borne by landowners. Those costs are not well documented, but as a report published by the Competitive Enterprise Institute in August 2018 shows, taxpayer costs for the ESA total in the tens of billions of dollars, and the economic costs to landowners are likely in the hundreds of billions of dollars.

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
  - Rail-to-Trails
  - 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 delisting currently listed species be granted if the information supporting the listing does not meet the minimal requirements of the IQA.
  - Make explicit in the law that the IQA is actionable in federal court.
  - Require that listing any species must be preceded by the online posting, within one month of receipt of the petition, of (a) the information supporting the petition and (b) a list of the data used to document the existence of each of the factors used to justify the listing.
  - Repeal the ESA's command-and-control regulatory regime and replace it with a conservation incentives program.
- Amend the Clean Water Act to restrict Section 404 jurisdiction to the constitutionally limited navigable waters of the United States.
- Prohibit funding for the following:

- 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.
- Adding any railroad rights-of-way into the Department of Transportation's rail banking inventory.

The Trump administration is in the process of finalizing significant reforms to the rules implementing the ESA and Section 404, which, if successful, would shrink the jurisdictional reach of both statutes. This is welcome news for many landowners, but it does not solve the underlying problem. Only Congress can do that by addressing the issue of regulatory takings.

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, wetlands regulation under Section 404 of the Clean Water Act, and the Coastal Zone Management Act—have increasingly been used by federal agencies to extend de facto land-use controls over much of the United States. (The extent of federal regulatory control of private land can be seen at http://naturalresources.house.gov/federalfootprint/.) Land-use control rather than environmental protection is in fact, if not in stated intention, the main purpose of those statutes.

The Endangered Species Act has proven 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 taking of the use of private property creates perverse incentives for landowners to manage their land, therefore it does not provide habitat for listed species. Similarly, wetlands regulation has gone far beyond any environmental purpose and far beyond legitimate federal jurisdiction of navigable waters.

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 justify compensation, unless the regulation takes all or nearly all of the value of the property. Making regulators pay for the costs of regulating should also provide the push necessary to enact significant ESA and wetlands reforms.

The idea that the government and not private citizens should 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 to claim compensation if they lost more than half the value of their property because of Endangered Species Act designations and wetlands and other land-use regulations. In 2004 and again in 2005, Oregon voters passed referenda by wide margins to provide compensation for landowners whose property has lost value because of state land-use regulations. Yet government encroachment on private lands continues.

Regulatory takings compensation legislation will reduce violations of property rights. Making regulators pay for the costs of regulating should provide the push necessary to enact significant reforms in the Endangered Species Act, Section 404 wetlands regulation, and other land-use statutes.

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

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

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SHRINK THE FEDERAL ESTATE

The environmental degradation of federal lands goes hand in hand with declining resource production and impoverishment of rural populations in areas of the West, where the majority of lands are federally owned. The Trump administration has undone most of the worst administrative obstacles to energy production on the federal estate, but Congress needs to do much more to reverse the locking up of federal land, restore multiple-use management, and increase resource production.

Congress should:

- Defund the Land and Water Conservation Fund of 1965 and not reauthorize it. Any reauthorization should continue to make all land acquisitions and other spending subject to congressional appropriation.
- Require all future federal land acquisitions to be funded by selling at least $10 worth 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 into federal ownership, either through sale or donation.
- 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 into private ownership of Bureau of Land Management (BLM) 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 into private ownership.

The federal government owns far more land than it can care for properly. Federal stewardship varies widely, but on average, federal lands are in poorer environmental condition than are comparable private lands, and the quality of federal land management has declined. Beginning in the 1960s, management of federal lands has moved away in fits and starts from active multiple-use management of resources toward non-management, based on the 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 consequences of this disastrous policy have become as clear as the air has been darkened and fouled by smoke from fires across the West over the past several summers.

The four federal land agencies—the Department of the Interior's Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, and the Department of Agriculture's Forest Service—control about 610 million acres, or 27 percent of the American land mass. (An interactive map showing the types of federal land ownership and management can be seen at http://naturalresources.house.gov/federalfootprint/.)

The first thing Congress should do to improve federal environmental stewardship is to stop acquiring more private land. Since the Land and Water Conservation Fund was enacted in 1965, the federal government has appropriated more than $11 billion (not adjusted for inflation) to acquire more than 5 million acres 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 second thing Congress should do is transfer federal lands to the states and into private ownership. The State of Utah in 2012 enacted the Transfer of Public Lands Act, which provides a well-thought-out path for transferring most lands controlled by federal land agencies (excluding National Parks and Wilderness Areas). The American Lands Council has developed concepts for how states could request federal lands to be transferred and how the transfer process could work.

Experts: Myron Ebell, Robert J. Smith

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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 has 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.

Congress should:

- Amend the Antiquities Act of 1906 to require all existing National Monument designations of more than 640 acres to be approved within four years by the legislature and governor of the state in which the National Monument is located.
- Prohibit future National Monument designations larger than 5,760 acres, and require that Congress and the legislature and governor of the state in which the National Monument is located must 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 rights of way decisions be subject to state laws and decided in state courts.

During the Obama administration, those withdrawals reached outrageous levels. The Trump administration has taken several small steps to undo or limit some of those unlegislated federal land lockups. For example, President Trump signed executive orders to reduce the size of two National Monuments in Utah—the Grand Staircase-Escalante, designated by President Clinton in 1996, and the Bears Ears, designated by President Obama in 2016.

Although congressional oversight is needed on all these preservation categories, three methods for locking up federal lands deserve immediate attention by Congress:

- The misuse by recent presidents of the Antiquities Act of 1906 to designate huge federal areas as National Monuments;
- Administrative designations of federal lands as Wilderness Study Areas and Roadless Areas; and

- Closure of public rights of way that are long established and that in many cases were created under Revised Statute 2477 and grandfathered into the Federal Land Policy and Management Act of 1976.

The Antiquities Act of 1906 was intended primarily to allow the executive branch to take immediate action to protect Native American ruins and artifacts that are discovered on federal lands from being looted. It was understood that presidents would use that authority to protect areas of 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 roughly 36 million acres as de facto wilderness. Lands that have been classified as Wilderness Study Areas or Roadless Areas for more than 10 years without action by Congress to designate them officially as such should be released from those administrative preservation categories. The Protect Public Use of Public Lands Act (H.R. 5198, S. 2206, 115th Congress) was introduced in Congress in 2017 to release National Forest Lands in Montana from Wilderness Study Area status and return them to multiple uses.

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 to 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

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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' 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.

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 Protection Act's Environmental Impact Statement and Environmental Review, as with responses to other types of natural disasters.
- Enact legislation to mandate incremental increases in timber sales on National Forests over five years from the current level of 2 to 3 billion board feet to 12 billion board feet per year (USFS, "Forest Products Cut and Sold from the National Forests and Grasslands," https://www.fs.fed.us/forestmanagement/products/cut-sold/index.shtml).
- Enact legislation to prohibit future federal coal leasing moratoriums.
- Shorten delays in issuing drilling permits by enacting legislation to put states in charge of applications for permits to drill in oil and gas leases on federal land.
- Enact legislation to share royalties from federal offshore production with all coastal states.

