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How Reins Would Improve Environmental Protection Symposium: The EPA at 40

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HOW REINS WOULD IMPROVE ENVIRONMENTAL PROTECTION

DAVID SCHOENBROD*

"A senior EPA executive, who has to remain nameless . . . thought a concept like REINS was a great idea for two reasons . . . [First] was his unutterable frustration that the Congress often sends overly generic or nonspecific or, in fact, many times contradictory titles in bills. [Second was] that it would force a dialogue for clarity between the agency [and Congress]. Instead of having 2,700-page bills that show up hours before a vote, the dialogue could be ongoing, reduced down to a concise piece of legislation that had very clear intent, very clear expectations and metrics, and a clear outcome to maintain context for our citizens."

Representative Geoff Davis, March 14, 2011¹

Representative Davis's report that a senior EPA executive supports the concept behind REINS (short for "Regulations from the Executive in Need of Scrutiny Act")² is hearsay from the bill's chief sponsor, and anonymous at that, but the reasons given for that support correspond with the reasons that I gave for my support at the *Duke Environmental Law and Policy Forum (DELPF)* symposium on January 24, 2011. In this essay, I explain my reasons for supporting the substance of the bill, but also for disagreeing with some of its rhetorical wrappings.

My argument that REINS would actually improve environmental protection is a tough sell to environmentalists. After all, the bill would shift power from the agencies to Congress, and Congress is seen as the enemy. But the statutes that empower the agencies are increasingly obsolete.³ There are limits on agencies' ability to adapt

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1. 157 CONG. REC. H1785 (daily ed. Mar. 14, 2011).

2. H.R. 10, 112th Cong. (2011); S. 299, 112th Cong. (2011).

3. That the statutes are obsolescent and need updating is the overall point of DAVID

them to deal effectively with old, unsolved problems and newer ones such as climate change.⁴ The need to update these statutes will only grow in time. Meanwhile, Congress keeps sticking its nose in through the oversight, appointments, and budget processes. REINS would give Congress a more direct sort of control, but this control would come at the expense of legislators having to take direct responsibility for decisions to impose or not impose specific regulations. That is the first step towards a more constructive approach to our environmental problems.

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William Reilly, an excellent EPA administrator and thoughtful presence throughout the *DELPF* symposium, invoked an image of ticking hand grenades to describe the politically charged statutory duties that George W. Bush's EPA had failed to fulfill and thus left to Barack Obama's EPA:⁵ "They're like little hand grenades that have been rolled out there by previous administrators, and now they're ticking."⁶ Mr. Reilly's analogy is apt but incomplete. W's presidential administration was far from the first to roll hand grenades to its successor. His EPA was on the receiving end of grenades rolled to it by the EPA of his predecessor, William Clinton.⁷ Indeed, presidents

SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, *BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK* (2010).

4. For example, the Clean Air Act inhibits EPA's ability to use market-based approaches to interstate air pollution. David Schoenbrod, *The Clean Air Act Is in No Shape to Be Celebrated*, HUFFINGTON POST (Sept. 3, 2010, 12:44 PM), http://www.huffingtonpost.com/david-schoenbrod/the-clean-air-act-is-in-n_b_704631.html.

5. Gabriel Nelson, *EPA: Previous Administrators Handed Rulemaking 'Grenades' to Obama - William Reilly*, E & E PUBLISHING (Dec. 17, 2010), <http://www.eenews.net/public/Greenwire/print/2010/12/17/1>; Gabriel Nelson, *Previous EPA Administrators Handed Rulemaking 'Grenades' to Obama, William Reilly Says*, N.Y. TIMES (Dec. 17, 2010), <http://www.nytimes.com/gwire/2010/12/17/17greenwire-previous-epa-administrators-handed-rulemaking-g-7635.html> [hereinafter *Previous*].

6. *Id.*

7. For example, the EPA was sued in 1989, under Bush I, to revise its regulations on water pollution from Concentrated Animal Feeding Operations. But, it was not until the very last days of the Clinton administration, more than eight years later, and after the 2008 elections, that the Clinton EPA even issued proposed regulations on this touchy subject. The result was that the ultimate decision was left to the Bush II EPA. *Waterkeeper Alliance v. Env'tl. Prot. Agency*, 399 F.3d 486, 494-95 (2d Cir. 2005). The Clinton administration did issue long overdue regulations on arsenic in drinking water, but did not get around to making this politically explosive decision until after the November 2000 elections. *National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring*, 66 Fed. Reg. 6976 (Jan. 22, 2001). How convenient! As a result, the decision was not final when George W. Bush took office and therefore his EPA had to decide whether to let

have been rolling environmental hand grenades to their successors since the EPA was established.

The prime roller is Congress. Congress rolled ticking hand grenades by imposing deadlines to issue regulations without regard to whether the EPA could meet them. So the great bulk of deadlines go unmet under presidents of both parties.⁸ One forty-year veteran of a major EPA program was heard to say, "I can count on one hand the number of major regulations issued without a court-ordered deadline."⁹

Congress also rolled ticking hand grenades by requiring the EPA to achieve environmental quality goals without regard to whether they could be achieved through steps palatable to the legislators themselves. In the 1970 Clean Air Act, for example, Congress mandated that the EPA achieve air quality goals that could be met only by choking the supply of gasoline to Southern California, banning cars and trucks during business hours from the business district of Manhattan, and more.¹⁰

Congress thus sets up the EPA for abuse from the legislators no matter what the agency does. If the EPA takes politically unpopular steps, legislators can chastise it for the burdens imposed on their constituents. If the EPA fails to achieve statutory goals, the legislators can chastise it for failing to protect their constituents. In sum, Congress has designed the environmental statutes to provide "a handy set of mirrors—so useful in Washington—by which a politician can appear to kiss both sides of the apple,"¹¹ as John Quarles (EPA's first general counsel and later its deputy administrator) put it.

