5. One Nation, Ungovernable? Confronting the Modern Regulatory State

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1. Introduction

> *Is not your indignation roused at this absolute, imperious style? For what did you open the veins of your citizens and expend their treasure? For what did you throw off the yoke of Britain and call yourselves independent? Was it from a disposition fond of change, or to procure new masters?*
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> —New York Governor George Clinton, appealing to the public as "Cato" on October 11, 1787, in opposition to Alexander Hamilton's and the Federalists' vision of national government (Ford, 1892).

When policy makers neglect federal regulation, they ignore arguably the greatest element of governmental influence in the United States' economy and perhaps in society itself. One cannot prove it, but it would be no great surprise to find the regulatory enterprise to constitute a greater bulk than federal spending. As a policy concern, regulation merits attention like that paid to the $18 trillion national debt. This essay provides a road map for focusing attention on regulation.

In the early 21st century, those wishing to address regulation find themselves constrained: after a century of progressivism and policy dominance by intellectuals supportive of larger government, there remains little mobilized constituency for limited government. Republicans are at peace with the welfare state, a federal role in education, antitrust regulation, non-declaration of wars, and even with not

I would like to thank an anonymous reviewer for comments on an earlier draft, and Donald Boudreaux, Gregory Conko, and Ryan Radia for helpful advice. Errors and bloopers are my own.

enforcing the congressional "power of the purse", out of fear of blame for shutting down the federal government. The executive branch steers and makes law, despite the Constitution's assignment of that role to Congress in Article 1, Section 8: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives". Once executive power expands, noted University of Chicago political scientist William Howell, "[t]he president doesn't give back that which was given to him before … What you see over the long arc of history is … a dramatic expansion of presidential power and authority" (Kuhnhenn, 2015).[1]

The modern ethos of extending regulatory agency and executive branch power became epitomized in President Barack Obama's February 2013 *State of the Union Address*. Capping weeks of the White House's touting of a "pen and phone" strategy (Rucker, 2014) to further expand federal economic, environmental, and social regulation and intervention (White House, Office of the Press Secretary, 2014), the president promised that, "[i]f Congress won't act soon … I will. I will direct my cabinet to come up with executive actions we can take, now and in the future" (Marks, 2013).

Should the new 114th Congress object to such aspirations, it faces "the year of the veto" (Sink and Wong, 2015; see also Korte, 2015). The president followed through on a veto of the Keystone XL pipeline (White House, Office of the Press Secretary, 2015) in contrast to America's one-time ethos of rapid, driven infrastructure growth (Gordon, 2004). Alas, no resurgence of constitutional order and federal government restraint appears in the offing; politicians and even courts no longer possess the vocabulary for it. Nonetheless, the goal of this paper is to inspire advocates of limited government by showing how policy makers could use the limited tools at their disposal to create a body of information that can make such reform possible in more favorable circumstances.

Part 2 points to some economic and social consequences of the unrestrained modern government, and takes a moment to recognize (or perhaps lament) that, while the Constitution is not coming to the rescue, we are not without options. Part 3, in light of Congress' over-delegation of power to federal agencies, briefly reviews the formal oversight procedures that ostensibly exist for the thousands of regulations issuing annually. Part 4 shows that central oversight of regulation sports

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1. William G. Howell is co-author of the book, *Thinking about the Presidency: The Primacy of Power* (Howell, 2013).

theoretical inconsistencies and gaps and argues it has not worked, but posits why, just possibly, it could. Part 5 presents the data demonstrating that federal regulatory review has fallen short and is far from comprehensive. Part 6 covers some of what is (imperfectly) known about regulatory burdens and volume to help inform efforts to liberalize. Finally, Part 7—given the reality that code or administrative agency law is here to stay for the time being—offers disclosure-based "low-hanging-fruit" reform proposals, while remaining cognizant of central review's shortcomings. The aim of these proposals is (1) to help legitimize Congress' case for regulatory liberalization and enable a revival of some semblance of constitutional order; and (2) to facilitate future liberty-minded executive branches' deployment of the "pen and phone" in *defense* of liberty. An alternate take on "Energy in the Executive" (Hamilton, 1788) would be a welcome contrast to its malevolent usage in undermining the institution of limited government and destabilizing core values of classical liberal society.

2. Regulatory overreach?

> *I think that is really where the thrill comes from. And it is a thrill; it's a high … I was born to regulate. I don't know why, but that's very true. So long as I am regulating, I'm happy .*
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> —OSHA safety standards program director Marthe Kent in 2001 (quoted in Olson, 2001).

Seemingly, no corner of life escapes the modern state's purview, and much emanates not from an elected Congress but from the president and from unelected bureau personnel. Concern over executive branch ambition ranges across the policy spectrum—from a House Republican lawsuit against President Obama's unilateral actions (Walsh and Bash, 2014) to Georgetown law professor Jonathan Turley's 2014 House Judiciary Committee testimony that "[w]e are in the midst of a constitutional crisis with sweeping implications for our system of government" (Turley, 2014).

One doesn't have to dig to find exasperation. Home Depot co-founder Bernie Marcus told *Investor's Business Daily* that:

> Having built a small business into a big one, I can tell you that today the impediments that the government imposes are impossible to deal with. Home Depot would never have succeeded if we'd tried to start it today. Every day you see rules and regulations from a group of Washington bureaucrats who know nothing about running a business. And I mean every day. It's become stifling. (Merline, 2011)

What sorts of impediments? Here's a short list of recent ones:

- the Department of Health and Human Services and the Internal Revenue Service are transforming America's traditional medical system via the Patient Protection and Affordable Care Act;
- financial regulations such as the Sarbanes-Oxley and Dodd-Frank laws foster the very "too big to fail" entities cited as the reason to intervene in the first place, create instability, and damage the poor's access to banking services;
- communications regulation such as the aggressive "net neutrality" rules of the Federal Communications Commission (FCC) (US FCC, 2015) threatens free speech and network infrastructure investment even though the rationales for establishing an FCC no longer exist (Cox and Crews, 2005);
- energy regulation and green extremism disrupt access to land and resources, aggravating energy poverty and even food shortages (Action Aid and Competitive Enterprise Institute, 2011);
- the homeland security culture has wrought a cabinet department, invasive airport security, general surveillance, and an as yet incalculable impact on civil liberties;
- antitrust agencies disrupt competition (in the name of protecting it) despite the modern technological era's rapid pace of "creative destruction" compared to the "smokestack monopoly" era that allegedly justified antitrust regulation;
- the Department of Justice's "Operation Chokepoint" threatens to harass small entities out of business in pursuit of federal control over a financial industry segment—without congressional approval or even the normal public comment process (Murray, 2014b).

Such examples scale down to the Consumer Product Safety Commission's proposed window blinds regulation to FDA's regulation of a serving size of breath mints (US CPSC, 2013; US FDA, 2014; see also Istook, 2014, 2015).

What is the impact of all this? Those doing the regulating see no problem. Previewing his 2014 *State of the Union Address*, President Obama said: "2014 was the fastest year for job growth since the 1990s. Unemployment fell faster than any year since 1984" (cited in Davis, 2015).

Others continue seeing things differently. Referring to the economy and well-being, Obama asserted in his 2015 *State of the Union Address* that "tonight, we turn the page" (White House, Office of the Press Secretary, 2015a). But growth emerging from a painfully low baseline is hardly turning over a new leaf. Unemployment is "down" because statistics omit those who have given up the job hunt. Job growth that did occur has been attributed to an end to unemployment benefits (Brennan, 2015). An astounding 92 million Americans are not working (CBS/Associated Press, 2014), positioning labor-force participation at a 36 year low, with nearly 12 million having dropped out during the Obama administration (Meyer, 2014). Data point to high debt per capita, and to the highest part-time and temporary-job creation rates in contrast to full-time career positions (for example, see US Census Bureau, 2014). A popular blog laments the "slow death of American entrepreneurship" (Casselman, 2014). Headlines tell painful tales, like that of January 2015 in *Investor's Business Daily* (2015) reporting on businesses dying faster than they're being created, a circumstance the *Washington Post* had noted in 2014 (Ingraham, 2014). Likewise a Brookings study (Hathaway and Litan, 2014) on small business formation noted declining rates, as did a *Wall Street Journal* report on reduced business ownership rates among the young (Simon and Barr, 2015). One recruiter described to the *Wall Street Journal* how regulations undermine employment (Moore, 2013), while others point to an inverse correlation between regulation and innovation (Kritikos, 2014). And industry anecdotes parallel the general statistics: in food service, regulations are driving restaurants out of business and even sending them abroad (Little, 2013).