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 Forest Service 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, most withdrawals from multiple use were made by Congress, such as, for example, designating federal lands as Wilderness Areas. In recent decades, most withdrawals have been made administratively by the BLM and 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. In many cases, various types of recreational access have been banned or limited.

Massive federal land ownership means that BLM and USFS control the economies of many rural areas in the West. Closing off federal lands to resource production has had 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 caused scores of mill towns to disappear. Sustained-yield management of National Forests has been replaced by "management" through catastrophic forest fires. Subsurface energy and mineral production also declined as a result of decisions made by the Obama administration.

In the first two years of the Trump administration, the Department of the Interior has made progress in increasing oil, gas, and coal production on federal lands and offshore areas. Congress made a major contribution in 2017 when it allowed oil and gas exploration of the coastal plain of the Arctic National Wildlife Refuge. Also in the past two years, the U.S. Forest Service has taken steps that could eventually lead to increased timber production in the National Forests. However, much remains to be done to maintain and increase resource production on federal multiple-use lands.

Experts: Myron Ebell, Ben Lieberman, Marlo Lewis

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REMOVE CLIMATE PLANNING FROM FEDERAL LANDS POLICY

Planning for the effects of potential climate change pervaded federal land management policy and planning during the Obama administration.

Congress should:

- Defund and abolish the 22 Landscape Conservation Cooperatives (LCCs) and the associated National Climate Adaptation Science Center and eight regional Climate Adaptation Science Centers.

The Trump administration has made progress in dismantling Obama-era climate offices, programs, and policies. President Trump's Executive Order 13783 directed the Council on Environmental Quality (CEQ) to withdraw the 2016 Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews. CEQ withdrew the guidance document on April 5, 2017.

The Department of the Interior rescinded a number of climate policies that were inconsistent with the Executive Order, and Interior's Energy and Climate Change Council seems to have stopped functioning. The U.S. Department of Agriculture's Forest Service seems to no longer have a climate adviser or a functioning Office of Sustainability and Climate Change.

Attempts to insert climate change planning into federal land management are misconceived 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." 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 subregional climate changes occur constantly around the planet even during periods like the past two decades, when the GMT is more or less steady. Moreover, the current scientific understanding of the potential ecological impacts from climate change is highly speculative at best. For those reasons, adding climate to land planning is an expensive and cumbersome waste of time.

However, Congress still has work to do. In particular, the administration has yet to shut down the 22 Landscape Conservation Cooperatives and eight affiliated Climate Science Centers, which were established in 2010 by Department of the Interior Secretarial Order 3289 (https://lccnetwork.org/sites/default/files/Resources/DOI_SecretarialOrder_3289A1.pdf). Congress should do so.

Congress has never authorized the Landscape Conservation Cooperatives, which were designed to expand the regulatory reach of the Endangered Species Act. The Obama administration's reasoning was that, because 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.

Moreover, the LCCs are not confined to planning on federal lands. All privately owned lands are included in the 22 LCCs, which cover the entire country plus large parts of Canada and Mexico and large tracts in the Gulf of Mexico and the Pacific Ocean. Indeed, the LCCs' motto, "Beyond Boundaries." is proudly displayed on the landing page of LCC Network's website (https://lccnetwork.org/).

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

6 Technology and Telecommunications

Few economic sectors rival the technology and telecommunications industries in terms of 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, and the World Wide Web had not yet been invented. Today, there are more mobile devices in the world than there are people, and more than half of the world's population uses the Internet. Massive investment in information technology and infrastructure has fueled innovation, greatly expanded global productivity, created tens of millions of high-skilled jobs around the world, and improved our lives in ways few could imagine two decades ago.

As technology evolves, new challenges invariably arise, including for policy makers. Establishing ill-conceived 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 existing rules to eliminate governmental obstacles to innovation. As history shows, most concerns 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. When new services or tools raise legitimate concerns about public health, consumer protection, or competition, lawmakers should resist the urge to act until they first observe how voluntary institutions—the marketplace and 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 and regulatory schemes devised in earlier eras—especially schemes administered by independent agencies, which in recent years have pulled out all the stops to remain relevant in a world in which they may no longer have a useful role to play.

PROTECT INTERNET FREEDOM AGAINST BURDENSOME NET-NEUTRALITY MANDATES

Beginning in the 1990s, the Internet has transformed global commerce, as American companies have led the way in developing better ways to harness the Internet's power and in 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 freedom has come under attack in recent years. On the infrastructure side, a decade-long effort by federal regulators to dictate business models to the companies that provide broadband Internet access to consumers has been halted by the Federal Communications Commission (FCC)—for now. Firms that operate websites, apps, and mobile platforms have managed to evade a similar crackdown so far, but recent legislation portends greater regulation at every layer of the Internet.

Congress should:

- Classify the status of the provision of broadband Internet access to consumers—whether by wire or radio—as an information service not subject to common carrier regulation under the Communications Act of 1934.
- 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. Specifically, 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 otherwise afforded to the agency by the Communications Act, thereby reversing the D.C. Circuit Court's contrary holding in *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014).

Since taking off in the 1990s, the Internet has thrived as a platform for free expression, innovation, and experimentation. One might assume that federal agencies, having witnessed this success story, would refrain from regulatory intervention. Unfortunately, from 2008 to 2016, the FCC abandoned its restrained approach, attempting time and time again to expand its reach over the Internet. That effort initially focused on the principle of "net neutrality," which holds that broadband providers should be barred from blocking or prioritizing time-sensitive Internet traffic—such as videoconferencing or online gaming—upon the request of either broadband subscribers or companies that sit at the "edge" of the network. More recent

FCC actions under the Obama administration revealed that the agency wished not only to impose net neutrality rules on broadband providers but to seize broad powers to regulate the Internet.

More than 20 years have passed 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 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 Communications Act empowered the FCC to regulate providers of telecommunications services as common carriers, which it can subject to obligations ranging from mandatory interconnection to price regulation. (Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, 11534–35, para. 69 & n. 140, 1998.)

In the aftermath of the 1996 Act's passage, the FCC exercised restraint in its approach to regulating the Internet under both Democratic and Republican administrations. In a proceeding launched by the FCC under Clinton-appointed Chairman William Kennard and completed under Bush-appointed Chairman Michael Powell, the FCC concluded in 2002 that broadband delivered by cable television companies was an information service, not a telecommunications service, and therefore 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 Association 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," the local telephone providers that were part of AT&T before its court-ordered 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 those competitors, like the Baby Bells themselves, had started offering broadband Internet access over telephone wires using a technology known as the digital subscriber line, commonly known by its acronym, DSL. 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, it also meant that they no longer had to share their private property with broadband rivals.

