

Introduction

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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 than 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.