One can recognize that small business may not be, as is often claimed, the "backbone" of the entire economy—rather, new businesses appear to be (Dearie and Geduldig, 2013). Yet, regulations are a hidden tax for them and their larger brethren; obscured in prices for most of us, if you are a businessperson, you have found them. It is an awakening mirroring the college graduate encountering his first docked paycheck, wondering, "Who's this guy FICA?"

Congress blames overreach and its consequences on the president and agencies, but Congress both actively delegated that power and permitted its seizure with inaction. The over-delegation phenomenon of unelected and unaccountable agency personnel doing the lawmaking was detailed in David Schoenbrod's *Power without Responsibility* (1993). In *Is Administrative Law Unlawful?* Philip Hamburger sees the modern administration state as a reemergence of the absolute power practiced by pre-modern kings (2014a).[2] In *Imprimis*, Hamburger describes the return of monarchical prerogative—the very condition our Constitution was drafted to eliminate:

> the United States Constitution expressly bars the delegation of legislative power. This may sound odd, given that the opposite is so commonly asserted by scholars and so routinely accepted by the courts … The Constitution's very first substantive words are, "All legislative Powers herein granted shall be vested in a Congress of the United States". The word "all" was not placed there by accident. (2014b: 5)

The Supreme Court, for its part, has struck down rules in some cases: for example, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) invalidated FDA tobacco regulation as exceeding the agency's authority under FDCA to regulate products without manufacturer claims of therapeutic benefit. The Court has remanded some cases for further proceedings: *Massachusetts v. EPA*, 549 U.S. 497 (2007) and *Whitman v. Am. Trucking Associations*, 531 U.S. 457 (2001). The Court however tends to defer to agencies' "expertise" (May, 2010). Justice Clarence Thomas described the roots of this deference:

> Many decisions of this Court invoke agency expertise as a justification for deference. This argument has its root in the support for administrative agencies that developed during the Progressive Era in this country. The Era was marked by a move from the individualism that had long characterized American society to the concept of a society organized for collective action. (*Perez v. Mortgage Bankers Association*, 2015: 19, note 6)[3]

The combination of the progressive victory, inertia, and a ratchet effect that expands government power without ever unwinding (Higgs, 1987) implies that resurgence in constitutional order is not in the offing. For all intents and purposes,

2. Prof. Hamburger expanded on themes of administrative law in series of blog posts at the *The Volokh Conspiracy*. Posts begin here: <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/14/prof-philip-hamburger-columbia-guest-blogging-on-his-is-administrative-law-unlawful/>.
3. Thomas referenced *Woodrow Wilson and the Progressive Era 1910–1917*, p. 1 (Link, 1954).

code law has won, and is here to stay for the time being. Such constraints appear to prevent us from doing much about regulation until such time as reinstating congressional accountability to voters for everything the bureaucracy does is achieved (Crews, 2013). The traditional approach to addressing such concerns presumes that limited government can be saved in Washington by means of the ballot box. But congressional action on regulatory reform measures that secures a presidential signature is improbable to say the least in the current environment.

Congress enabled this bureaucratic and presidential hubris, and only Congress can fully reverse "regulation without representation" (Schoenbrod and Taylor, 2003: 84). States are increasingly aware that the Constitution's Article V affords them an opportunity to amend the founding document to reduce the federal leviathan and reestablish accountability for the regulatory bureaucracy (Leef, 2014). We shall be optimistic and shall look at the limited good administrative oversight can do, with an eye toward using its failures to create a body of information that can build a foundation and case for future liberalization and re-establishment of democratic accountability.

There is no silver bullet. As William A. Niskanen made clear in *Market Liberalism*: "More promising than any identifiable change in the regulatory process would be a revival of the constitutional doctrines limiting restraints on interstate commerce, restrictions on private contracts, the uncompensated taking of property rights, and the undue delegation of policy decisions to regulatory agencies" (1992: 114). So our process reforms are not enough; yet to build momentum in the current environment, the regulatory state must endure at minimum disclosure, transparency and accountability demanded of taxing and spending.

We have gotten "what the Constitution says" off our chest and can next confront the regulated nation we live in and address constraints that prevent our traditional tools from doing much about it. But this is not a pessimistic survey: the final section highlighting incremental reforms addressing regulatory overreach is meant to create ammunition to help in restoration of constitutional order.

3. What formal constraints apply to the administrative and regulatory state?

Legislatures rarely control spending, let alone the tentacles of the regulatory enterprises they endorsed over decades through both design and apathy. As lawmaking untethered from the legislature and was delegated to unelected, unaccountable bureaucracies, economic, environmental, and social interventions escalate. In terms of output level, there were 72 laws passed by Congress and signed by the president in 2013 (US GPO, 1995–2014); meanwhile agencies, implementing laws passed earlier and by earlier Congresses, issued 3,659 rules and regulations—a multiple of 51 rules for every law.

On those occasions when Congress gets traction on regulatory liberalization and is able to mobilize for reform, the inspiration is often smaller business burdens and job concerns. Since 1980, the Regulatory Flexibility Act has directed federal agencies to assess their rules' effects on small businesses and describe regulatory actions under development "that may have a significant economic impact on a substantial number of small entities" (US GPO, 2009: 64,131–32). It has (imperfectly) recognized the importance of vitality in small business and the need to scale federal actions to the size of those expected to comply, and occasional attempts to update it occur but have not been implemented. Another mobilization-driven regulatory reform was the Unfunded Mandates Reform Act of 1995 (P.L. 104-4), driven largely by governors mobilized against Washington's rules for which compliance was disrupting states' own budgetary priorities (Dilger and Beth, 2014). So popular was the Senate version of the legislation it was dubbed "S. 1"

The 1996 Congressional Review Act (CRA) requires agencies to submit reports to Congress on their major—roughly $100 million—rules. Maintained in a Government Accountability Office database available on line, these reports allow one to more readily observe which of thousands of final rules issued each year are major and which agencies are producing the rules (US GAO, various).

The CRA gives Congress a window of 60 legislative days in which to review a major rule and, if desired, pass a "resolution of disapproval" rejecting the rule. The CRA, in spirit, is one of the more important recent affirmations of the separation of powers. But despite the issuance of thousands of rules since passage, including many dozens of major ones, only one rule has been rejected: a Labor Department rule on workplace repetitive-motion injuries in early 2001.

Such concerns were recognized early, and upgrades to CRA to require an affirmative approval of major agency regulations before they are effective are required. Congress did not do this with Republican control of both Houses and the presidency, and now Obama promises a veto should they pass such legislation. Meanwhile the CRA itself is further undermined now, given that final rules are no longer properly submitted to the Government Accountability Office and to Congress as required under the law (Copeland, 2014). That is an indispensable step since Congress needs the reports to introduce a formal disapproval resolution.

The Constitution has not come to the rescue, and alas, nor has Congress, so for the moment, we are largely "stuck" with the executive branch review of regulations. The basis of the modern regulatory process is the post-New-Deal Administrative Procedure Act (APA) of 1946 (P.L. 79-404), which set up the process of public advance notice of rule-makings and provided the opportunity for the public 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. The *Federal Register* is the daily depository of all these proposed and final federal rules and regulations, such as the 3,659 rules of 2013. While the APA established formal rule-making processes with quasi-judicial proceedings for significant regulations, these are rarely used. Instead, APA's "informal rule making" procedure of notice and comment ("Section 553" rule making) is most common (Carey, 2014: 2). But there is wiggle room even for that. As noted in a 2014 survey from the Congressional Research Service, "[t]he APA specifically authorizes any federal agency to dispense with its requirements for notice and comment if the agency for good cause finds that the use of traditional procedures would be 'impracticable, unnecessary, or contrary to the public interest' " (Carey, 2014: 2).