For a time, wireline broadband providers operated outside 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 operated and innovated 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 effort, 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 [*Verizon v. FCC*, 740 F.3d 623 (2014)]. (However, the D.C. Circuit accepted the agency's argument that Section 706 of the 1996 Telecommunications Act granted the FCC an independent source of authority for certain types of regulation). 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 the Obama administration to influence the FCC—a putatively "independent" agency—Democratic Chairman 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. That reinterpretation was 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 reclassify Internet access service 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.

The FCC then embarked on a "regulatory voyage" using its proclaimed authority, intervening in ways that had little to do with net neutrality. For instance, in 2016, the FCC imposed draconian rules on the privacy practices of Internet service providers that curtailed the ability of broadband providers to offer consumers lower prices in exchange for targeted advertising. That made it costlier for broadband companies to do business.

That FCC regulatory onslaught came to an abrupt halt in early 2017, when the agency's leadership changed. Under the agency's current chairman, Ajit Pai, the FCC reversed course and issued new regulations in January 2018 to restore Internet freedom (83 Fed. Reg. 7852). Among the changes, the FCC reestablished its previous treatment of Internet service providers as information services not subject to utility-style common-carrier rules. In May 2018, however, the U.S. Senate voted 52-47 to pass a Congressional Review Act resolution of disapproval regarding the FCC's order (S.J. Res. 52, 115th Congress). The House of Representatives has yet to vote on the matter. If it does, it should reject the Senate's resolution and instead pass legislation to ensure that a future FCC cannot restore the onerous regulations the current FCC has worked so hard to eliminate.

Experts: Ryan Radia, Wayne Crews

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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 many of 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 governmental entities, from local law enforcement to federal intelligence agencies, have a powerful arsenal of technological and legal means at their disposal for accessing our communications and our metadata—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 that the U.S. government collects about its citizens is staggering—and many programs surely exist that the public is not yet aware of.

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. 387 in the 115th Congress); or
  - Tracking the location of a U.S. person's mobile communications device.

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. In fact, 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, tit. II, 100 Stat. 1848 (1986), codified as amended at 18 U.S.C. §§ 2701–2710 (2012)]. This 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 sync service. [The government must generally give a subscriber notice before accessing the contents of her records, although the government routinely delays such notice under 18 U.S.C. § 2705(a).]

Subpoenas typically are 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 on 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 the Stored Communications Act, the distinction between opened and unopened mail and that between communications and other information stored electronically online made sense, given the state of technology at the time. In 2018, however, Americans reasonably assume that their digital "papers and effects" are safe from warrantless government access—an assumption that is often inaccurate. To remedy this mismatch between perception and reality, and to assure consumers that their data in the cloud is safe from law enforcement fishing expeditions, Congress should pass legislation based on the Email Privacy Act, which passed the House of Representatives in a unanimous vote in the 114th Congress (H.R. 699) and passed the House on a voice vote in the 115th Congress (H.R. 387). 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 on the basis of an apparent emergency involving an imminent threat to human life, such as the kidnapping of a child.

Experts: Ryan Radia, Wayne Crews

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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 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. Any improvements they bring about in cybersecurity—if they are 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 cost—customers leave, insurers increase premiums, and trial lawyers purportedly representing injured classes of people file lawsuits against the business.

Congress should:

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

Firms that suffer cyberattacks as a result of their lax cybersecurity practices often impose costs in the form of externalities—such as the time a consumer spends resolving disputes with banks over fraudulent credit card purchases—on third parties that may be unable to recover the losses. But the mere existence of this externality does not necessarily mean that government intervention is needed to eliminate it. Even if a systemic 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 is prescriptive regulation.

Experts: Ryan Radia, Wayne Crews

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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 Video, and HBO Now. In fact, just two of those companies—Netflix and Amazon—have as many streaming video subscribers in the United States as every cable and satellite television provider combined. 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. Not only do those outdated rules undermine the vitality of traditional media businesses, they also threaten the future of Internet-based television services.

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.

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 content 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 the fees are not retained by local stations. Instead, stations typically are 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, every 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 Office distributes those fees to the copyright owners whose works were distributed by the television company.

In contrast to that 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 to the Copyright Office are required. There is no government fee schedule to learn. 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 disappear from the company's library, only to be replaced by new shows. 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 often distort the market for television distributed by cable and satellite companies. Title VI of the Communications Act contains myriad rules that govern 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 *Black Mirror* and Amazon's *Jack Ryan*. In fact, the FCC has even suggested that it might reinterpret the Communications Act so 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, newspapers have lost billions of dollars in revenue and millions of subscribers. In many cities, iconic newspapers have ceased printing a daily edition or 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 local media outlets with more funding, personnel, and other resources.

Experts: Ryan Radia, Wayne Crews

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UPDATE COPYRIGHT FOR THE INTERNET AGE

From television shows to music to movies, the United States is home to many of the world's most celebrated artists and creative industries. The nation's legal environment has helped content providers contribute to this cornucopia of creativity.

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 to 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 to better protect creative works from infringement.

Congress should:

- Amend the U.S. Copyright Act so that it:
  - Bans tools that circumvent technological protection measures only if they are likely to undermine the value of the underlying creative works they seek to protect;
  - Affords users of copyrighted works an affirmative defense to charges of infringement if they cannot find the copyright holder despite conducting a good faith, reasonable search for the owner; and
  - Enhances 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 content.

Article I of the U.S. Constitution empowers Congress "[t]o 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 (1976) (codified as amended at 17 U.S.C. §§ 101–810)]. For the most part, that regime works well, enabling artists who create popular works to earn a commensurate return on their efforts.

However, 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 overly broad. Although effective DRM can be invaluable, in 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 to 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, for firms that distribute tools that are 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 on 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. § 302–04). People eventually die, and corporations are regularly acquired or cease to exist. Yet many works created by persons who are now deceased or corporations that are now defunct remain subject to copyright protection, making it difficult or impossible to ascertain who holds the copyright for those works. Companies that wish to monetize and distribute those so-called orphan works often forego the opportunity, out of 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 against changes of copyright infringement if he could not find the copyright holder after conducting a good faith, reasonable search for the owner. This reform would not resolve the orphan works problem entirely, but it would mark a major step toward allowing consumers to enjoy a wealth of protected works with unknown owners.

Creators seeking to prevent the online infringement of their works 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 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 on receiving notification from a copyright owner regarding the unauthorized work. Although that system has proven 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 considering such reforms, lawmakers should resist calls to impose technological mandates on online service providers that could greatly 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, Wayne Crews

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DO NOT EMPOWER STATES TO BE ABLE TO TAX OUTSIDE THEIR BORDERS

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 have spent decades 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. All of this culminated in this year's overturning of longstanding taxing restrictions in the case *South Dakota v. Wayfair*, decided by the Supreme Court in the summer of 2018.

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.