The conflicted behavior of Congress reflects, in turn, the conflicted desires of the American people, whom William Ruckelshaus (twice EPA administrator) recently described as "ideological liberals and operational conservatives."¹² However, the legislators cannot justify their apple-kissing behavior by pointing to the conflicted desires of their constituents because the Constitution

the arsenic regulations take effect. The Bush EPA's decision not to let the regulations take effect blew up in the administration's face. DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* 169–80 (2005).

8. See generally Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 *LAW & CONTEMP. PROBS.* 311 (1991).

9. Courtesy precludes attribution.

10. See SCHOENBROD, *supra* note 7, at 39–51 (2005).

11. John Quarles, *A Thicket of Environmental Laws*, *WALL ST. J.*, Aug. 24, 1979, at 10.

12. See *Previous*, *supra* note 5.

assigns to Congress the job of resolving the constituents' conflicting desires. Congress is where representatives of all the people's conflicting interests are supposed to *congregate* to make the hard choices before acting.¹³ Instead, Congress generally designs its environmental statutes so that the hard choices blow up in the face of agencies.

One way to get Congress to do its job is for the courts to enforce the non-delegation doctrine.¹⁴ But whether courts should do so, they won't.¹⁵

Another way to get Congress to do its job, as James Landis (the New Deal's sage of administrative law) suggested, is for agencies to present their regulations to Congress for approval. He wrote, "It was an act of political wisdom to put back upon the shoulders of Congress" responsibility for controversial choices.¹⁶

Judge (now Justice) Stephen Breyer has explained how congressional vetting of agency regulations could work in practice. Congress could enact a statute that first, bars agency regulations from going into effect unless confirmed through the United States Constitution's Article I legislative process, and second, establishes a fast-track process that would require the legislators to accept or reject the regulations by a deadline.¹⁷

Deadlines on Congress would be poetic justice.

REINS would implement Justice Breyer's scheme for the most important regulations.

13. See THE FEDERALIST NO. 62 (James Madison).

14. See generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993).

15. See generally *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (rejecting the D.C. Circuit's finding that Congress had unconstitutionally delegated authority to the EPA to set ambient air quality standards based on human health.). For discussion of the reasons for this refusal, see David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL'Y 239 (2002).

16. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 76 (1938).

17. Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793-94 (1984) (writing about how Congress could retrieve the power it lost when the Supreme Court struck down the legislative veto in *I.N.S. v. Chadha*, 462 U.S. 919 (1983)). Breyer also commented on the wisdom of providing a Congressional check to agency power. *Id.* at 796-98. On the latter question, it is interesting to consider Justice Breyer's likely response to William F. Buckley's famous statement that "I should sooner live in a society governed by the first two thousand names in the Boston telephone directory than in a society governed by the two thousand faculty members of Harvard University." William F. Buckley, speaking in 1963, as quoted in RALPH KEYES, THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN 82-83 (2006).

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I have supported the concept behind REINS since I was a beginning academic still doing some litigation for the Natural Resources Defense Council (NRDC) in the very early 1980s.¹⁸ Indeed, that support grew out of my experience as a principal attorney at NRDC through most of the 1970s.

One of my tasks at NRDC was to head the campaign of environmental and anti-poverty organizations to protect children from lead in gasoline.¹⁹ Congress amended the Clean Air Act in 1970²⁰ because the public demanded protection; the pollution that worried voters most came from lead in gasoline. Lead was known to poison children. The bumper stickers read: "GET THE LEAD OUT."²¹

In the 1970 legislation, Congress did take responsibility for a rule that would eventually reduce lead exposure, but not to protect children. The act authorized the EPA to require that new cars made from 1975 onward use only lead-free gas.²² The reason was that Congress had decided that auto manufacturers must, from 1975 onwards, include pollution-controlling devices in their cars.²³ The device of choice, the catalytic converter, cut many pollutants, but not lead—in fact, lead would ruin it.²⁴ For Congress to require motorists to pay for the device and then let it be ruined by leaded gas would look foolish.

Legislators could not tell voters in 1970 that this rule to protect pollution control devices and their own reputations was sufficient to protect children from lead. Children would still be exposed to lead from gasoline for many years after 1970. The rule would not even take effect until the 1975 cars became available.²⁵ Even then, pre-1975

18. See David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 804, 807 (1983) (arguing that agencies should be required to propose any new rules to Congress for legislative consideration).

19. See SCHOENBROD, *supra* note 7, at 29–38.

20. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

21. See SCHOENBROD, *supra* note 7, at 29.

22. See Clean Air Amendments §§ 202(a)–(b) (authorizing the EPA to establish emissions standards for "any air pollutant from . . . new motor vehicles . . . which . . . endangers the public health or welfare."); *id.* § 211 (authorizing the EPA to regulate fuel additives that "endanger the public health").