During the late 1970s and early 1980s, concern over regulations' economic impacts bred inquiries and reforms meant to reinvigorate the economy while stemming that era's inflationary pressures (Hopkins, 1976). The mood was for rethinking government regulations, in contrast to today's compulsion to expand them. Alongside cost concerns, agency tendencies to overstate or selectively express benefits was recognized. Prominent regulatory liberalizations began in the 1970s, and included certain trucking, rail, and airline deregulatory moves, partial financial services reforms, relaxed antitrust enforcement, and paperwork reduction (Firey, 2011). The regulatory review story began with President Nixon, was elaborated extensively by President Ford, and embraced more fully by President Carter. This involved the White House Office of Management and Budget (OMB) acting as central reviewer of important agency regulations. A significant advance was the Reagan Administration's formalization of more activist central regulatory review at the Office of Information and Regulatory Affairs (OIRA) within OMB.

Created by the Paperwork Reduction Act of 1980, OIRA first concentrated on reducing the private sector's federal paperwork burdens. Later, OIRA's authority was expanded by President Reagan's February 17, 1981 Executive Order 12291 to encompass (theoretically) a larger portion of the regulatory process by requiring that any new major executive agency regulation's benefits outweigh costs where not prohibited by statute (independent agencies were exempt), and to review agencies rules and analyses. Earlier administrations' regulatory review efforts such as those conducted by the Council on Wage and Price Stability, the Council of Economic Advisers and the interagency Regulatory Analysis Review Group, lacked extensive enforcement powers (DeMuth, 1980). These earlier bodies could seek regulatory cost analysis if not statutorily prohibited, but could not enforce net-benefit requirements; agencies could still reject reviewers' counsel and appeals to the president were possible, but rare (DeMuth, 1980). Net benefit analysis has insurmountable problems of its own in this writer's view (Crews, 2013a: 11 ("The Costs of Benefits"); Crews, July 2013b), but the *intent* was significant in the prevailing context of consciously addressing regulation. The early and mid-1980s saw declining costs and flows of regulation, particularly economic regulation in contrast to social and environmental (Hopkins, 1992).

Over the years, OIRA review—and that at the first President Bush's Council on Competitiveness tasked to screen regulations (Bloomberg Business, 1991)—faced political opposition, narrow scope of authority (Bolton, Potter and Thrower, 2014) and limited resources (Dudley, 2011). On September 30, 1993, President Bill Clinton's replacement of Reagan's E.O. 12291 with his own E.O. 12866 (Regulatory Planning and Review) reduced OIRA's authority. President Clinton's approach retained the central regulatory review structure but "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process" (US GPO, 2009), weakening the "central" in central review. The new order also changed the Reagan criterion that benefits "outweigh" costs to a weaker stipulation that benefits "justify" costs. But the order did retain requirements for agencies to assess costs and benefits of "significant" proposed and final actions, conduct cost-benefit analysis of "economically significant" ($100 million plus), and to assess "reasonably feasible alternatives", and for OIRA to review those. As with E.O. 12291, independent agencies remained exempt.

President Obama's own January 18, 2011 E.O. 13565 on review and reform (Improving Regulation and Regulatory Review) carried on the Clinton order and articulated a pledge to address unwarranted regulation (US GPO, 2011a). The president achieved a few billion dollars in savings, even wisecracking in the 2013 *State of the Union Address* about a rule that had categorized spilled milk as an "oil" (White House, 2012). Suffice it to say that such trivialities are not the source of the regulatory excess and economic stagnation that concern many; the few billion dollars cut via executive order have been swamped by rules otherwise issued and legacy regulation.

Independent agencies, while they are subject to APA notice-and-comment are not subject to enforceable regulatory review. Still President Obama addressed them in his July 11, 2011 E.O. 13579 (Regulation and Independent Regulatory Agencies) with a call to fall into line on disclosure (US GPO, 2011a). A president cannot change congressional directives with respect to independent agencies, but can use the pen-and-phone bully pulpit, if not to restrain agencies, to *discourage their excesses*.

In all, four of President Obama's executive orders address over-regulation and rollbacks and the role of central reviewers at OIRA.[4] Yet, expansion of government into economic, social, and environmental realms has been the administration's emphasis, not review-generated cutbacks. Quite the contrary: the situation today is that expansions in which many agencies engage are supported and encouraged by the administration, such as President Obama's call on the FCC November 10, 2014 "to take up the strongest possible rules to protect net neutrality" (White House, 2014).

So, despite Obama's executive orders ostensibly shining a light on regulatory excess, walking the executive order walk likely awaits a different executive. Formal executive branch regulatory review processes cannot work when the executive's philosophy is that government, not private individuals and interactions, should dominate finance, health care, energy policy, manufacturing, and other spheres of human action. Barack Obama's repeated pledges to go around Congress attest to this while every instance from net neutrality to rules on the sizes of breath-mint servings to school lunch mandates underscores a federal government disinclined to leave the public alone. Like the original E.O. 12291, the *potential* for executive orders to boost oversight and review is high when the motivation exists. But the limits have undermined the review process.

4. The limits of central regulatory review

> *Nobody could fly an airplane commercially on any route without specific permission from the Civil Aeronautics Board, and price competition, cutting prices, was illegal.*
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> —Alfred Kahn (cited in CNN, 2010).

The central review we just described does not work well enough.

Rent seeking

For one thing, it is not quite accurate, as OMB has proclaimed, that "businesses generally are not in favor of regulation" (US OMB, 1997). Business not only generally favors regulation, but often sought regulation in the first place (Stigler, 1971), so the premise of OIRA regulatory reviews may be suspect terrain at the

4. These are all available on OMB's webpage, *Regulatory Matters*, <https://www.whitehouse.gov/omb/inforeg_regmatters>.

very outset. Taxes obviously transfer wealth and affect profits, but regulations do likewise: pollution controls, accounting requirements, privacy mandates, and the like do not affect every firm equally. They create artificial entry barriers and hobble competition; they benefit some producers while punishing others. This aggravates cronyism and fosters attempts at regulatory capture. Consumers enjoying falling prices and growing output were not up on their hind legs demanding the Interstate Commerce Commission, or the state regulation of utilities (Geddes, 1992), or the antitrust laws, or regulation of Uber: these were and are sought by political elites and producers protecting profits and eliminating competition. And what were once small businesses, when they get big, may look more favorably upon rent-seeking and score-settling (Tollison, 1982).

Regulation benefits regulatory advocates and pressure groups and, obviously, the regulator. Thus, regulations have a constituency that favors command-and-control rules over market processes, quite distinct from the social welfare rationales that dominate the rhetoric of the entire policy realm and central review. This creates legislation and rules for "review" that should not exist in the first place.

Also important: just as *economic* regulatory agencies are captured by special interests, much of what is considered *social* or *health and safety* or environmental regulation may be bad for consumers as well (Crandall, 1992). Even when regulation "works", the overall or societal benefits can be outweighed by costs; also the social calculus approach to net benefits can ignore wealth transfers, regulatory takings, and due process.

Executive review presumably recognizes institutionally that agencies and departments do not benefit from *curtailing* operations, from *not* regulating. Conversely, they gain immensely—in budget allocation, staffing, and political and career status—the more extensive the regulatory empires they oversee. Turf-building assures agencies will sometimes not care all that much about anything more than cosmetic cost-benefit concerns, enough to create the appearance of a need to regulate (mints, blinds, menus, energy choices). However, unlike private actors, bureaus suffer no repercussions when their interventions prove scientifically, socially, or economically wasteful and harmful. Output for bureaus is not directly measurable but must be inferred from the level of activity, creating a slippage in the ability to closely monitor agency effectiveness (Niskanen, 1971). Unlike profit-making firms, unaccountable bureaus can disregard minimizing the costs of their "product" (regulations) since others (private sector entities and their customers) bear the impact of their actions.

The executive branch regulatory review regime now in place was intended to be a step toward regulating regulation. However, if one presumes rent seekers capture the regulatory process, then it is no leap to suspect they also captured or capture the regulatory review process. There may be rent-seeking and rent-avoidance motivations at play. The more cynical view is that presidents established regulatory review for the purpose of monitoring their appointees to make certain that promises of public or private goods made to "essentials" and "influentials" are satisfied and are delivered with lower cost burdens (Bueno de Mesquita, Smith, Siverson and Morrow, 2003). This may be correct.

Regulatory dark matter

Even if APA notice and comment were to excel, and the OIRA review of rules to be well functioning, it provides only a partially adequate safeguard since the already incomplete discipline of rule making—which provides OIRA the matter to review in the first place—down plays agency guidance documents ("non-legislative" rules), memoranda, notices, and bulletins with legal effect (Crews, 2014c). These and other "non-rules" can be ways of avoiding not just the constitutional law-making process, but may skirt the publication notice-and-comment requirements of the Administrative Procedure Act and federal Office of Management and Budget (OMB) review (Mercatus Institute, 2014).