Before *South Dakota v. Wayfair*, the *Quill v. North Dakota* precedent required a seller to have a physical presence, or "nexus," in the buyer's state before it could 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 that 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, *Quill*'s default rule is no longer in control. States are now free to expand their remote taxation powers to an unprecedented extent. The overturn of *Quill*'s physical presence by the Supreme Court in *South Dakota v. Wayfair* makes it critical and urgent for Congress to impose a moratorium on states acting on their own to expand their remote taxation powers. Then Congress should go on to legislate a federal origin-based regime for online sales taxes.

Allowing states to expand their taxing powers unchecked 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.

That would hurt the thriving online retail industry, which has benefited tremendously from low barriers to entry and minimal regulatory burdens. And it would constitute 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 must act swiftly and decisively to stem the chaos that the Court’s reversal will bring.

Although politically challenging, an origin-based approach to remote sales is the only solution that balances federalism, economic efficiency, and tax equity among different types of retailers. Online retailers, like their peers in the brick-and-mortar world, would be taxed at the point of sale, not on the basis of the destination of the product or the residence of the buyer. That keeps taxing authorities politically accountable to whom they are taxing, avoids costly compliance costs of a destination-based system, and treats all sellers equally.

The Marketplace Fairness Act (MFA, S. 976, 115$^{\text{th}}$ Congress) passed the Senate in 2013 and was reintroduced in the 114$^{\text{th}}$ 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 also would subject businesses to audits by out-of-state tax authorities. It would lessen downward pressure on sales tax rates from tax competition and threaten consumer privacy through states’ data sharing.

The Remote Transaction Parity Act (RTPA, H.R. 2193, 115$^{\text{th}}$ Congress) adopts the same approach as the MFA. It gives 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-state audits, the RTPA creates an option for sellers to use state-employed tax compliance agents. It attempts to protect sellers with gross receipts of less than $5 million from being audited by other states but 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 year, it permanently drops to $1 million.

In August 2016, House Judiciary Committee Chairman 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 non–sales tax states' businesses to collect and remit sales taxes, thereby compromising those states' autonomy.

The Online Sales Simplicity and Small Business Relief Act (H.R. 6824, 115th Congress), introduced by Rep. Sensenbrenner (R-Wisc.) in September of 2018, would go a long way toward stemming the damage and chaos for smaller online retailers resulting from the *Quill* reversal in *Wafair*. Specifically, it would:

- Prevent states from collecting taxes retroactively;
- Prevent states collecting from until January 1, 2019; and
- Institute a remote small business exemption for firms with less than $10 million in gross annual receipts.

The No Regulation without Representation Act (H.R. 2887, 115th Congress), also sponsored by Rep. Sensenbrenner, requires that a business have a physical presence before a state can regulate it. Reestablishing the physical nexus principle would be an important step toward righting the ship on extraterritorial actions at the state level. Legislation codifying into law a physical presence standard similar to that embodied in the *Quill* precedent is also sensible.

Polling shows that attempts to expand sales taxes on the Internet remain unpopular among Americans, especially among young adults. A March 2018 poll from the National Taxpayers Union found that 65 percent of Americans opposed an Internet sales tax.

Attempts to expand states' ability to tax online sales outside their borders are unpopular with voters and fly in the face of fiscal conservative principles. 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: Ryan Radia, Wayne Crews, Jessica Melugin

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Labor and Employment

7

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 the freedom to adapt to changing market conditions.

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, obsolete New Deal–era labor laws and regulations have yet to adapt to a changing economy. Congress needs to revisit the whole of U.S. labor law—including the roles of the two key federal labor regulators, the National Labor Relations Board (NLRB) and the Department of Labor (DOL)—to free up the creative energies of the American labor force.

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- 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 regarding conditions that 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 the FLSA's Section 213.

The Labor Secretary can exercise broad authority to interfere with millions of private employer–employee relationships across the country. Overreach of that power was displayed under the Obama administration. For example, in 2016 the Department of Labor dramatically raised the salary threshold for employees to be exempt from overtime pay from \$23,660 to \$47,476—a more than 100 percent increase. As former Wage and Hour Administrator Tammy McCutchen pointed out in Congressional testimony, such an increase is out of line with historical raises in the salary threshold. Such massive changes to the rules of the game burden employers with massive costs and create new compliance issues.

Congress should:

- Reclaim authority over changes to the Fair Labor Standards Act that affect millions of workers. Legislation should require that when the Department of Labor proposes a regulatory change to an exemption from wage and hour requirements, it should have to pass both Houses of Congress with a simple majority before finalization of the rule.
- 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.

The FLSA was enacted in 1938 and needs modernization. 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 demands that an employee must earn more than the salary threshold and primarily perform "bona fide executive, administrative, or professional" activities to fall within wage and hour exempt status. However, determining whether an employee meets the criteria to qualify as an "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. With an ever-changing regulatory landscape, the Depression-era wage and hour statute's requirements are ill suited to govern today's modern workplace, and they create confusion and uncertainty that presents challenges to employers' ability to comply with the law.

Expert: Trey Kovacs

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HARMONIZE THE DEFINITION OF EMPLOYEE ACROSS GOVERNMENT

Determining the proper legal classification for an individual is not a simple task. A major reason for the difficulty is a patchwork of federal and state laws that define the term *employee* and therefore *independent contractor* differently. Causing further confusion, courts and regulatory agencies approach the question of whether an individual is an employee or independent contractor inconsistently. More than 10 different tests are applied among federal agencies and courts for defining the term employee. For example, the test to determine independent contractor status is different under statutes governing the Internal Revenue Service from those governing the Fair Labor Standards Act.

This patchwork of laws and tests creates uncertainty for employers, independent contractors, and their clients. It increases the odds of a company misclassifying workers, which can result in severe consequences for employers. Statutes define the term *employee* differently and apply separate tests to determine an individual's status. Therefore, a company may properly classify a worker as an independent contractor under one federal statute yet misclassify that same worker under state law or another federal law. The FLSA uses the "economic realities" test to determine employee status, which conflicts with other statutes that use the "common law" definition.

Congress should:

- Pass legislation along the lines of the Harmonization of Coverage Act (H.R. 3825, 115th Congress), which would bring the definition of the term employee in the Federal Labor Standards Act in line with its definition in other statutes.

For example, the two primary labor and employment statutes—the National Labor Relations Act and the Fair Labor Standards Act—apply different tests to determine whether an individual is an employee or an independent contractor. The Fair Labor Standards Act uses the economic realities test, which determines a worker's status primarily based on the worker's level of economic dependence on an employer. In contrast, the common law test determines an individual's status based on how much control an employer exerts over a worker.

Misclassifying employees is a costly mistake that can result in back pay, tax consequences, and even criminal penalties. A company may seek to avoid exposure to such risks by refusing to hire independent contractors, which diminishes both economic opportunities for independent workers and cost savings for the company. Congress must bring certainty to independent work and businesses. To do so, it needs to harmonize the definition of *employee* across federal statutes.

Government policy should not discourage individuals from engaging in independent entrepreneurship, which provides significant contributions to the economy. Forty-two million Americans engage in some form of independent work to start businesses, earn income, improve skills, or take on passion projects, according to a 2018 survey by MBO Partners, a consulting firm that specializes in connecting businesses with independent workers. Of the total number of independent workers, 3.3 million earn more than $100,000. In addition, satisfaction among independent workers is high.

