Liberate to Stimulate

Policy makers frequently propose spending stimulus as a way to grow economies. It rarely goes well. A regulatory liberalization stimulus, on the other hand, can offer confidence and certainty for businesses and entrepreneurs. While congressional action is needed, the executive branch can continue to stress regulatory streamlining and specific actions such as requiring rules and guidance to be submitted to Congress and the GAO as required by the Congressional Review Act. In addition, President Trump should issue new executive orders (a) requiring review of independent agency rules, (b) outlining principles for guidance document preparation and disclosure, and (c) calling for the completion of the aggregate regulatory cost estimate already required by law.

Steps to Improve Regulatory Disclosure

Certainly, some regulations' benefits exceed costs under the parameters of guidance to agencies such as OMB Circular A-4, but for the most part net benefits or even actual costs are not subject to quantification.[516] Without more thorough regulatory accounting than we get today—backed up by congressional certification of what agencies specifically do—it is difficult to know whether society wins or loses as a result of rules.[517] Pertinent, relevant, and readily available regulatory data should be summarized and reported publicly to help nurture the political climate for better disclosure and reform. One incremental but important step toward greater openness would be for Congress to require—or for the administration or OMB to initiate—publication of a summary of available but scattered data. Such a regulatory transparency report card could resemble some of the presentation in *Ten Thousand Commandments*.

Accountability is even more important than disclosure. Congress routinely delegates legislative power to unelected agency personnel. Reining in off-budget regulatory costs can occur only when elected representatives assume responsibility and end "regulation without representation." Changes made by comprehensive regulatory reform, such as the Regulatory Accountability Act, could help induce Congress to internalize pressures that would inspire cost-benefit appraisals before issuing open-ended directives to agencies to write rules.[518] More stringent limitations on delegation, such as requiring congressional approval of rules, are essential.

Regulations fall into two broad classes: (a) those that are economically significant or major (with effects exceeding $100 million annually) and (b) those that are not. Agencies typically emphasize reporting of economically significant or major rules, which OMB also tends to highlight in its annual regulatory reports. A problem with this approach is that many rules that technically come in below that threshold can still be very significant in real-world terms.

Moreover, agencies need not specify whether any or all of their economically significant or major rules cost just above the $100 million threshold or far above it. One helpful reform would be for Congress to require agencies to break up their cost categories into tiers, as depicted in Table 13. Agencies could clas-

Policy makers frequently propose spending stimulus as a way to grow economies. It rarely goes well.

Table 13. A Possible Breakdown of Economically Significant Rules

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

sify their rules on the basis of either (a) cost information that has been provided in the regulatory impact analyses that accompany some economically significant rules or (b) separate internal or external estimates.

Further, much of the available regulatory information is difficult to compile or interpret. To learn about regulatory trends and acquire information on rules, interested citizens once needed to comb through the Agenda's 1,000-plus pages of small, multicolumn print, and today compile results from online searches and agencies' regulatory plans and sites like Regulations.gov. Data from the Unified Agenda could be made more accessible and user-friendly if elements of it were officially summarized in charts and presented as a section in the federal budget, in the Agenda itself, or in the *Economic Report of the President*. Suggested components of this Regulatory Transparency Report Card appear in Box 6.[519] In addition to revealing burdens, impacts, and trends, it would reveal more clearly what we

Box 6. Regulatory Transparency Report Card, Recommended Official Summary Data by Program, Agency, and Grand Total, with Five-Year Historical Tables

- Tallies of "economically significant" rules and minor rules by department, agency, and commission.
- Tallies of significant and other guidance documents, memoranda, and other "regulatory dark matter" by department, agency, and commission.
- Numbers and percentages of executive and independent agency rules deemed "Deregulatory" for E.O 13,771 purposes.
- Numbers and percentages of rules affecting small business; deregulatory component.
- Depictions of how regulations/guidance accumulate as a small business grows.
- Additional rules agencies elected to subject to Regulatory Impact Analysis and E.O. 13,771 scrutiny.
- Aggregate cost estimates of regulation by category: paperwork, economic (for example, financial, antitrust, communications), social, health and safety, environmental.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Numbers and percentages lacking cost estimates, with explanation (Compile statistics on what we do not know about regulatory burdens).
- Analysis of the *Federal Register,* including number of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the Government Accountability Office in its database of reports on regulations.
- Number/percentage of agency rules and guidance documents presented properly to Congress in accordance with the Congressional Review Act.
- Ranking of most active rulemaking agencies.
- Rules that affect internal agency procedures alone.
- Number of rules new to the Unified Agenda; number that are carryovers from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them or for which weighing costs and benefits is statutorily prohibited.
- Ultimate percentages of rules reviewed by the OMB and action taken.

do *not* know about the regulatory state, such as, for example, the percentage of rules that failed to quantify either costs or benefits.