Guidance documents are a way of getting around central control, since the APA's requirement of publishing a notice of proposed rule making does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice", in addition to the "good cause" exemption for legislative rules noted earlier (P.L. 79-404: §553). Like agency notice-and-comment rules, sometimes guidance is upheld by courts, sometimes not, when it does more than merely interpret (Whisner, 2013). Notable examples of guidance include Environmental Protection Agency's Clean Water Act jurisdictional guidance on "Waters of the United States" (US EPA, 2014), the Federal Trade Commission's guidance on disclosure of paid search engine results (Oreskovic, 2013), and President Obama's waivers of elements of the Patient Protection and Affordable Care Act. But something must be done. No one has made a systematic study of the total quantity of agency guidance but it may be that guidance document volume dwarfs that of rule making (Raso, 2010), which is not surprising when no one can even say with authority how many agencies exist (Whisner, 2013: 386). Raso quotes a 1992 *Duke Law Journal* article: "Federal Aviation Administration rules are two inches thick while corresponding guidance totals forty feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over twenty feet" (Strauss, 1992: 1463, 1469). It is hard to argue against the proposition that "the body of guidance documents (or nonlegislative rules) is growing, both in volume and in importance" (Whisner, 2013: 394).

There are even more ways agencies regulate. "Sub rosa" regulation has been an issue for decades. In *Regulation and the Reagan Era*, Robert A Rogowski was clear:

> Regulatory bureaucracies are able to accomplish their goals outside the realm of formal rule making … An impressive underground regulatory infrastructure thrives on investigations, inquiries, threatened legal actions, and negotiated settlements … Many of the most questionable regulatory actions are imposed in this way, most of which escape the scrutiny of the public, Congress, and even the regulatory watchdogs in the executive branch. (1989: 209–210)

Reform is extremely difficult: one must appreciate that attempts to force more of this informal regulatory dark matter into the notice and comment stream might induce agencies to become even more creative in skirting review, such as with informal provision of information regarding agency expectations (Shapiro, 2014), doubtless at times of the variety: "Nice business you got there, shame if something were to happen to it". New constraints could lead to other unforeseen measures by agencies to escape oversight, the effectiveness of which could depend "significantly on how easy it is for OIRA to detect avoidance, and for OIRA, the courts, and others to respond" (Mendelson and Wiener, 2014: Abstract). Agencies can also raise the costs of presidential review of what they do, "self-insulating" their decisions with "variations in policy making form, cost-benefit analysis quality, timing strategies, and institutional coalition-building" (Nou 2013: 1,756).

But on the other hand …

Data we shall cover next in part 5 support those skeptical of central review's effectiveness and bear out that just a small part of regulatory output is reviewed and that escaping scrutiny is, if not easy, not difficult either. It will seem obvious that the review process has not been driven by public-interest theory and that it has not fared well. An as yet unarticulated theory of rent seeking, the reality that independent agency rules are not reviewed, and that it is easy to escape review are enough to explain the botched process we shall see in Part 5.

Yet there might be something salvageable in a "public interest" theory of regulatory review. Here, I will note that officials of limited-government persuasion have headed OIRA, many of them well-acquainted with the special-interest theory of regulation. There are grave problems with central review; perhaps the institution can be changed so that the "public interest" is better served; additionally, as discussed in part 7, we might influence the kind of information agencies create until such time as reforms instituting congressional accountability ripen.

Tough centralized review of regulations has been argued as a way to empower consumers and citizens, relative to the rent-seeking and capture that typically prevails. Without central regulatory review, costs of influencing laws are high since policy formation is dispersed among numerous agencies and lawmakers. Producer groups whose members are often more concentrated (crony types, not infrequently), hold a relative advantage in securing favorable policy since lower organizational costs enable them to prevail at the expense of those less favorably positioned. For scattered consumers, the cost of political organization are higher and tendencies to free-ride on the efforts of others can dominate even when ire is raised, derailing the ability to push back on over-regulation or to even recognize it.[5] Regulation therefore grows over time because it costs consumers more to organize and prevent having a dollar taken away than it costs for them to simply accept the loss. Consumers become the put-upon "suppliers" in the equation of "demanders and suppliers of wealth transfers" (McCormick and Tollson, 1982).

Centralized regulatory review may come to the "rescue" by helping level the playing field for the usual losers in the rent-seeking game. Theoretically again, centralization of review in one spot can increase the "rate of return" to lobbying for dispersed groups (like consumers) relative to that of concentrated interests because they need influence only one entity rather than many (Miller, Shughart, and Tollison 1984). Meanwhile, expected benefits for concentrated groups are likely to be little influenced or even reduced (since they would have taken most of the pie anyway without central review). If that holds, "commissions (i.e., the reviewing entities) that are responsible for regulating several industries are less likely to be captured by a single industry, and thus are more likely to be responsive to the diverse interests of consumers and consumer advocates" (Mueller, 1989: 245).

But central review mechanisms can block neither legislators nor presidents who act to circumvent such oversight. To the extent Congress passes onerous laws,

5. The seminal discussion on free-riding and group behavior is Olson, 1965.

requires unnecessarily rapid statutory deadlines for new regulations, prohibits cost analysis of rules, creates loopholes that prevent or enable avoidance of review, or frontally acts to benefit special interests, aggressive regulatory review remains improbable. In many ways, we need to become better at measuring the unmeasured. So let us look where central review stands now.

5. What the government's numbers say about central review of regulation

In June 2014, the White House Office of Management and Budget (OMB) released the *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations* (US OMB OIRA, 2014a). These annual reports show the results of OMB's reviews of a subset of the thousands of proposed and final rules issued annually. But notices, guidance documents, memoranda and bulletins get no scrutiny here, and rarely anywhere else.

When they draw attention to these reports at all, administrations stress "net-benefits" of the regulatory enterprise as a whole (Sunstein, 2012). So, in the new report, the administration says that in its fiscal year 2013 (October 1, 2012–September 30, 2013), executive agency major rules generated benefits of up to $81.4 billion annually, while costing only $2.4 billion to $3.0 billion annually in 2010 dollars (US OMB OIRA, 2014a: 20–21, table 1-4). For the decade 2003 to 2013, costs were pegged at between $68.5 billion and $101.8 billion, in 2010 dollars (US OMB OIRA, 2014a: 9–11, table 1-1).

Today's official narrative maintains that this OMB-reviewed subset of major or "economically significant" executive branch rules (those anticipated to have a $100 million economic impact) account for the bulk of regulatory costs. The OMB holds that: "[T]he benefits and costs of major rules, which have the largest economic effects, account for the majority of the total benefits and costs of all rules *subject to OMB review*" (US OMB OIRA, 2014a: 22, emphasis added). But OMB's break-downs incorporate benefits and costs of only the few "major" executive agency rules that agencies or OMB have expressed in quantitative, monetary terms.

Only seven rules in the *2014 Draft* had both cost *and* benefit analysis performed, out of 54 executive agency major rules that OMB reviewed. OMB listed another 11 rules with dollar costs assigned, without accompanying benefit estimates (US OMB OIRA, 2014a: 26–28, table 1-6(b)). There were a few hundred non-quantified "significant" rules OMB looked at, and hundreds more it did not review (indeed over 3,500 rules and regulations are finalized each calendar year).

The "subject to OMB review" clause in the quotation above is a critical qualifier. Plenty gets left out, like "non-major" rule impacts, as well as the aforementioned guidance documents, memoranda, and other notices. Ominously, independent agencies' thousands of rules get no OMB review, not even the many rules stemming from high-impact laws like the Dodd–Frank Wall Street Reform and Consumer Protection Act. Indeed, the non-reviewed character of most rules small and large, such as controversial independent agency rules like the Federal Communications Commission's on-going net neutrality proposals to impose utility-style regulation on the internet detract from the annual report's authority as a comprehensive survey of the compliance burdens and economic impact.

In instances like the independent Consumer Financial Protection Bureau created by Dodd-Frank, the concern goes well beyond lack of regulatory review (Murray, 2014: a, c): there exists a fundamental lack of accountability, either executive or legislative or judicial, since the President cannot remove the director, and since Congress does not fund the self-financing agency. Congress lacks even the necessary "power of the purse" to ensure even an appearance of accountability to voters (Murray, 2014: a, c).