Contrary to popular belief, contingent workers can earn as much as or more than full-time employees, according to a survey commissioned by the freelance work-referral firm Upwork and the Freelancers Union. A 2017 study by the American Action Forum and Aspen Institute found that independent contractors contributed greatly to the economic recovery. The report found, "Between 2010 and 2014, independent contractors grew by 11.1 percent (2.1 million workers) and represented 29.2 percent of all jobs added during that time period." Work as an independent contractor also offers critical opportunity and earnings for the unemployed while they search for new work, according to a 2016 McKinsey Global Institute study.

Many individuals value the flexibility inherent to independent contract work. Unfortunately, the current laws and regulations incentivize employers to hire employees as opposed to independent contractors, even when the latter may be more efficient or cost effective.

Experts: Trey Kovacs, Iain Murray

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REFORM THE WORKER CLASSIFICATION PROCESS

The Fair Labor Standards Act is the primary law governing wage and hour mandates across the country, including full- and part-time private-sector workers and local, state, and federal employees. The FLSA sets the minimum wage and overtime eligibility, record-keeping requirements, and exemptions to those requirements. 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 above a salary threshold, currently set at $23,660, and primarily perform "bona fide executive, administrative, or professional" activities to qualify for wage and hour exempt status. However, in today's economy—characterized by horizontal corporate structures, significant job mobility, and flexible work arrangements—clearly defining employees as either management or rank-and-file workers is more difficult than it has been in the past.

Another area in which 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, one of the broadest and most far-reaching definitions of employee under U.S. law.

Congress should:

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

Worker misclassification happens primarily in one of two ways:

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

Overwhelmingly, workers choose to work as independent contractors because they value independence in their lives over being directed by an employer. Yet current laws greatly reduce an individual's ability to undertake work as an independent contractor. Eliminating a form of work is poor policy at any time.

Temporary workers and independent contractors serve important business functions. 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 perform more jobs during the summer, without having to take on permanent staff that it will not be able to afford during the winter.

During the past five years, investigations by the Labor Department's Wage and Hour Division resulted in $1.2 billion in back wages. Certainly, there are some bad actors who will try to short workers on pay, but the DOL's Depression-era wage and hour laws that define who is an employee do not match up with the modern workplace and often lead to penalties based on mere technicalities.

Expert: Trey Kovacs

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GIVE EMPLOYERS AND EMPLOYEES GREATER CHOICE OVER COMPENSATION

The Fair Labor Standards Act restricts how employers may compensate employees. For every hour per week worked in excess of 40 hours, employees are paid time-and-a-half their regular wage rate unless they fall under one of several exemptions outlined in the FLSA. Employers and employees are prohibited from voluntarily negotiating other forms of compensation for hours worked in excess of 40 per week other than time-and-a-half pay.

Many employees likely prefer receiving extra pay from working overtime. However, that should not foreclose other compensation options that fit the unique needs of some individuals. Individuals with children or who are caregivers to the elderly sometimes need extra time off work to take care of loved ones or tend to life's other demands and goals.

Congress should:

- Pass legislation to let employers offer their employees paid leave for working overtime instead of time-and-a-half wages.

Survey results show that flexible workplace rules rank highly on why a worker will choose one job over another. A 2017 Gallup poll of office workers found that 54 percent would change jobs to have access to "flexible work time." A survey conducted by Deloitte on millennials finds that when you take pay out of the equation, work–life balance and flexible work schedules stand out when people evaluate a new job opportunity. A Harris Poll survey commissioned by EY (formerly Ernst & Young) came to a similar conclusion; it found that millennials would change jobs and location to work for an employer that offers "flexibility and [to] better manage work and family life."

The Working Families Flexibility Act of 2017 (H.R. 1180, 115th Congress) would amend the FLSA to permit—not require—employers to offer employees the choice between compensatory ("comp") time and overtime pay. Both employer and employee would have to agree on the arrangement; employers could not coerce employees to accept the alternative compensation. Both overtime wages and comp time would accrue at one-and-a-half times the number of overtime hours worked. In addition, if an employee does not use all of the comp time he or she has accrued, it may be cashed in at the end of the year.

Workers deserve greater choice in their employment terms. The Working Families Flexibility Act provides employees options on how they are compensated and greater workplace flexibility. Amending the FLSA to permit comp time puts private sector employees on an even level with federal employees who have had the option of accruing comp time since 1985.

Expert: Trey Kovacs

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REFORM THE NATIONAL LABOR RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Act (NLRA) is the primary federal statute that governs private-sector labor relations. It establishes the process that employees may use to either organize or refrain from doing so. The NLRA outlines "unfair labor practices," or activity that employers and unions are prohibited from undertaking. The Act created the National Labor Relations Board, an independent agency made up of five members, which is in charge of enforcing the NLRA 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 NLRB's 80 years in operation, almost all NLRB members have come from either a business or union background. That has meant that most Board members have a predisposition to favor one side or the other. With nearly all Board members having a bias, the NLRB has not been able to act in an impartial manner, as it was created to do.

The Board comprises 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 a Republican holds the presidency. Worse, even though changes in precedent are made in purely partisan fashion, federal courts routinely give judicial deference to the NLRB on the basis of the board members' supposed expertise. As a result, NLRB policy is constantly changing, creating immense uncertainty for all stakeholders—employees, employers, and unions.

Congress should:

- Pass legislation to strip the National Labor Relations Board of its adjudication and rulemaking authority to avoid uncertainty surrounding national labor policy.
- Short of stripping the Board of its decision-making authority, pass legislation to add a sixth member to the Board. Such a change would greatly reduce constant change in Board precedent and bring a greater level of stability to labor relations.

- Eliminate exclusive representation.
- Enact the Employee Rights Act to:
    - Protect secret ballots in union organizing elections;
    - Enable workers at unionized workplaces to periodically vote on whether they wish to retain a union as their bargaining representative;
    - Prohibit unions from penalizing workers who wish to decertify; and
    - Protect workers and employers from union violence.

The National Labor Relations Act sets the rules for union elections and unfair labor practices. However, much of the Act is outdated and needs reform. The Employee Rights Act (H.R. 2723, 115th Congress) would go a long way toward protecting workers' freedom of choice of whether to join a union and increasing union accountability.

The Employee Rights Act would:

- Amend the National Labor Relations Act to require all union elections to be conducted via secret ballot. That ensures that workers are able to participate in union elections anonymously, which reduces the opportunity for unions or employers to intimidate or coerce workers on their decision.
- Require a recertification election via secret ballot to take place when more than 50 percent of the collective bargaining unit has turned over since the previous election. A majority of workers, having never voted on union representation, have inherited the union that currently represents them.
- Impose penalties on labor unions that penalize workers who file for union decertification.

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 privately and free from coercion. Card-check takes the form of union organizers asking individual workers to sign a card that acts as their vote for the union. 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, which leaves workers open to union intimidation tactics.

