

2011

The Regulatory Thicket: It's Time to Cut Back

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Recommended Citation

21 *City Journal* 120-123 (Autumn 2011) (with I. Murray), available at http://www.city-journal.org/2011/21_4_regulations.html.

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Reining in the Rules

David Schoenbrod

The economic consequences of regulating business are huge. Regulatory costs raise prices, depress incomes, and encourage companies to locate in friendlier climes, harming our economy and hampering recovery. Unfortunately, the perennial cry to reduce “regulatory drag” has yielded few results at the federal level. Congress rarely responds to such pleas because voters usually regard regulation one-sidedly, believing that it simply reduces risks without imposing burdens. Only when voters think as *consumers* and clearly see the advantages of easing regulations does Congress act. Recall the late 1970s and early 1980s, when airlines, interstate bus companies, and other businesses previously treated as public utilities were successfully deregulated. In those instances, the public rightly understood that heavily price-controlled air travel and an unchallenged Ma Bell hurt their economic interests while enriching monopolistic companies. More often, however, a divided Congress digs in against efforts to lighten regulations, with the pro-regulation faction arguing, usually successfully, for “protections that the American people want.”

Regulatory drag can be reduced only as part of a reform that credibly promises to ease burdens *and* protect the public. Such reform is possible, but it needs to start by changing how Congress approaches regulation: lawmakers must assume responsibility for rule-making.

Though Congress is to blame for the excessive regulation of business, that isn’t because it makes too many rules itself. Rather, as government has grown more complex over the last century, Congress has deferred to unaccountable federal agencies the tricky work of writing the rules that put its regulatory schemes into effect, and those agencies have tended to go much further than Congress would have. The result is regulatory overreach, bureaucratic intransigence, and waste—which legislators can then blame on the agencies. This pass-the-buck-and-point-the-finger arrangement enables lawmakers to take credit for the promised benefits of new regulatory schemes but to evade responsibility for the actual costs and problems that result. Legislators thus feel free to enact more and more regulatory statutes. The Office of Management and Budget has estimated that since 1980, federal regulators have written more than 130,000 rules, an ever-thickening tangle that Americans and American firms must reckon with.

Not so long ago, Supreme Court Justice Stephen Breyer explained in an influential law review article how a return to congressional accountability might work: Congress would pass a statute that prevented any new regulations from going into effect until the legislature confirmed them in a vote. Breyer’s idea has found congressional champions in Representative Geoff Davis and Senator Rand Paul, both Kentucky Republicans, who have sponsored a bill that would compel Congress to approve or disapprove agency regulations. The bill would apply only to “major” regulations, defined as those that the Office of Management and Budget determines to have an annual impact of \$100 million or more. Over the summer, House Speaker John Boehner and House Majority Leader Eric Cantor announced that the lower chamber would take up the bill; a vote could come as early as November.

The Davis-Paul bill has some Democratic sponsors, but many Democrats oppose it. Republicans have given Democrats an excuse to dislike the bill by naming it the Regulations from the Executive in Need of Scrutiny (REINS) Act; the title and some of the accompanying rhetoric make the bill sound like just another plan to ease burdens on business while increasing risks for the public. That may be why the Senate has shown little interest in REINS so far. But the bill may have an easier time after the 2012 election, if Republicans make gains then. The Senate Committee on Homeland Security and Governmental Affairs, meanwhile, is putting together a regulatory-reform bill of its own.

To try to explain why elected lawmakers should not be accountable for agency-made laws, the bill’s opponents point out that legislators aren’t as knowledgeable as agency experts. But as the New Deal’s sage of administrative law, James Landis—already confronting the problem of congressional abdication of responsibility—put it seven decades ago, “It is possible by a simple device to have the administrative [agency] as the technical agent in the *initiation* of rules of conduct, yet at the same time to have the legislative share in the responsibility for their *adoption*” (emphasis added). Others object that Congress would be swayed by campaign contributions from the industries that it regulates. In fact, big money counts for more in the administrative process than in Congress. Still others worry that filibusters would be common—but the Davis-Paul bill, which limits debate to two hours in each house, wouldn’t allow that.

Opponents of congressional accountability for regulations make a final argument: Congress, they say, simply lacks the time to vote on major regulations. But it’s worth noting that during the 111th Congress, even as federal agencies promulgated 130 major regulations, Congress enacted more than 80 laws naming post offices and the like. REINS would shift representatives’ time from striking poses to taking responsibility for the most important laws that bind and protect their constituents. If Congress really believes that the time required for review is too great, it could raise the criterion for a regulation to count as “major” over the \$100 million threshold, rather than abdicate responsibility entirely. The more honorable course would be to spend more days voting in Washington and less time campaigning for reelection. Actually doing the job ought to be a prerequisite for fighting to keep the job.

Establishing democratic accountability would encourage Congress to reject regulations that impose burdens disproportionate to their benefits. Reducing regulatory drag would therefore bring significant benefits to our economy over time. It would also be the right thing to do. In a representative democracy, the way to find out which regulations citizens want is for elected representatives to vote on them—not for unelected officials to write them as the representatives hide.

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