Thirty other major rules implemented transfer programs (US OMB OIRA, 2014a: 28–29, table 1-7(a)); such "budget rules" are officially considered transfers rather than regulations. Paying little regard to these may be appropriate in a limited government context, but not as the federal government dominates ever more such economic and social activities as retirement and medical insurance.

Over the years, some 10% of all rules have been reviewed whether or not costs and benefits enter into the picture. In the *2014 Draft Benefits and Costs* report, OMB tells us that: "From fiscal year 2004 through FY 2013, Federal agencies published 37,022 final rules in the Federal Register. OMB reviewed 3,040 of these final rules under Executive Orders 12866 and 13563" (US OMB OIRA, 2014a: 8). As noted, for FY 2013, OMB reviewed 54 major rules and a few hundred significant ones, 18 of which had a cost estimate. For context, 3,659 rules were finalized by over 60 federal departments, agencies, and commissions during the calendar year.

OMB's once-common recognition that costs "could easily be a factor of ten or more larger than the sum of the costs … reported" (US OMB, 2002: 37), was a more helpful stance, since, as *table 5.1* shows, of several thousand agency rules issued, and the several hundred reviewed annually by OMB, only a handful of executive agency rules (and no independent agency rules) feature cost analysis alone, let alone the cost-benefit analysis that could justify common administration claims of net benefits for the entire regulatory enterprise.

Table 5.1. The "funnel of gov"—on the depth of regulatory cost review, 2001–present

	Major Exec. Agency Rules Reviewed by OMB			*Federal Register*	Costed rules as % of total final* rule flow
	Both costs and benefits	Rules with costs only	Grand total, rules with costs	Final rules	
2001	14	13	27	4,132	0.65%
2002	3	0	3	4,167	0.07%
2003	6	4	10	4,148	0.24%
2004	11	7	18	4,101	0.44%
2005	13	2	15	3,943	0.38%
2006	7	1	8	3,718	0.22%
2007	12	4	16	3,995	0.40%
2008	13	6	19	3,830	0.50%
2009	16	12	28	3,503	0.80%
2010	18	8	26	3,573	0.73%
2011	13	6	19	3807	0.50%
2012	14	9	23	3708	0.62%
2013	7	11	18	3659	0.49%
Total	**147**	**83**	**230**	**50,284**	**0.46%**

Source: compiled by W. Crews from US Office of Management and Budget, various fiscal years' editions of *Report to Congress on the Costs and Benefits of Federal Regulations*, <http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress>.

Note *: final rules published in the *Federal Register* are presented by calendar year; other data by fiscal year. Final rules data are available in the Appendix of various years' editions of *Ten Thousand Commandments*, available at <www.tenthousandcommandments.com>.

As a percentage of the annual flow of final rules in the *Federal Register,* the proportion of rules designated "major" with cost analysis averaged around 36% over the decade; but the proportion of *all* rules with any cost analysis at all has averaged just 0.46%. The percentage of all rules with a cost assessment has never reached 1% in OMB reports (the highest was .8% in 2009). Benefits, which the federal government declares justifies the modern regulatory state, fare even worse.

6. Beyond the OMB annual reports—a more complete picture of the regulatory enterprise

If you make 10,000 regulations you destroy all respect for the law.

—Winston Churchill

The partial picture given by the OMB's annual *Report to Congress* may be rounded out somewhat by examining pages of rules, numbers of them, and costs of regulations where such information is available. This section reviews some of what we think we know about regulatory costs. Alas, the *known* is outweighed by the *unknown*. Policy makers could use such information to make the case for greater disclosure and accountability—and liberalization.

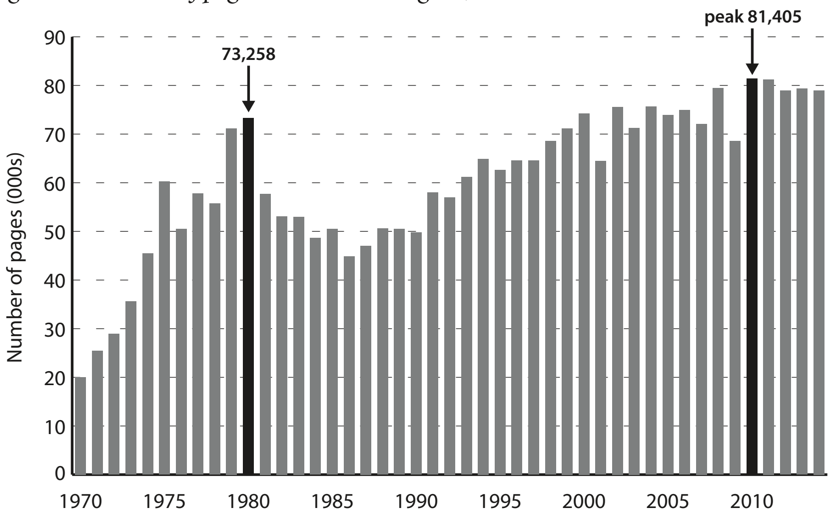
Thousands of rules, thousands of pages of regulations

While an utterly imperfect gauge, the number of pages in the *Federal Register* is probably the most frequently cited measure of regulation's scope, which unintentionally highlights the abysmal condition of regulatory oversight and measurement. At the end of 2014, the page count stood at 78,978, the fifth-highest level in the *Register*'s history (*figure 5.1*; Crews, 2014a). Both 2010 (81,405 pages) and 2011 (81,247 pages) were all-time record years. The 79,435 count in 2008 under George W. Bush holds the third-highest title. In keeping with the modern "pen-and-phone" ethos, of six all-time-high *Federal Register* page counts, five have occurred during the Obama administration.

Note the interim 1980 peak of 73,252 pages of regulations, which held the "record" until 2000. This essay is not the venue for an extended discussion but, despite concerns some might have with a public-interest theory of regulatory central review, one could make the case that the then-just-initiated E.O. 12291 process contributed to the initial decline during the 1980s. If it did, agencies eventually found a way to compensate and resume regulatory output, as well as engage in strategic avoidance of OIRA review and "regulatory dark matter".

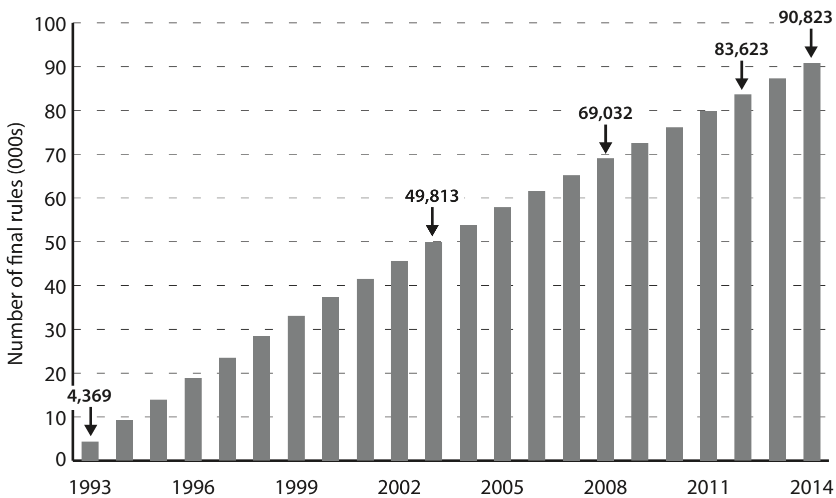
Among those thousands of pages were 3,541 final rules and regulations in 2014 (Crews, 2014a). Mirroring *Federal Register* pages, this count peaked at 7,745 in 1980 (Crews, 2014d: 62), when Reagan's E.O. 12291 was issued, then declined during that decade. Since 1993, when Clinton's E.O. 12866 was issued, rules have never dipped below 3,500 annually and often exceeded 4,000, especially during the 1990s. Over the past 20 years, 90,823 rules have been finalized (*figure 5.2*). These counts do not include guidance, bulletins, executive orders, memoranda, and the like, which have assumed greater prominence but are not reflected in ordinary rule counts.

Figure 5.1. Number of pages in the Federal Register, 1970–2014



Source: National Archives and Records Administration, Office of the Federal Register (various).