23. *Id.* § 202(b)(1)(A); *id.* § 211 (authorizing the EPA to regulate fuel additives).

24. See SCHOENBROD, *supra* note 7, at 34.

25. See Clean Air Amendments §§ 202(b)(1)(A)–(B) (requiring that vehicles manufactured in model years 1975 and later meet emissions standards for carbon monoxide and hydrocarbons).

cars would still use leaded gas, and in 1975, there would be roughly 100 million such cars on the road using leaded gas.²⁶ Many of them would remain there into the 1980s.

So Congress in 1970 had to do more to satisfy voters' demand to protect children from lead. But lawmakers could not simply ban leaded gasoline forthwith; voters also wanted cheap gasoline, and adding lead reduces slightly the cost of refining it.²⁷ Congress was caught between voters' demand to protect children and voters' desire to keep gas cheap.

When Congress is faced with a controversial choice, it often enacts a two-step plan sure to produce ticking hand grenades. It (1) announces a lofty goal, but (2) orders an agency to achieve the goal, thus letting the agency take the heat for failing to achieve it or for the painful steps necessary to achieve it. Congress rolled a grenade with lead. Congress (1) decided that a health-based air quality standard for lead must be achieved by May 1976 and (2) ordered EPA to establish the rules to achieve that standard by the deadline.²⁸

After passing the statute, diverse members of Congress—Democrats and Republicans, liberals and conservatives—lobbied the EPA, often on the quiet, to do nothing about the leaded gasoline used by the pre-1975 cars.²⁹ Other members complained about the failure to protect health and encouraged the EPA to act.³⁰ As often happens when an agency is caught in such a cross fire, the EPA went into a stall.³¹

In late 1972, my colleagues and I at the Natural Resources Defense Council won a decision against the EPA that prompted it, at last, to issue a rule to reduce the amount of lead in gasoline used in the pre-1975 cars.³² This victory was followed by others.³³ Yet, those

26. See SCHOENBROD, *supra* note 7, at 34.

27. *Id.* at 34–35.

28. See Clean Air Amendments §§ 108(a)(1)–(2), 109(a)–(b), 110(a)(1)–(2).

29. See SCHOENBROD, *supra* note 7, at 31 (“[L]egislators in Congress, including liberal Democrats with industry connections, urged the EPA to go slow on lead.”).

30. See *id.* at 30.

31. See *id.* at 31.

32. *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), *aff'g* NRDC v. Envtl. Prot. Agency, No. 72-2233 (U.S. App. D.C. 1973) (directing the EPA to reach a final decision within thirty days regarding whether to regulate lead additives).

33. See, e.g., *Nat. Resource s Def. Council v. Train*, 545 F.2d 320, 328 (2d Cir. 1976) (holding that EPA lacked the discretion to not issue air quality standards for lead under the 1970 Clean Air Amendments); *Lead Indus. Ass'n v. U.S. Envtl. Prot. Agency*, 647 F.2d 1130 (D.C. Cir. 1980) (holding that EPA decisions to regulate lead based on available scientific evidence were not arbitrary and capricious).

victories in the courts did not translate into any reductions in lead in the air for many years. In fact, the amount of lead emitted from motor vehicles actually increased slightly from 1970 to 1975.³⁴ Meanwhile, the May 1976 deadline to protect health was approaching.

When Jimmy Carter was elected president in 1976, I hoped that his tough campaign talk about the environment would translate into tough action on lead. To the contrary, President Carter eventually ordered the EPA to weaken the already weak lead reduction schedule his Republican predecessors had adopted.³⁵

Lead in gasoline began to decline in the late 1970s, primarily because the pre-1975 cars were being replaced by new cars that could use only unleaded gasoline, rather than because of anything the EPA was doing to protect health.³⁶ By the mid-1980s, so many older cars had been taken off the road that the major oil companies found it unprofitable to continue producing and distributing leaded gasoline.³⁷ But they did not want to lose market share to smaller refiners who still sold leaded gas, so Big Oil lobbied Ronald Reagan's EPA to ban lead additives on the grounds that they are dangerous to health.³⁸ The agency complied.³⁹ EPA finally got tough on lead, but only after powerhouse oil companies watching their bottom lines got involved.

If Congress in 1970 could not have passed the buck to the EPA on the hard choices on protecting health from lead, Congress would still have had to do something in response to the popular demand to protect the children. Congress would have had to enact a rule cutting lead in gasoline, but that rule would have been a compromise, getting rid of more than half of the lead over the next several years with further reductions to come.⁴⁰ After all, in the same statute, Congress had required the powerful auto industry to reduce emissions of three pollutants other than lead by ninety percent by 1975.⁴¹

The reason that Congress did not enact a rule to cut lead in 1970 is that legislators would have been criticized on two fronts: by voters

34. U.S. ENVTL. PROT. AGENCY, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970-1990* app. G-33 (1997) [hereinafter *BENEFITS AND COSTS OF THE CLEAN AIR ACT*].