Because employers must agree to card-check elections in place of NLRB-supervised secret-ballot elections, unions are encouraged 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.

Decertification is an arduous and difficult process. 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. That practice has led to a number of "inherited unions." Recent research by the Mackinac Center shows that only 7 percent of current union members actually voted for the union that represents them. That means that a vast majority of workers never had a voice in choosing their workplace representation.

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

Although workers should have the right to organize and unions should have the right to try to attract workers to join, there should be some limits on what kind of activities are allowed toward that goal. One such restriction should be outlawing union violence. Unfortunately, in its 1973 *U.S. v. Enmons* decision, the U.S. Supreme Court created a loophole that exempts violence committed by a union in the course of promoting union goals from prosecution under the Hobbs Act, a major federal anti-extortion law. Since 1975, the National Institute for Labor Relations Research has collected more than 9,000 accounts of union violence reported in the media. However, the study also estimates that 80 to 90 percent of union violence reported to police is not reported, which means that the number of actual incidents of union violence is probably much higher.

Expert: Trey Kovacs

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CLARIFY THE DEFINITION OF JOINT EMPLOYMENT

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 hinder entrepreneurship, reduce job creation, expand employer liability, increase employment insurance costs, encourage lawsuits, and disrupt successful business models. The underlying motive of the NLRB's move is to ease union organizing.

Congress should:

- Pass the Save Local Business Act (H.R. 3441, 115th Congress), which codifies the traditional joint employer standard. It amends the National Labor Relations Act to clarify that a joint employer relationship is established when an employer exercises "actual, direct, and immediate" control over employees.

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

As a result of the increased liability it imposes on employers, the NLRB's new joint employer standard puts a wide swath of proven, established business models at risk, including franchising, contracting out of a business's non-core functions, and using temporary staffing agencies. Those industries create thousands of jobs annually and generate opportunity for entrepreneurs to start new businesses. The NLRB's new joint employer standard, by making larger firms liable for the employment practices of entities it may not be able to control, will result in reduced opportunities for entrepreneurs and fewer jobs.

Expert: Trey Kovacs

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ENABLE VOLUNTARY UNION MEMBERSHIP

A longstanding practice in both private and public sector labor law directly conflicts with an individual's right to freedom of association. It is possible under the National Labor Relations Act and Civil Service Reform Act of 1978 for a minority of workers to impose a union on the rest of their colleagues. A flaw in labor relations policy allows a union to be certified as the exclusive representative of a bargaining unit by receiving only a majority of votes cast in an election, not a majority of votes from all employees at a workplace. In some states, employees must pay fees to a union to finance such unwanted representation. Congress should amend federal labor relations law so that unions represent only workers who voluntarily join and pay dues.

Congress should:

- Pass legislation modeled after New Zealand's Employment Relations Act, which ensures that any association between a worker and a union is mutually voluntary. In New Zealand, all union membership is voluntary, and unions represent only workers who voluntarily join and pay dues.

The National Labor Relations Act restricts workers' freedom to choose how they are represented in the workplace. Section 9(a) of the NLRA imposes the principle of "exclusive representation" on workers and employers. When a union wins an election, it is certified as the exclusive representative of a bargaining unit at a workplace. That policy grants the union a monopoly over workers in the bargaining unit.

An exclusive representative union represents all workers in a bargaining unit. That means that the union represents workers who voted in its favor, workers who voted for another union, and workers who voted against any union representation. Laws that grant exclusive representation status to unions prohibit employers from negotiating work conditions directly with employees or with another employee representative. In states without right-to-work laws, nonunion workers must pay agency fees to cover the costs of such compulsory union representation.

Section 7111 of the Civil Service Reform Act of 1978, which governs labor relations in the federal government, grants labor unions exclusive representation status when a majority of employees voting in an election cast ballots in favor of a union.

Workers who do not want union representation should be free to independently negotiate their own terms and conditions of employment with their employer. Congress should enact legislation that frees workers from forced representation and dues. When a union represents a workplace, only union members should work under a collective bargaining agreement, receive union services, and pay voluntary dues.

Expert: Trey Kovacs

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END GOVERNMENT-SUBSIDIZED UNION ACTIVITY

Section 7131 of the Civil Service Reform Act of 1978, also known as the Federal Service Labor-Management Relations Statute, permits unions official time, which allows federal employees paid time off from their government duties to perform union business. The practice represents a massive taxpayer-funded subsidy to federal employee unions. In FY 2016, official time cost $176 million, with federal employees spending 3.6 million hours conducting union business, according to the latest estimate from the Office of Personnel Management. Official time is a misuse of taxpayer funds and should be eliminated. Federal employees should exclusively perform the activity they are hired to perform.

Congress should:

- Pass legislation that amends section 7131 of Title 5 of the Civil Service Reform Act to eliminate the use of official time by federal employees for union activities.
- At a minimum, pass legislation that requires federal agencies to monitor, record, and publish the cost, hours, and activity performed as part of union business during official time.

In 2018, President Trump issued Executive Order 13837, which directs federal agencies to significantly curtail union official time. The E.O. also directs agencies to carefully monitor official time to prevent unlawful uses and improves agency reporting. That is a positive development, but its gains will be short term if Congress does not pass legislation codifying restrictions of official time.

The Civil Service Reform Act of 1978 grants official time to federal employee unions for collective bargaining negotiations and grievance procedures. Otherwise, official time is permitted only if the activity is deemed by the public employer and union to be "reasonable, necessary, and in the public interest."

Any activities performed by an employee relating to the business of a labor organization—including the solicitation of membership, elections of labor organization officials, collection of dues, collective bargaining, grievances, lobbying, or any activity previously permitted under official time—should be performed during the time the employee is in non-duty status.

Several Government Accountability Office reports have found that federal employees use official time for union activities without authorization, public employers are not aware of what activity federal employees engage in on official time, and the costs and hours of official time use are unknown because of poor accounting practices.

Expert: Trey Kovacs

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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 the products and services they choose.

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. Some 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, which leads to higher prices in the marketplace.

Legislators and regulators also respond to political pressures, so rules are often driven by 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, government too often tends to restrict the use of products and technologies that activists consider risky but that 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 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. When 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 CONSUMERS' ACCESS TO TOBACCO SUBSTITUTES AND VAPING PRODUCTS

After a decade of intense research, there is no doubt that vaping, although not harmless, is vastly less harmful for smokers than combustible tobacco products and are effective in helping smokers quit their deadly habit. Yet, the U.S. Food and Drug Administration is threatening to regulate vaping products out of existence. That can only result in higher incidences of cancer and more smoking-related deaths as more people find it harder to quit smoking tobacco.