Figure 5.2. Cumulative count of final rules published in the Federal Register, 1993–2014

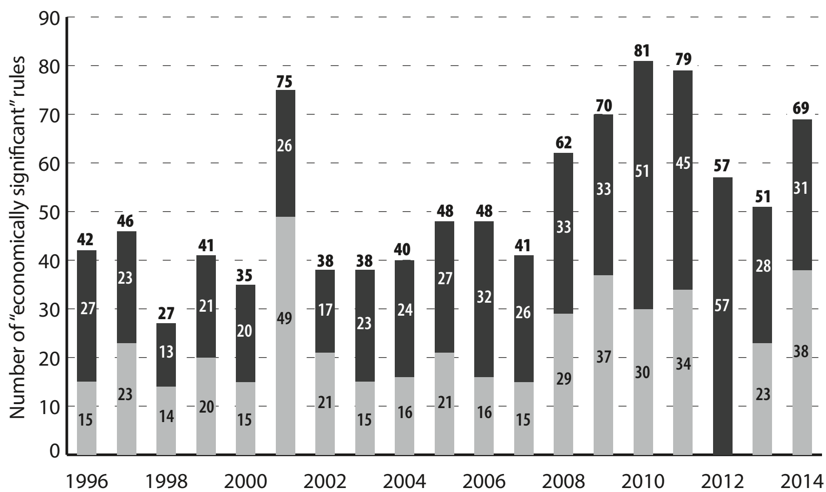


Source: National Archives and Records Administration, Office of the Federal Register (various).

This chapter has stressed accountability, noting that much law comes from agencies rather than elected lawmakers: while agencies issued 3,541 rules in 2014, Congress passed 129 laws that were signed by the president (Crews, 2015). While the rules are not substantively related to the current year's laws since they represent ongoing implementation of typically far earlier legislation, this ratio amounts to 27 rules for every law in terms of flow. Another 2,375 proposed rules were issued in 2014 and are under consideration by agencies.

Of the more than 3,000 rules issued each year, the subset known as "economically significant" is noteworthy. These rules, anticipated to have economic effects of $100 million or more annually, have begun to increase in recent years. *Figure 5.3* shows that the annual totals are down substantially from the 2010 peak of 81, but did jump to 69 from 51 last year. Nonetheless, besides 2001, the flow of completed economically significant rules from 2008 forward is notably higher than during the late 1990s and first few years of the 2000s.

Figure 5.3. Completed "economically significant" rules issued annually, 1996–2014



Source: Compiled from *The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions* (US OMB OIRA, various). No Spring 2012 edition appeared.

The paperwork and compliance drag

> *I would say that seven years ago, I would spend 20 to 25% of my time as CEO of a small company dealing with regulatory issues … I spend no less than 50 or 60 percent of my time today dealing with regulatory issues. It's unbelievable.*
>
> —Banking CEO Mike Menzies on regulatory compliance (cited in Smith, 2012).

According to the 2014 federal *Information Collection Budget*, it took 9.453 billion hours in 2013 to complete the paperwork requirements from 22 executive departments and six independent agencies subject to the survey; that is up from 7.4 billion in 2000 (US OMB OIRA, 2014b). Most of that is Treasury (tax compliance) but new financial and health regulations are changing the landscape. It is hard to visualize 9.5 billion hours, but an 80-year human lifespan is 29,200 days. In hours, that is 700,800 hours. Looked at that way, 9.5 billion hours of paperwork is the equivalent of *13,488 full human lifetimes*. This is paperwork only, not other directives, mandates, or restrictions involved in actually carrying out regulation.

Unsurprisingly, but ominously, the job market for "compliance officers" is booming while other Americans cannot find work. The *Wall Street Journal* pointed to $162,000 to $232,000 salaries for large (particularly financial) firms' compliance officers and rising employment in the category overall compared to the actual productive economy—all driven by complicated new laws, regulations, and fines (Millman and Rubenfeld, 2014).

Smaller firms do suffer more from regulatory compliance costs generally. According to a major study by the National Association of Manufacturers (NAM), per-employee regulatory costs for firms of fewer than 50 workers can be 29% greater than those for larger firms—$11,724 for smaller firms compared to $9,083 for larger ones (Crain and Crain, 2014: 2).

A placeholder for the annual dollar cost of the regulatory state

We went a couple of hundred years without anyone bothering to reckon the total cost of federal regulation in the United States. Today, cost estimates of the regulatory enterprise range from the few billion the Office of Management and Budget bothers to proclaim (recall from part 5 that OMB has presented costs for 157 rules since 2000), through the $2.028 trillion annually the National Association of Manufacturers (NAM) estimated in 2014 (Crain and Crain, 2014: 1), and onward into the stratosphere according to an academic estimate of dozens of trillions in lost GDP annually (Dawson and Seater, 2013).

For a bit of bracketing and context, a 1995 report from the General Accounting Office (today called the Government Accountability Office) put 1994 regulatory costs at $647 billion in 1995 dollars (US GAO, 1995), which would be around $990 billion in 2013 dollars even assuming no new regulation in 20 years. Earlier governmental reckonings before and after the turn of the century from the OMB and the Small Business Administration (SBA), with various levels of critique and venom, have also noted annual costs in the hundreds of billions, some well in excess of $1 trillion converted into today's dollars. See *table 5.2* for these, as well as the NAM's just noted modeling of 2012 total annual regulatory costs in the economy of $2.028 trillion (in 2014 dollars).

These surveys tend to convey regulatory costs using the following categories: 1. economic regulatory costs (e.g., price-and-entry restrictions and transfer costs like price supports that shift money from one pocket to another); 2. workplace regulatory costs; 3. environmental regulatory costs; 4. paperwork costs.

Among these, the latest comprehensive federal government assessment of the entire federal regulatory enterprise that one might regard as "official" was prepared in September 2010 for the Small Business Administration (Crain and Crain, 2010). Modeling techniques have changed over time as the SBA presented several versions over the past decade and a half, with the most recent falling into criticism to which the authors responded directly (Crews, 2014d: 82, fn 20). Policy makers have a responsibility to disclose regulatory costs, uncertainties notwithstanding. The reality is no "objectively identifiable magnitudes" are available and costs in a fundamental sense are unmeasurable to third parties (Buchanan, 1969). But no blank checks for regulators should be permitted and, until congressional accountability is established for all regulations, the effort needs to be made. Meanwhile other developments—including recent major financial, health, and environmental policies—indicate regulatory costs not captured by most assessments to date. Other long-known costs, such as indirect costs and the effects of lost innovation or productivity, are difficult to assess and can produce underestimates of the total regulatory burden, which works to the advantage of the regulator.

For convenient annual cataloging of what we can reckon about regulatory costs, rather than employing a sophisticated model, I compile an informal baseline less than the NAM estimate using largely government data such as turn-of-the-century aggregate OMB and Governmental Accountability Office estimates, the annual updates from the *Report to Congress* and the annual *Information Collection*

Table 5.2. Estimates of the Cost of Regulation in the late 20th and early 21st centuries

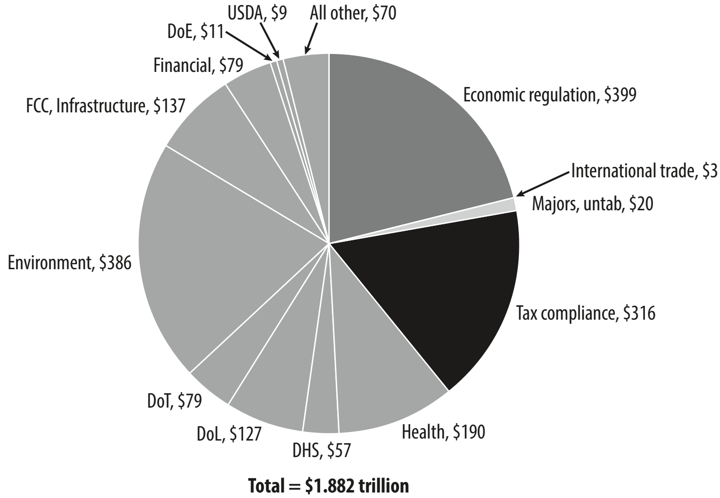
	Hopkins 1992 ($1991)	GAO 1995 ($1995)	Hopkins 1995 ($1995)	SBA 2001 ($2001)	OMB 2002 ($2001)	SBA 2005 ($2004)	SBA 2010 ($2009)	NAM 2014 ($2012)
Environmental	115		168	197	203	221	281	330
Other Social	36		55		30			
Transportation					22			
Labor					22			
Economic Regulation						591	1,236	1,448
Efficiency	73		80		150			
Transfers	130		147		337			
Efficiency—Domestic				101				
Transfers—Domestic				202				
Efficiency—Int'l Trade				44				
Transfers—Int'l Trade				88				
Workplace and Homeland Security				82		106	75	92
Paperwork/Process/ Info Collection (tax compliance)	189		218	129	190	195	160	159
Totals	**543**	**647**	**668**	**843**	**954**	**1,113**	**1,752**	**2,029**
Totals ($2013)		**992.498**	**1,024.712**	**1,109.39**	**1,255.46**			

Notes: [1] GAO = Government Accountability Office; SBA = Small Business Administration; NAM = National Association of Manufacturers. [2] Some figures are here adjusted to 2013 by the change in the consumer price index between 2001 and 2013 (1.316), and between 1995 and 2013, derived from US DoL BLS, 2014b: Table 24. Historical Consumer Price Index for All Urban Consumers - (CPI-U), U.S. city average, All items.