35. See SCHOENBROD, *supra* note 7, at 33.

36. SCHOENBROD, *supra* note 7, at 35.

37. *Id.*

38. *Id.*

39. Regulation of Fuel and Fuel Additives; Gasoline Lead Content, 40 C.F.R. pt. 80 (1985).

40. SCHOENBROD, *supra* note 7, at 35-36.

41. Clean Air Amendments, 42 U.S.C. §§ 202(a)-(b) (2006).

who wanted all the lead out right away and by other voters upset by a small rise in gas prices.⁴² So, instead of enacting such a law, which would have been good for the American people, legislators enacted a statute avoiding responsibility, which was perfect for them.

The upshot is that lead came out of gasoline much more slowly than if Congress itself had made the hard choice. As a result, massive numbers of children, especially inner-city children, died and/or had their IQs reduced below seventy.⁴³ Using EPA data on the health effects of lead in gasoline, I estimate that the deaths and permanent impairments due to Congress's evasion of responsibility are on the scale of American casualties in the War in Vietnam.⁴⁴

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As a result of this experience at NRDC, I published an article⁴⁵ and then, in 1993, a book⁴⁶ arguing that Congress should take ultimate responsibility for the regulations from the EPA and other agencies. Representative J.D. Hayworth asked me to help draft a bill to promote responsibility by Congress.⁴⁷ I proposed basing the bill on Judge Breyer's idea; the resulting bill was called the Congressional Responsibility Act.⁴⁸ Congress imitated the name for a watered-down version that it did enact, the Congressional Review Act.⁴⁹ It gave the legislators the option of taking responsibility for regulations, while the Congressional Responsibility Act would have forced them to take responsibility.⁵⁰ Needless to say, legislators hardly ever opt to take responsibility under the Congressional Review Act.⁵¹

42. See SCHOENBROD, *supra* note 7, at 34-35.

43. See BENEFITS AND COSTS OF THE CLEAN AIR ACT, *supra* note 34, at app. G-34; see also Richard L. Canfield et al., *Intellectual Impairment in Children with Blood Lead Concentration Below 10 µg per Deciliter*, 348 NEW ENG. J. MED. 1517 (2003) (finding that an increase in blood lead levels from 1 to 10 µg per deciliter results in a 7.4-point decrease in IQ, with each 10 µg increase above 10 µg resulting in an additional 4.6-point decrease in IQ).

44. See SCHOENBROD, *supra* note 7, at 35-38.

45. Schoenbrod, *supra* note 18.

46. SCHOENBROD, *supra* note 14.

47. See SCHOENBROD, *supra* note 7, at 162-63.

48. Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong. (1995).

49. Congressional Review Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (codified at 5 U.S.C. §§ 801-808).

50. In particular, the Congressional Review Act creates a fast track process for *rejecting* a newly issued agency regulation through the legislative process, 5 U.S.C. § 802, while the Congressional Responsibility Act would prevent a regulation from going into effect unless *approved* through a fast track legislative process, H.R. 2727 at § 3.

51. *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2163 (2009).

Now in 2011, the House of Representatives will likely vote on REINS, which is modeled on the Congressional Responsibility Act.⁵² Like the Congressional Responsibility Act, the new bill would implement Judge Breyer's concept; but unlike it, the new bill would be limited to "major" regulations.⁵³ These are defined chiefly as regulations that the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) finds to have an annual effect on the economy of \$100 million or more.⁵⁴ In particular, such major regulations would not go into effect until confirmed through the legislative process.⁵⁵ The bill imposes deadlines requiring up or down votes in the House and the Senate within thirty legislative days after its introduction.⁵⁶

Although the germ of the idea behind the bill can be traced back to a champion of New Deal-era administrative law, the current bill's sponsors herald it with language that can be understood as anti-agency and anti-regulation. For example, the title, Regulations from the Executive in Need of Scrutiny, suggests agencies are the source of the problem. Yet it was Congress, often with broad bipartisan support, which imposed the deadlines and duties on the agencies and authorized the courts to make sure the agencies complied.⁵⁷ Also,

52. See Regulations From the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. (2011); S. 299, 112th Cong. (2011).

53. H.R. 10 at § 801(a)(3). There is a limited exception to the requirements of the Act for monetary policy. H.R. 10 at § 806.

54. H.R. 10 at § 804(2).

55. H.R. 10 at §§ 801(a)(3), 803; cf. U.S. CONST. art. II, § 7.

56. H.R. 10 §§ 802(c), 802(e)(1); S. 299 §§ 802(c), 802(e)(1).

57. In her testimony before the Subcommittee on Courts, Commercial, and Administrative Law, Sally Katzen explained, "agencies are not free agents . . . they can only issue regulations that implement existing law—that is, laws that are duly enacted (passed by both Houses of Congress and signed by the President)." *The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (statement of Sally Katzen, Visiting Professor NYU School of Law and Senior Advisor of the Podesta Group) [hereinafter *Katzen Statement*]. The rhetoric surrounding REINS also does a disservice by posing the problem as controlling agencies when it is really making Congress accountable. Professor Katzen rightly notes that there are existing procedural safeguards that help restrain agencies. She explains that the Administrative Procedure Act "generally requires that agencies give notice of what they intend to do, along with their supporting data and analysis," and provide people with "a meaningful opportunity . . . to comment" on the proposed agency action. *Id.*; see also Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). Furthermore, the agency that proposes the rule "respond[s] to significant comments, explaining whether (and why) they agree or disagree with the comments received." *Katzen Statement, supra*. None of the procedures now in place accomplishes what the REINS act would: force Congress to take responsibility.

some sponsors argue in support of the bill by deploring the cost of regulation, without noting that the benefits can be much greater than the costs.⁵⁸ Indeed, some regulations enjoy wide congressional support.⁵⁹

This rhetoric is, however, a passing thing and the bill's title can be readily changed. A *Wall Street Journal* editorial called it by a more apt name, "The Congressional Accountability Act."⁶⁰ Thoughtful people will focus on substance that would endure if the bill is passed rather than the rhetoric.