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 that can be reasonably assumed to have a net positive effect on public health.
- For noncombustible nicotine-delivering products, instruct the FDA to create a system whereby manufacturers submit ingredients and safety disclosures but are not forced to wait for approval from the agency before selling their products on the market.
- Amend the TCA to allow less harmful nicotine products to be advertised as such. Despite the increasing evidence that noncombustible nicotine is vastly less harmful than cigarettes, consumers remain largely unaware of that fact. Allowing producers of tobacco alternatives to communicate their lower risk will provide smokers with accurate information about alternatives and may convince more smokers to switch.
- Modify the TCA's "predicate" date (the grandfather date) to 2018 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 to change the predicate date to August 2016, which could serve as a model.

Although many 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 issued onerous new regulations for vaping products. Despite the much lower risk, the new rules treat vapes—which help millions quit smoking and seem 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.

Between now and 2022, 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, conform to new labeling requirements, and 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 eliminate 99 percent of currently available products. The options that remain for vapers will be more expensive and less attractive, meaning that 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, the FDA, without direction from Congress, announced that it would begin regulating all nicotine products as tobacco products 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 upwards 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. Most likely, only large tobacco companies will 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 such products—all of them 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 feature new warning labels. 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—many of whom will continue to use much deadlier traditional cigarettes.

Clearly, the effects of those new rules were not what Congress intended when it enacted the TCA. In addition to giving the FDA oversight of tobacco products, the TCA instructed the agency to promote cessation to "reduce disease risk and the social costs associated with tobacco-related diseases." Instead, the FDA's actions will reduce access to safer tobacco alternatives.

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. Although 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 either 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.

Although some advocates fear that 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. According to a July 2017 study led by Georgetown University oncologist David T. Levy, 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. (The study was funded by the National Institute on Drug Abuse, the National Cancer Institute, and the Cancer Intervention and Surveillance Modeling Network.)

Allow noncombustible products to advertise reduced harm

Not only are vapes now required to acquire FDA sanction, manufacturers also are prohibited from telling customers that vapes 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 to other tobacco products, was intended to stop companies from using such terms as "light" or "low tar" that falsely contend that the products are safer than regular cigarettes. Subsection 911 also bars manufacturers from advertising that vapes have fewer toxins than do 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.

The result will be a vaping market in which products are more expensive, consumers have access to fewer customizable options and fewer flavors, and manufacturers are barred from trying 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 already 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, before 2007 there were no vaping products on the market comparable to today's products. If Congress changes that date to 2016 or 2018—when the law is fully in effect—it will reduce the number of products that 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 a decade. The FDA's mission is to protect and enhance consumer health. The agency asserts that the new regulations on vapes will "improve public health and protect future generations from the dangers of tobacco use," but 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.

By the FDA's own admission, the new rules will eliminate almost all of those products, which even FDA experts recognize are "good for public health." It seems that the FDA would rather eliminate life-saving products than allow them to be available without its explicit permission.

Preserve noncombustible nicotine products' advantage over traditional tobacco

Under Commissioner Scott Gottlieb, the FDA has thankfully delayed the decision of his predecessor to regulate less harmful vapor products like it does traditional combustible cigarettes until 2022. However, the FDA and other federal agencies are considering proposals to regulate e-cigarettes in a way that would eliminate their comparative advantage over traditional cigarettes and thus eliminate incentives for current smokers to switch to the less harmful alternatives. For example, the FDA is currently considering a proposal to limit the flavors that e-cigarette makers could offer to tobacco and menthol.

The purported targets of such a ban are candy- and fruit-flavored varieties of e-cigarettes. The agency claims that those varieties can attract nonsmoking minors to use e-cigarettes and thus lead to later smoking. However, data collected by the Centers for Disease Control and Prevention (CDC) show that even as e-cigarettes have risen in popularity, cigarette use among teenagers has declined dramatically. Research, such as a 2015 paper led by University of Pittsburgh oncologist Saul Shiffman, also shows that nonsmoking minors are not attracted by e-cigarette flavors. Instead, those flavors seem to help smoking adults switch to vaping, and stay with it, instead of returning to smoking. Eliminating those flavors would have no effect on minors, but it could have potentially disastrous consequences for smoking adults.

The FDA is charged with protecting consumers from dangerous products. Thus far, none of the scientific evidence indicates that e-cigarette use is harmful either in the short or long term, and almost all of the evidence indicates that vaping is significantly less harmful than cigarette smoking.

One of the FDA's fundamental roles is to provide information about risk to consumers. By focusing on the hypothetical harms that e-cigarettes may or may not pose, the agency has altered public perception about the relative risk of e-cigarettes, with an increasing number of adults reporting that they believe e-cigarettes are as harmful as or even more harmful than traditional smoking—a demonstrably false belief. The FDA must not only base its regulations on sound science but also be more careful about how it addresses and discusses concerns to avoid misinforming the public.

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PROTECT FEDERALISM AND AMERICAN ADULTS' ACCESS TO ONLINE GAMBLING PLATFORMS

The morality of gambling is an issue that has long been settled in the United States. All but one state has some form of gambling, all but six have lotteries, and four states have legal casino-style gambling online. Without exception, the regulation of intrastate gambling has been left to the states under the Tenth Amendment of the Constitution. That was confirmed in May 2018, when the Supreme Court ruled that a federal law barring states from legalizing sports betting was unconstitutional. 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 for state lawmakers and businesses.

Congress should:

- Protect the principle of federalism, Internet freedom, and consumer safety by rejecting any proposals to enact new legislation or amend existing legislation that would prohibit states from legalizing online gambling within their own borders, and between other states where such gambling is legal.

Although states have traditionally regulated intrastate gambling, some members of Congress continue to push for federal laws that would block or otherwise hamstring states from fully legalizing gambling, especially online. Beginning in the 114th Congress, some lawmakers, led by Rep. Jason Chaffetz (R-Utah), have proposed amending the Federal Wire Act of 1961, a law meant to prevent criminal organizations from using the "national wire" to profit from illegal interstate sports gambling. The law was originally enacted because of fears that states would 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 being as conduits for money laundering or other crimes. But some in Congress would rather push such activities back into the black market.

Proponents of federal restrictions on state gambling, whether or on- or offline, argue that such legislation is necessary to protect consumers. In reality, creating barriers to legal gambling merely encourages the black market to flourish, putting consumers at greater risk, and undermines state sovereignty.

After the Supreme Court struck down a federal law prohibiting states from legalizing sports betting in May 2018, some members of Congress advocated for new laws to regulate the burgeoning sports gambling market. Sen. Orrin Hatch (R-Utah), who helped enact the original federal sports betting laws, has said that a free market for sports betting in the states would create a "patchwork race to the regulatory bottom" and has announced his intention to introduce new legislation to protect the integrity of sports.

Proponents of federal gambling restrictions worry that Internet gambling will lead to increased rates of 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 developed nations. In fact, online gambling sites may be better equipped to identify and help players who exhibit signs of problem behavior, because unlike at a brick-and-mortar casino, a person's online behavior can be monitored and analyzed by sophisticated algorithms.