Sources: Crain (N.V.) and Crain (W.M.), 2010; Crain (W.M.) and Crain (N.V.), 2014; Crain (W.M.), 2005; Crain (W.M.), and Hopkins, 2001; Hopkins, 1992, 1995; US GAO, 1995; US OMB, 2002: 15,037–15,038.

Budget (which tabulates paperwork hours), and independent agency rule costs, supplemented with the few private-industry and sector analyses that exist. I reckon a placeholder of $1.882 trillion (*figure 5.4*), as compiled in more detail elsewhere in the working paper, *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway* (Crews, 2014e).

Figure 5.4. Annual cost of federal regulation and intervention ($billions), 2015 placeholder



Source: Crews, 2014e.

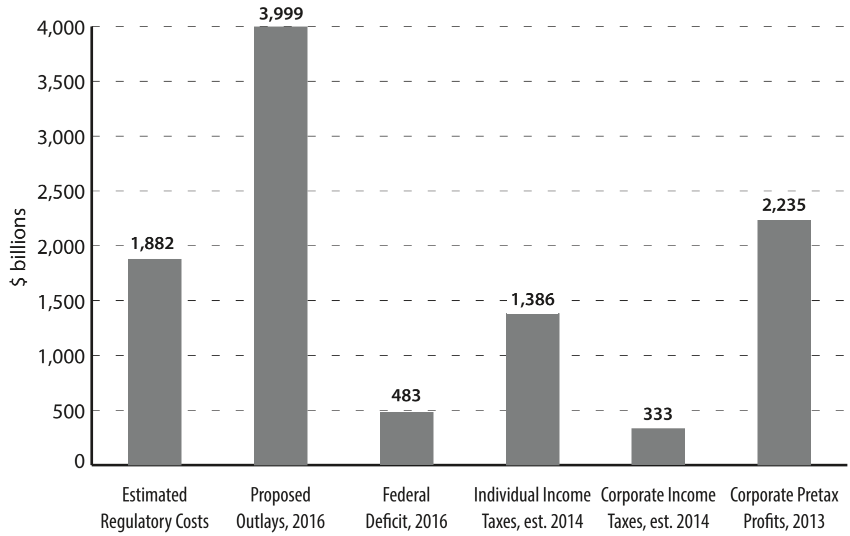
Each element of regulatory costs demands a dissertation unto itself for those affected but the largest components portrayed are legacy economic regulation, environmental regulation, and paperwork burdens. In the modern United States—after Dodd-Frank and the Affordable Care Act—the health services and financial components can be expected to expand. In any event, our figure of $1.88 trillion omits much: most regulations' costs are never tabulated and some entire classes of government intervention—such as antitrust, government manipulation of money, credit, and interest rates, and restricted access to resources— are ignored by officialdom. (Crews, 2014e: Unfathomed, Unmeasured Omissions).

Regulatory costs compared to federal spending, the deficit and taxes

How might we put regulatory costs in perspective? We probably cannot, since costs are not truly measurable, but here goes. The Commerce Department's Bureau of Economic Analysis in December 2014 estimated a 2014 GDP of $17.6 trillion (US DoC BEA, 2014b). The regulatory cost placeholder of $1.88 trillion is equivalent to around 11% of that.

Let's look at regulation in comparison to the size of the federal government itself. In FY 2014, the US federal government posted a deficit of $482 billion on $3.504 trillion in total spending outlays. *Figure 5.5* shows outlays, regulation, and the deficit at one glance. One could envision regulations as a form of off-budget spending in the sense that they represent costs of federal requirements the

Figure 5.5. Estimated regulatory costs compared to everything else ($ billions)



Note: Federal deficit and outlay numbers are by fiscal year; regulatory costs by calendar year.
Sources: Crews, 2014e; corporate 2013 pretax profits (domestic and international) from US DoC BEA, 2014a; estimated 2014 tax figures from US OMB, 2015; 2014 outlays and deficit from CBO, 2015: table 1-2: CBO's baseline budget projections (p. 13).

population is compelled to bear. For that perspective we seek, note that our placeholder for estimated regulatory costs approaching $2 trillion is equivalent to more than half the 2014 level of fiscal budget outlays ($3.5 trillion), and nearly four times the $482 billion deficit.

Regulatory costs also easily exceed the cost of individual income taxes and vastly outstrip revenue from corporate taxes. As figure 5.5 also shows, regulatory costs now tower over the estimated 2014 individual income-tax revenues of $1.386 trillion. Corporate income taxes, estimated at $333 billion in 2014, are dwarfed by regulatory costs.[6] Regulatory costs also rival the level of pre-tax corporate profits, which were $2.235 trillion in 2013 (US DoC BEA, 2014a).

Furthermore, while not shown in the chart, US regulatory costs surpass the 2013 GDPs of both our neighbors: Canada's stood at $1.827 trillion, and Mexico's at $1.261 trillion according to the World Bank (2014). As it happens, there are only nine countries whose GDP exceeds the cost of regulation in the United States. If

6. Individual income-tax receipts had fallen substantially during the economic downturn and are rising again at the moment (US OMB, 2015). Corporate tax receipts had declined by half during the recent downturn.

US regulatory costs of $1.88 trillion were a "country", it would be the world's tenth largest economy, between India and the Russian Federation. The implication is that less or smarter regulation could enable a far healthier economy.

Regulation's impact on families

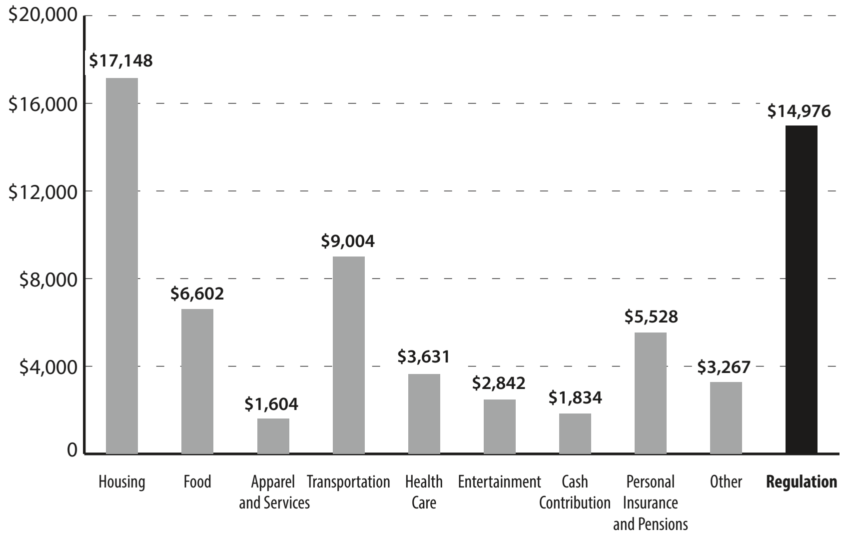
When a business pays taxes, part of those costs get passed along to consumers in prices, or indirectly in lost output and generally diminished wealth. Like the taxes they are required to pay, businesses will pass some regulatory costs on to consumers. Regulatory costs will be borne by businesses of various types, households, lower-level governments, and so forth in direct pass-downs and in broader indirect economic drag. The "incidence" for households, or how much of the American family household budget is "absorbed" by regulatory costs is impossible to say. Businesses bear the brunt (apparently 50% or more, varying by kind of entity) yet, as noted in the study for the National Association of Manufacturers on regulatory costs:

> It is worth emphasizing that all regulatory costs are—and can only be—borne by individuals, as consumers, as workers, as stockholders, as owners or as taxpayers. In other words, the distinction between "business" and "individuals" focuses on the compliance responsibility, fully recognizing that ultimately all costs must fall on individuals. (Crain and Crain, 2014: 46)

Regulatory costs propagate through an economy, but the ultimate economic unit remains the individual. Just for perspective, were we to assume full pass-through of all such costs to consumers, we can look at the "share" of each household's regulatory costs and compare it with total annual expenditures as compiled by the Bureau of Labor Statistics (BLS) (US DoL BLS, 2014a).[7] The comparison is just a useful way of reflecting on the magnitude of regulatory costs. For America's 125.67 million households, or "consumer units" in BLS parlance, the average 2013 income was $63,784. *Figure 5.6* breaks down household expenditures of $51,100 by category. Note that the highest category is housing at $17,148 annually; the second-highest category is transportation at $9,004.