* * *

Let us start by considering some concerns that might be voiced by a hypothetical critic.

Concern: "Legislators are much less knowledgeable than agency experts." But the bill would marry fact development by experts with political responsibility by elected politicians. Under REINS, the agency would, as James Landis put it, continue to be "the technical agent in the initiation of rules of conduct, yet at the same time . . . have [the elected lawmakers] share in the responsibility for their adoption."⁶¹

Concern: "Regulations will be filibustered." But REINS limits debate on the confirmatory vote and all related motions to two hours in each house.⁶²

58. See Richard L. Revesz & Michael A. Livermore, *Hold the REINS: Regulations Generate Major Economic Benefits*, HUFFINGTON POST (Feb. 18, 2011), http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/hold-the-reins-regulation_b_804211.html (arguing that regulations can produce billions of dollars in net benefits).

59. See generally *Katzen Statement*, *supra* note 57. Christopher Demuth expanded upon the same point in testimony before Congress. "Environmental initiatives are often highly popular, and EPA, beset as it always is by interest groups whose métier is exaggeration and alarmism, may find it difficult to see past the lobbying fog: it may underestimate as well as overestimate popular support in a way that constituency-minded legislators would not." *Environmental Regulations, the Economy, and Jobs: Before the Subcomm. on Env't and the Econ. of the H. Comm. on Energy and Commerce*, 112th Cong. 10 (statement of Christopher DeMuth, D.C. Searle Senior Fellow, Am. Enter. Inst. for Pub. Policy Research).

60. *The Congressional Accountability Act: A Proposal to Ban Regulation Without Representation*, WALL ST. J. (Jan. 14, 2011), <http://online.wsj.com/article/SB10001424052970203525404576049703586223080.html>.

61. LANDIS, *supra* note 16, at 76. E. Donald Elliot makes a related point in calling for Congress to get expert help in crafting statutes: "The function of Congress is not to devise solutions to complex technocratic problems, but to provide democratic legitimacy." SCHOENBROD, STEWART & WYMAN, *supra* note 3, at 122.

62. Regulations From the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. §§

However, Professor Sidney Shapiro accuses the drafters of REINS of pulling a fast one. He argues that the “motion to proceed” to the confirmatory vote would be separately debatable and therefore could be filibustered.⁶³ But, REINS is an amendment to the Congressional Review Act and under it motions to proceed are debatable when they are to proceed to a time-limited matter: Then they are not debatable.⁶⁴ Any legislator who still sees some way there could be a filibuster should propose an amendment to foreclose the possibility.

Concern: “Congress lacks the time to vote on agency regulations.”⁶⁵ But, during the 111th Congress, agencies promulgated 130 significant interim final rules and final rules.⁶⁶ One way to put this in perspective is that during the same Congress, the legislators enacted over eighty public laws naming post offices, federal buildings, and other lands.⁶⁷ These naming bills take much less time than would

802(d)(2), 802(e)(2)(B) (2011).

63. Sidney Shapiro, *CPR Backgrounder: The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment*, CTR. FOR PROGRESSIVE REFORM, available at http://www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder.pdf.

64. RICHARD S. BETH, CONG. RESEARCH SERV., RL 31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT 12 (2001).

The Congressional Review Act omits one other provision that appears in many expedited procedures for taking up resolutions of disapproval. The Act does not explicitly make the disapproval resolution privileged. It is established Senate practice that a motion to proceed to consider a matter is debatable (and, therefore, subject to filibuster) unless the matter in question is privileged. Senate precedents, however, indicate that if a statute established a time limit for the consideration of a specified measure, the provision has the effect of rendering the measure privileged, so that a motion to proceed to its consideration is not debatable. Consistent with this principle, the Senate has treated a motion to consider a disapproval resolution under the Congressional Review Act as not debatable, even though the Act does not explicitly bar the debate. *Id.*

In theory, the Senate could amend its rules to allow filibusters under REINS. But, according to Rule XXII of the Standing Rules of the United States Senate, cloture is barred on a debate on a motion to change the Senate rules unless two-thirds of the senator's present and voting vote for cloture. The Senate has never amended its rules without complying with pre-existing rules. CHRISTOPHER M. DAVIS ET AL., CONG. RESEARCH SERV., R41342, PROPOSALS TO CHANGE THE OPERATION OF CLOTURE IN THE SENATE 4-6 (2010), available at <http://www.fas.org/sgp/crs/misc/R41342.pdf>.

65. See Ezra Klein, *The Reins Act*, WASH. POST (Feb. 11, 2011, 10:16 AM), http://voices.washingtonpost/ezra-klein/2011/02/the_rein_act.html.

66. Office of Info. & Regulatory Affairs, REGINFO.GOV, <http://www.reginfo.gov/public/> (follow “Regulatory Review: Search” hyperlink) (last visited Apr. 14, 2011).