Another common argument used by gambling opponents is that online gambling is necessarily interstate and therefore impossible to contain within state boundaries. Should some states legalize the practice, other states wishing to prevent their residents from gambling online will be unable to block access. That concern is without merit. Should that argument prevail, it would help set a dangerous precedent for other forms of online commerce. Technology exists to track users' location and block them if necessary, as states and countries with legal online gambling have shown.

States have proven that they are more than capable of regulating those activities over the past five years, when online casino-style gambling has been legal in U.S. states. Federal laws and mechanisms already exist to regulate or prosecute operators that violate the laws of other states or nations. Should Congress eventually enact restrictions on Internet gambling, Americans will no doubt simply return to using foreign-operated sites, which have few, if any, protections for American consumers, or illegal sites, which have none.

Clearly, there is no justification or pressing need to rewrite a 25- or 50 year-old law to protect consumers. States already are doing so by allowing legal, well-regulated gambling online. Congress should stay out of their way. Federal interference 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.

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STRENGTHEN COOPERATIVE FEDERALISM BY DESCHEDULING CANNABIS FROM FEDERAL DRUG PROHIBITIONS

The year 2019 marks the 82nd anniversary of Congress prohibiting the sale and possession of marijuana. Since 1937, however, public opinion on the subject has changed dramatically. Polls in 2017 showed that 64 percent of Americans support legalization of marijuana, including 51 percent of Republicans and 72 percent of Democrats. But while Americans' views on cannabis have shifted, the federal stance has remained frozen in the Great Depression era. Under federal law, the possession or sale of cannabis, whether for medical or recreational purposes, is punishable by fines of up to $1 million and sentences as long as life in prison, even if the parties charged are in full compliance with the laws of their state.

Congress should:

- Protect the principle of cooperative federalism, voters' rights, and consumer safety by un-scheduling marijuana from the Controlled Substances Act or amend the Act to decriminalize marijuana selling or buying in the CSA in states where such activity is legal.

To date, 30 states and Washington, D.C. have democratically enacted laws to legalize the sale and possession of medical marijuana, and nine states and D.C. allow legal recreational marijuana use. Legalization across the states is the result of changing attitudes and the will of voters, which Congress ought to respect. Unfortunately, in January 2018 the Department of Justice ended the decades-long hands-off position taken by both Congress and the executive branch. In addition to the difficulties that already exist for legal state-based marijuana businesses and consumers because cannabis is federally criminalized, the DOJ's new stance puts them at even greater risk for legal consequences.

Our Constitution wisely limits federal power and leaves most issues of law enforcement to the individual states. Given that we are a nation of diverse populations and opinions, state legislatures and local law enforcement must be free to decide how best to use their limited resources to protect public health and safety and direct resources toward those priorities. What works for Colorado may not be appropriate for Alabama and vice versa.

In June 2018, a bipartisan group of lawmakers introduced the Strengthening the Tenth Amendment through Entrusting States (STATES) Act (S. 3032, 115th Congress). Sponsored by Sens. Cory Gardner (R-Colo.) and Elizabeth Warren (D-Mass.), the STATES Act is a modest amendment of the Controlled Substance Act (21 U.S.C. 801 *et seq*). Rather than remove marijuana from federal drug laws, the legislation would make the Controlled Substance Act inapplicable to any person acting in compliance with state law related to marijuana. At its heart, the Act does not require Congress to answer the question of whether marijuana should be legalized. Rather, it affirms that state legislatures are the governmental unit best equipped to decide whether and how marijuana ought to be legalized in their respective states. The STATES Act would not prevent the federal government from enforcing federal laws criminalizing the sale or use of marijuana. It merely requires the federal government to enforce those laws in a way that respects states' authority to legislate in this area.

The STATES Act can serve as a model for a modernized approach to marijuana regulation. Perhaps more than any other issue in Congress, this one has true bipartisan support, with cosponsors evenly distributed between Democratic and Republican members. President Trump has also stated that he would sign such a bill if it were to pass in Congress. Clearly, America is ready to see an end to the longstanding and untenable conflict between state and federal drug policy. All that remains is for Congress to take action.

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9

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 U.S. 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 nearly 10 million annual aircraft departures carrying more than 685 million passengers. More than $12 trillion worth of goods are moved every year in the United States by road, rail, air, and waterway.

Transportation networks vary greatly in terms of quality, financing, and management. For instance, roads generally are 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 at 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 were to prove politically unattainable, the starting point for sound transportation policy is adherence to the users-pay/users-benefit principle. Transportation infrastructure and operations should be paid for by the users 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, users-pay offers the following advantages:

- **Transparency.** Charges "follow" users, unlike tax dollars that wind through convoluted bureaucracies.
- **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 users-pay principle. In those cases, the programs should be reformed to meet the users-pay principle. If that proves not to be possible, that would suggest that the program is high cost and low value and should be ended.

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 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. Congress passed a multiyear Federal Aviation Administration (FAA) reauthorization in October 2018. There is much to be done to reform the FAA and federal aviation law in a more pro-market direction. Congress should continue to examine the air traffic control governance and airport funding and financing reform proposals that were debated in the previous session, especially (a) an air traffic control model based on Canada's successful corporatization and (b) lifting the federal cap on the local airport user fee known as the passenger facility charge. In the meantime, Congress should begin examining policy improvements for the next highway bill, as the current multiyear surface transportation reauthorization expires on September 30, 2020.

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 annually nearly $305 billion in economic costs nationwide, according to the 2017 INRIX Global Traffic Scorecard.

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 addition, Congress should look to replace fuel taxes with mileage-based user fees over the long run if it wishes to maintain the Highway Trust Fund. That was the recommendation of the 2009 final report of the National Surface Transportation Infrastructure Financing Commission, which was endorsed by former House Transportation and Infrastructure Committee Chairman Bill Shuster (R-Penn.) in his July 2018 surface transportation discussion draft.

Congress should:

- Provide oversight of state-based, mileage-based user-fee pilot programs authorized under the Surface Transportation System Funding Alternatives Program, Sec. 6020 of the Fixing America's Surface Transportation (FAST) Act of 2015.
- Examine mileage-based user fees as a national replacement for fuel tax revenue of the Highway Trust Fund.
- Streamline surface transportation programs by eliminating discretionary grants programs such as Better Utilizing Investments to Leverage Development (BUILD).
- Hold hearings on the National Highway Traffic Safety Administration's development of automated driving system policies.
- Enact performance-based safety regulatory reforms across the entire Department of Transportation.

In light of the National Highway Traffic Safety Administration's (NHTSA) guidance on automated driving systems, Congress should maintain tight oversight of the agency's policies regarding this technology. Many of the nonbinding recommendations are welcome and help to fill a vacuum that previously threatened to produce a patchwork of conflicting state laws and regulations.

Finally, despite President Clinton's 1993 Executive Order 12866 and subsequent reaffirmations that regulatory agencies should "specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt," many safety regulations remain prescriptive. New technologies and practices can achieve better safety outcomes at lower cost, but they remain prohibited thanks to outdated, inflexible regulations. Safety regulators should seek to develop performance- and risk-based regulatory alternatives to better advance their safety missions.

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