Furthermore, the accumulation of regulatory guidance documents, memoranda, and other regulatory dark matter to implement policy calls for greater disclosure of these kinds of agency issuances than exists now, since these can be regulatory in effect but are nowhere to be found in the Unified Agenda. Inventorying such dark matter is difficult to do, but formal attempts will be made in 2020. Legislation such as the Guidance out of Darkness Act would help remedy the disclosure problem.

In addition, we have little ability to distinguish between additive and subtractive rules and little guidance in terms of burdens imposed. Future regulatory reforms by Congress should require regulatory and deregulatory actions to be classified separately in the *Federal Register* and for agencies' confusing array of rule classifications to be harmonized.[520] Current reporting also distinguishes poorly between rules and guidance affecting the private sector and those affecting internal governmental operations.

Given a basic framework, additional information could be incorporated as warranted—for instance, success or failure of special initiatives such as executive branch restructuring or specific regulatory reform efforts. Providing historical tables would prove useful to scholars, third-party researchers, members of Congress, and the public. By making agency activity more explicit, a regulatory transparency report card would help ensure that policy makers take the growth of the administrative state seriously.

Ending Regulation without Representation: The "Unconstitutionality Index"—28 Rules for Every Law

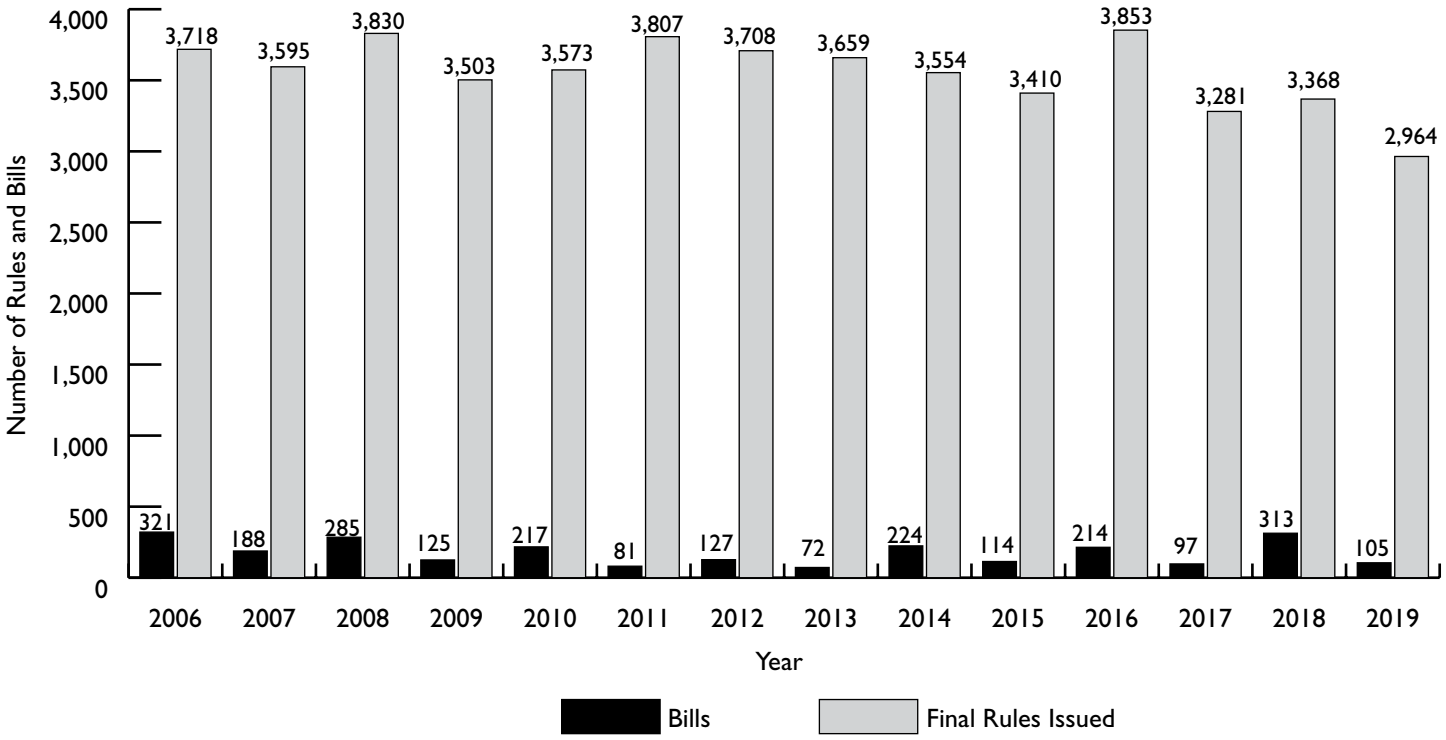
Regulatory agencies do not answer to voters. Yet in a sense, regulators, rather than Congress, do the bulk of U.S. lawmaking. Columbia University legal scholar Phillip Hamburger has described the rise of a monarchical administrative state in defiance of a Constitution that "expressly bars the delegation of legislative power."[521] But agencies are not the sole offenders. For too long, Congress has shirked its constitutional duty to make the tough calls. Instead, it routinely delegates substantial lawmaking power to agencies and then fails to ensure that they deliver benefits that exceed costs.