67. Library of Cong., *Public Laws of the 111th Congress*, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws&c=111> (last visited Apr. 14, 2011).

deciding whether to confirm an agency regulation, even though the agency already crafted the regulation, developed a record, and evaluated its impacts and the time for debate is strictly limited. The relevance of the naming bills is that they typify numerous ways in which legislators spend a great deal of their time taking symbolic stances. Enacting REINS would be a decision to spend more time taking responsibility for hard and real choices about the regulations that protect and bind their constituents. These regulations are laws. Major regulations are major laws. The elected lawmakers in Congress should put taking responsibility for the major laws ahead of taking symbolic stances. As Representative Davis characterized the view of his senior EPA executive, Congress would vote on “a concise piece of legislation that had very clear intent, very clear expectations and metrics, and a clear outcome to maintain context for our citizens,” rather than an amorphous, sprawling, feel-good bill.⁶⁸

Quorum calls, roll calls, and other legislative business could well mean that considering each major rule could take a good bit more than two hours. If the time for considering all the major rules is too great in Congress’s judgment, it should raise the criteria for a major rule above \$100 million rather than abdicate responsibility for the most significant laws altogether.

Concern: “REINS is designed to stop the Obama administration from promulgating regulations.” Representative Steve Cohen observed in the hearings on REINS that such an act was not even considered until President Obama became president, suggesting that the real motive for REINS was to disempower the Obama administration rather than to promote accountability.⁶⁹ But, contrary to Representative Cohen’s assertion, Republicans introduced the Congressional Responsibility Act, which goes further than REINS, when George W. Bush was in the White House.⁷⁰ There is no doubt, however, that regulatory initiatives under President Obama have spurred on the Republicans. Yet, this is beside the point: he and Democrats in the Senate could exact, as a price for enacting the bill, an amendment to postpone the effective date of the bill until the start of the next presidential term. That way, Congress could make itself

68. 157 CONG. REC. H1785 (daily ed. Mar. 14, 2011) (statement of Rep. Davis, paraphrasing “senior EPA executive”).

69. *See Reins Act—Promoting Jobs And Expanding Freedom By Reducing Needless Regulations: Hearing on H.R.10 Before Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112 Cong. 100 (2011) (statement of Rep. Steve Cohen).

70. *See, e.g.*, H.R. 110, 108th Cong., 1st Sess. (2010).

accountable without reducing the powers that the people elected a sitting president to execute. The bill's Republican sponsors should agree because they would be hard pressed to get the bill enacted before then.

Concern: "Congress is irresponsible." Even if Congress is the most irresponsible branch, the status quo makes matters worse by leaving the hard choices to one of the most unaccountable parts of government—agencies, which are subject to backdoor influence from legislators who can avoid having to take public responsibility for how they use their influence. REINS gets to the root of the responsibility problem. Congress is irresponsible because the legislators have contrived to wiggle out of the responsibility that the Constitution assigns to them.⁷¹ REINS would force legislators to assume responsibility for regulating or not regulating through highly visible votes for or against major regulations. Agencies too would get their say by framing the regulations on which Congress would vote. The upshot would be a more responsible Congress, accountability for regulations, and expert input.

The upshot would also be better environmental protection. Here is why.

* * *

On the environment, Congress is bipolar. The right vilifies the left as crazy ideologues, and the left vilifies the right as greedy ignoramuses. When the right does well in an election, as it did in 1994, it projects its success into the future and acts as if it can run roughshod over the left. Back then, the Republicans came to grief for their environmental proposals, most significantly a proposal to bar agency regulations that failed to meet a cost-benefit test.⁷² As Professor Richard Lazarus explains, voters "responded with such hostility to [the Republican proposals that their] legislative reform effort was effectively sapped of its political viability."⁷³ The behavior

71. See generally SCHOENBROD, *supra* note 14. (arguing that the Constitution was designed to make Congress take responsibility for lawmaking, but that Congress has ducked that responsibility by delegating even the most fundamental choices about the laws).

72. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 129 (2004).

73. *Id.* at 131.

Somewhat ironically, the executive branch under Clinton used the same tactics against Congress that Congress had used against the Nixon, Reagan, and Bush administrations during the 1970s and 1980s. Just as Congress had effectively exploited the public's distrust of government to defeat earlier retreats from environmental protection, so did the Clinton administration block Congress in the 1990s. President Clinton, Vice President Al Gore, EPA administrator Carol Browner, and Interior Secretary Bruce Babbitt repeatedly characterized Congress as seeking to undermine public health and

of the left in many ways mirrors that of the right with the result that the victory in 2008 turned to the defeat in 2010.

Whether there is a moral equivalence between the behavior of the left and right, the result is erratic swings in the attitudes of the majority in Congress towards environmental protection. Here is how William Ruckelshaus put it in 1995 at a time when Republicans saw nothing but glory before them.

We recognize, as perhaps the newer members of Congress do not, that the current rhetorical excess is yet another phase in a dismaying pattern. The anti-environmental push of the nineties is prompted by the pro-environmental excess of the late eighties, which was prompted by the anti-environmental excess of the early eighties, which was prompted by the pro-environmental excess of the seventies, which was prompted. . . . But why go on? The pattern is quite clear. The new Congress may believe that it is the vanguard of a permanent change in attitude toward regulation, but unless the past is no longer prologue, the pendulum will swing back, and we will see a new era of pro-environmental movement in the future.⁷⁴

Ruckelshaus concludes that these wild swings have a devastating impact on EPA's ability to act sensibly.⁷⁵

To modulate the bipolar politics, what has to come, as *New York Times* columnist David Brooks recently put it, "is a sense of humility, that the reason people behave civilly to one another is because, alone, no one has the resources to really conduct an intelligent policy, that you need the conversation, you need the back-and-forth."⁷⁶ Brooks was speaking about the aftermath of the shooting of Representative Gabrielle Giffords, but his statement applies fully to environmental protection.

REINS would force a "dialogue" between the EPA and Congress, as the senior EPA executive whom Representative Davis quoted put it. Centrist legislators would be the ones most apt to converse, and their conversation would pressure those on the left and right to join in. Republicans and Democrats will resist stereotypical

environmental quality for the sake of industry profits. The U.S. public responded with such hostility to any proposed change that the legislative reform effort was effectively sapped of its political viability. *Id.*

74. William D. Ruckelshaus, *Stopping the Pendulum*, ENVTL. F., Nov.-Dec. 1995, at 26, 26; see also Cristine Russell, *Bill Ruckelshaus on EPA: "Battered Agency Syndrome?"*, THE ATLANTIC (Dec. 4, 2010), <http://www.theatlantic.com/technology/archive/2010/12/bill-ruckelshaus-on-epa-battered-agency-syndrome/67501/>.

75. Ruckelshaus, *supra* note 74, at 26.

76. *PBS Newshour: Shields and Brooks On Obama's Tucson Speech, Calls for Political Civility* (PBS television broadcast Jan. 14, 2011), available at http://www.pbs.org/newshour/bb/politics/jan-june11/shieldsbrooks_01-14.html.

reactions to environmental regulations, or voters will punish them at the polls. That is how we should get to sensible outcomes in a democracy, not by hiding behind unelected agency officials.

Representative Hank Johnson argued at the hearings on REINS that the bill would shift the political balance in favor of corporations because they could afford to make large contributions to members of Congress.⁷⁷ This is a one-sided view that appeals to a naïve understanding of regulatory politics. The money of businesses speaks loudly in Congress, but it also speaks loudly in the agency rulemaking process, both by paying for lawyers and experts to mount arguments to the agency and also for contributions to legislators to get them to pressure the agency. Besides, in politics, votes trump money, and when it comes to mobilizing voters, environmental interests have real strengths.⁷⁸ REINS would shift final authority on regulations from the offices of agencies to the floor of Congress where legislators would have to stand up and be counted in plain view of their constituents.

Experience shows that environmental interests often fare better when Congress makes the hard choices. The most striking advances under the Clean Air Act have come when Congress did take responsibility. For example, as discussed above, Congress in 1970 took responsibility for requiring auto manufacturers to cut emissions from new autos by ninety percent. Then, in 1990, Congress took responsibility for requiring power plants to cut sulfur emissions by fifty percent⁷⁹ and for completely phasing out stratospheric ozone destroying chemicals.⁸⁰ In contrast, where Congress left responsibility for the hard choices to the EPA, as it did with lead in gasoline, the public often suffers. Similarly, when Congress passed the buck on hazardous air pollutants in 1970, the agency went into a stall and was unable to deal with the great bulk of them for twenty years until Congress acted in 1990.⁸¹ As Professor Dan Farber has noted, the idealistic goals that Congress told EPA to achieve in making its laws

77. *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 151–52 (2011), available at http://judiciary.house.gov/hearings/printers/112th/112-26_65074.PDF.

78. See SCHOENBROD, *supra* note 7, at 134–35 (discussing those strengths).

79. 42 U.S.C. § 7651(d) (2006); see also SCHOENBROD, STEWART & WYMAN, *supra* note 3, at 7.

80. 42 U.S.C. § 7671(c) (making the production of class I ozone-depleting substances unlawful after January 1, 2000); *id.* § 7671(d) (making the production of class II ozone-depleting substances unlawful after January 1, 2030).

81. SCHOENBROD, *supra* note 7, at 50.

actually prevented sensible steps to reduce pollution.⁸²

REINS would also improve environmental regulation by giving legislators, at long last, a personal stake in updating their obsolete environmental statutes. The basic structure of most key environmental statutes dates back thirty or forty years.⁸³ Experience has shown that the statutes force the EPA to regulate in ways that are often ineffective and inefficient.⁸⁴ The inefficacy and inefficiency forced by obsolete statutes are a problem for the environment and the economy, but not for the legislators who can now blame the shortcomings on the EPA and other agencies. The upshot is a logjam in updating our obsolete environmental laws.

This logjam gave rise to Breaking the Logjam, a project which has proposed how to update the environmental statutes.⁸⁵ The leaders of the project—Richard B. Stewart, Katrina M. Wyman, and myself—have had diverse experiences in the environmental field. We brought together fifty equally diverse environmental law experts to propose and reflect upon ways to modernize a wide spectrum of federal environmental statutes.⁸⁶ The undertaking was built upon four principles: (1) to adopt market-based tools wherever they can reliably achieve environmental goals; (2) to realign the responsibilities of the federal government and the states so that each level has more effective power over the environmental problems it is best placed to address; (3) to face trade-offs openly and based on reliable information; and (4) to use cross-cutting regulatory approaches that address closely related problems together rather than separately.⁸⁷

82. DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 73 (1999). *See also* STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1995).