The primary measure of an agency's productivity—other than growth in its budget and number of employees—is the body of regulation it produces.[522] Agencies face significant incentives to expand their turf by regulating even without established need. It is hard to blame agencies for carrying out the very regulating they were set up to do in the first place. Better to point a finger at Congress.

For too long, Congress has shirked its constitutional duty to make the tough calls.

The "Unconstitutionality Index"—the ratio of rules issued by agencies relative to laws passed by Congress and signed by the president—underscores the primacy of the administrative state over the Constitution. There were 28 rules for every law in 2019 (there had been 11 in 2018, see Figure 23). In calendar year 2019 regulatory agencies issued 2,964 final rules, while the 116th Congress passed and President Trump signed into law 105 bills.[523] Both Trump's rule count and the number of laws enacted were lower than last year, but there is no overall pattern to this, since the numerator (number of rules) and denominator (number of laws) can vary widely for a variety of correlated and uncorrelated reasons. The Index is in keeping with anecdotes about rules being far heftier than the laws that led to the rules. Back in 2013, when agencies had published over 11 million words of Obamacare regulations, observers pointed out that there were "only" 381,517 words in the underlying law itself.[524] Such complexities aside, the takeaway of the Unconstitutionality Index is that the unelected personnel of federal agencies, not elected members of Congress, do the bulk of lawmaking.

Figure 23. The Unconstitutionality Index, 2006–2019



Source: *Federal Register* data from National Archives and Records Administration and from Crews tabulation at http://www.tenthousandcommandments.com. Public Laws data compiled from Government Printing Office, Public and Private Laws at http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW; and from National Archives, Previous Sessions: Public Law Numbers at http://www.archives.gov/federal-register/laws/past/index.html.

The Unconstitutionality Index average over the past decade has been (also, coincidentally) 28 rules for every law. Rules issued by agencies are not usually substantively related to the current year's laws; typically, agencies' rules comprise the administration of prior years' legislative measures. If agency public notices and executive orders are considered, non-legislative policy making assumes even greater prominence as an issue of concern. In the current streamlining context, since eliminating a rule requires issuing one, the Index is ironically "worsened" by deregulation. (Appendix: Historical Tables, Part I, depicts the "Unconstitutionality Index" dating back to 1993 and shows the numbers of executive orders and the numbers of agency notices, which one might arguably incorporate into the Index, if so inclined.)

Mounting debt and deficits can incentivize Congress to regulate rather than to increase government spending to accomplish policy ends. If Congress wanted to boost job training, funding a program to do so would require legislative approval of a new appropriation for the Department of Labor, which would appear in the federal budget and increase the deficit. Instead, Washington could try to induce Fortune 500 companies to implement job training programs, to be carried out according to new regulations issued by the Department of Labor. The latter option would add little to federal spending but would still let Congress take credit for the program. By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny.

An annual regulatory transparency report card is needed, but it is not the complete response. Regulatory reforms that rely on agencies policing themselves within the lim-

ited restraints of the Administrative Procedure Act will not rein in the regulatory state or address regulation without representation. Rather, Congress should vote on agencies' final rules before such rules become binding on the public. Affirmation of new major and controversial regulations would ensure that Congress bears direct responsibility for every dollar of new regulatory costs.

The Regulations from the Executive in Need of Scrutiny Act (REINS) Act offers one such approach.[525] REINS would require Congress to vote on all economically significant agency regulations. It has passed the House in the 115th and the three prior congressional sessions but has not moved forward in the Senate. To avoid getting bogged down in approving myriad agency rules, Congress could vote on agency regulations in bundles. Another way to expedite the process is via congressional approval or disapproval of new regulations by voice vote rather than by tabulated roll-call vote. What matters most is that Members of Congress go on record for whatever laws the public must heed.

If Congress does not act, states could take the ball from Congress. Many state legislators have indicated support for the Regulation Freedom Amendment, which reads, in its entirety: "Whenever one quarter of the members of the U.S. House or the U.S. Senate transmit to the president their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation."[526] Pressures from states could prompt Congress to decide to act before matters deteriorate that far, but the Constitution does provide for states to check federal power.

While there are possible approaches to boosting disclosure, transparency, and accountability, congressional—rather than agency—approval of regulatory laws and their costs should be the main goal of reform. When Congress ensures transparency and disclosure and finally assumes responsibility for the growth of the regulatory state, the resulting system will be one that is fairer and more accountable to voters.

These safeguards are necessary but not sufficient. Legislative regulatory reform and executive branch streamlining are elements of more fundamental debates. Congress is responsible for the fiscal budget, yet deficits remain the norm. The larger questions at hand are over the role and legitimacy of the administrative state and the role of government in a constitutional republic.