83. *See, e.g.*, Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 88 (codified as amended in 16 U.S.C. §§ 1531 to 1544 (2006)); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in 42 U.S.C. §§ 4321, 4331 to 4335, 4341 to 4374 (2006)); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

84. *See* SCHOENBROD, STEWART & WYMAN, *supra* note 3, at 19–28.

85. The Breaking the Logjam project has issued a report and a book offering detailed suggestions for updating the environmental statutes. *Id.*; *see also* DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, *FINAL REPORT: BREAKING THE LOGJAM* (2009), <http://www.breakingthelogjam.org/CMS/files/39611235964787FACDBreakingLogjamReportfinal.pdf>

86. SCHOENBROD, STEWART & WYMAN, *supra* note 3, at xiv to xviii (listing symposium participants).

87. *Id.* at xii to xiv (describing the Breaking the Logjam project).

At the end of a four-year process, the leaders of the project published a book that includes proposals to update many environmental statutes. Take the proposal to restructure the Clean Air Act.⁸⁸ It is based on the most successful programs for regulating air pollution—those dealing with new vehicles, lead in gasoline, acid rain, and ozone-destroying chemicals. To emulate the key characteristics of those programs, the proposal recommends that Congress regulate the sources rather than the states, decide how much to cut pollution and how to allocate the cleanup burden, and use market-based mechanisms to give sources flexibility in making the cuts.⁸⁹ This implements the project's first principle. To keep the new program to manageable proportions, it should not attempt to regulate all sources. Rather, as the second principle suggests, it should cover only the biggest sources—new vehicles, fuels, and several thousand of the largest stationary sources.⁹⁰ Together these account for the lion's share of controllable emissions.⁹¹ The remaining stationary sources, which are large in number but small in emissions relative to those that would be federally controlled, would be left to the states, which would be largely freed from the state implementation plan requirement.⁹²

The proposal calls for the direct federal controls to mostly take the form of cap-and-trade.⁹³ Congress should set the caps to decline over time and determine the method of distributing the allowances. The reformed statute should establish backstops to remedy failure of the federal cap-and-trade system to perform as expected: backsliding by states or harmful interstate spillovers, hot spots, or shortfalls in achieving National Ambient Air Quality Standards.⁹⁴

The proposal downgrades the state implementation plans as the means to achieve the National Ambient Air Quality Standards because experience and changing circumstances have made those plans dysfunctional. An increasing proportion of pollution is interstate, even international.⁹⁵ A 2004 National Research Council

88. *Id.* at 73–98.

89. *Id.* at 86–87.

90. *Id.* at 89–91.

91. *Id.* at 90.

92. *See id.* at 89, 92.

93. *Id.* at 87.

94. *Id.* at 92, 97.

95. CTR. FOR BIOLOGICAL DIVERSITY & 350.ORG, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT 29–30 (2008), available at www.biologicaldiversity.org/programs/climate_law_institute/global_

study concludes that the rigidity and procedural complexity of the state implementation plan process hobbles pollution-control efforts.

The process

now mandates extensive amounts of . . . time and resources in a legalistic, and often frustrating, proposal and review process, which focuses primarily on compliance with intermediate process steps. This process probably discourages innovation and experimentation at the state and local levels; overtaxes the limited financial and human resources available to the nation's [Air Quality Management] system at the state, local, and federal levels; and draws attention and resources away from the more germane issue of ensuring progress towards the goal of meeting the NAAQS.⁹⁶

Our proposal would require legislators to take responsibility for choosing how fast to cut pollution and how to allocate costs. They do not want this responsibility, but REINS would give it to them anyway. The legislators would then have a personal stake in updating the environmental statutes so that Congress has more sensible regulations upon which to vote.

To sum up, REINS would generate a "dialogue" between EPA and Congress and create incentives for legislators to face up to obsolescence of our old environmental statutes. These effects would in turn induce changes in how Congress delegates to agencies. Knowing that they would have to take responsibility for the important regulations, legislators would order the agency to shape regulations to achieve standards based upon compromise, rather than, as now, to achieve purist standards that the agency finds infeasible and therefore covertly evades.⁹⁷ The purist standards generate huge amounts of wasted motion. The EPA, states, regulated entities, environmental advocates, and the courts must dance the dance that Congress choreographs to make it appear that the legislators have compromised nothing that any loud interest very much wants. By shouldering responsibility on how clean is clean enough, Congress would let the cleanup start sooner and bring the bickering to an end sooner too. Finally, by shifting the focus from Sunday school questions (such as whether health objectives should ever be sullied by concerns about the economy) to more concrete questions (such as how much to cut a particular kind of pollution), Congress would help

warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

96. COMM. ON AIR QUALITY MGMT IN THE UNITED STATES ET AL., AIR QUALITY MANAGEMENT IN THE UNITED STATES 128 (2004).

97. See Schoenbrod, *supra* note 18, at 766–79 (discussing how EPA evaded purist standards of Clean Air Act).

depolarize the polarization that poisons environmental politics.

* * *

The origin of the rolling, ticking hand grenades is Congress. By failing to do its job, it improvises explosive devices. REINS would roll the hand grenades back from whence they came. Returning the grenades to Congress would help break the logjam and thereby help convert Congress from terrorist to problem solver.