7. For the Bureau of Labor Statistics (BLS), "[c]onsumer units include families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses." For each "unit", average annual expenditures were $51,442 according to the BLS. The BLS also provided additional information on these figures (via e-mail from Vera Crain, February 22, 2013) and in US DoL BLS, 2012, 2013.

Figure 5.6. US household expense budget of $51,100 compared to regulatory costs



Sources: Bureau of Labor Statistics, 2014a; calculations by author. Proxy for "households" here is BLS depiction of 125,670,000 "Consumer units"; that comprises "families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses".

To reflect upon magnitudes: if one were to imagine allocating annual regulatory costs directly to individuals and assume full pass-through of costs to them, US households "pay" $14,976 annually in hidden regulatory tax ($1.882 trillion in regulation ÷ 125.67 million "consumer units"), "equivalent" to 23% of average income before taxes. That figure is higher than every annual household budgetary expenditure item except housing. The implication is that regulation has large societal wealth impacts. More is "spent", so to speak, on embedded or hidden regulation in society than on health care, food, transportation, entertainment, apparel and services, and savings. Societal regulatory costs amount to 29% of the typical household's expenditure budget.

7. A reform agenda—when the pen and phone advance liberty

If you ever get annoyed, look at me, I'm self-employed; I love to work at nothin' all day.
—Bachman-Turner Overdrive, *Takin' Care of Business*.

To the extent ill-founded, overlapping, and unclear regulations (and tax policy) dominate, businesses cannot plan, hiring becomes an insupportable risk (businesses will not hire if they know they cannot fire thanks to labor law) and citizens suffer. In the competitive marketplace, it takes a lot of bad ideas to generate a winner; over-regulation and its close ally *uncertainty* cut down on breakthroughs, slowing growth. A vanguard study on the uncertainty created by regulations and fiscal, trade, and debt policy estimated $261 billion in such costs just since 2011 (McNabb, 2013).

Moreover, policy makers and regulators fail to recognize that, while businesses want to "create jobs" as a matter of good citizenship, that goodwill does not change the reality that jobs are a cost, a *liability*. The modern environment makes business more risk averse (Casselman, 2013). One British businessman addressing French employment regulations observed: "[W]hen I am 100 percent utterly and completely certain that it is an absolute certainty that it is an absolute necessity that I need to recruit a new employee, I go to bed, sleep well and hope that the feeling has gone away by the morning" (Richardson, 2013).

If businesses are "punished" for hiring or cannot predict regulations coming their way, it is little wonder that they do not expand. We have already noted consequences, such as business startups hitting a record low (Reuters, 2012). Like poverty, unemployment does not have causes; both are the default state of mankind; only *wealth* has causes (noted in Crews, 2011a). The threat of regulation can induce companies to behave in reactive ways, distorting markets and creating economic inefficiency, compounding stagnation. Perhaps most ominous is that over half of existing firms would not do it again given today's anti-business climate of uncertainty (Gehrke, 2012). Wynn Resorts CEO Steve Wynn called Washington "the greatest wet blanket to business, and progress and job creation in my lifetime. And I can prove it and I could spend the next 3 hours giving you examples of all of us in this market place that are frightened to death about all the new regulations, our healthcare costs escalate, regulations coming from left and right" (Seeking Alpha$^{\alpha}$, 2011).

People like Wynn and our British businessman are hardly alone. *The Atlantic* conducted a Silicon Valley poll finding government to be a key innovation barrier (Gillespie, 2014), while Gallup polling found record numbers pointing a finger at big government (Jones, 2013). Regulatory liberalization that reduces uncertainty that increases the returns to risk-taking is the yet-to-be-deployed stimulus package. The problem, at this moment, is that Congress will have a tough time with a liberalization agenda in the "year of the veto".

The president has already promised to veto the Regulatory Accountability Act (EOoP OMB, 2015), the 114th Congress' signature regulatory reform bill that passed the second week of the new session in January 2015. The Regulatory Accountability Act of 2015 (H.R. 185) would codify some provisions contained in the executive orders we have discussed so far, making them enforceable, as well as allow formal semi-judicial proceedings for major rules and address guidance documents.

Similarly, the prior 113th Congress' passage of the ALERRT Act of 2014 (Achieving Less Excess in Regulation and Requiring Transparency, H.R. 2804), which also would in part codify existing executive orders, was met with presidential disregard (elements of this disclosure-oriented legislation will be described later). In both the 112th and 113th Congresses, the House passed the REINS Act (Regulations from the Executive in Need of Scrutiny, H.E. 367) to require an expedited congressional vote on all major or significant rules before they are effective (Adler, 2013). Note that this would change the presumption we saw in the Congressional Accountability Act. That act's "resolution of disapproval" would become a positive affirmation—a major advance in accountability for regulations. REINS has been reintroduced in the 114th Congress (Office of Sen. Rand Paul, 2015), but the president promised to veto it in the prior session.

Congress needs to broaden the REINS objection to any controversial rule, whether or not tied to a cost estimate that deems it a major rule. Furthermore, in the era of regulatory dark matter, the requirement for congressional approval should extend further to guidance documents and other agency decrees. At the moment, the point is moot since an Obama veto is assured, but the debate needs to occur.

Another important congressional reform in the "wish list" category would include changing statutory language that induces some agencies to disregard economic concerns in evaluating their regulations (Manheim, 2009). Ultimately, only Congress can compare questionable rules to the benefits that could be gained if the compliance costs went elsewhere. Therefore, Congress should also explore allocating regulatory cost authority among agencies in a "regulatory budget", while distinguishing between categories like economic, health/safety, and environmental regulations (Crews, 1998). A "budget" would create incentives promoting other supervisory mechanisms like central review, cost analysis, and sunsets, and inspire agencies to "compete" with one another in terms of lives they save or some other regulatory benefit rather than think within their own box.

Unfortunately, all the legislative accountability reforms just covered are unlikely to become law. Perhaps the most promising option for bipartisan, cross-branch, and bicameral cooperation is a "regulatory improvement commission" contained in the Regulatory Improvement Act of 2013 (Stemberg, 2013). This body, like the military base closure and realignment commission, would initiate review of the entire existing regulatory apparatus as distinct from the one-by-one appraisal that characterizes OMB review. The commission would select a bundle of rules for rollback with expedited congressional vote.

Certainly, today's policy climate is quite different from the 1990s, when Republicans proposed outright elimination of agencies like the Department of Energy (CEI, 1994). While major actions may not happen in the 114th Congress, it may be possible to develop "veto-override-proof" steps that lay important groundwork for a more favorable future reform environment. Congress can at least begin making regulatory realities more apparent, even in the current atmosphere that precludes fundamental reforms.

Meanwhile, as the next presidential elections approach, policy scholars may ponder what the executive's "pen and phone" can do to reduce rather than increase government influence in the economy. We knew from our Constitution's framers and we know now from the modern "pen and phone" era that, for better or worse, an energetic executive's hands are far from tied. Alexander Hamilton sought a king (Syrett, 1965) but settled for vigorously defending "Energy in the Executive". And to be sure, an "energetic" liberalization attitude prevailed in the executive branch during past presidencies and resulted in the creation of the executive branch review and oversight process itself. Given that such "pen and phone" power exists, it is time it be used to reduce government's scope and expand the private sphere (especially if Congress codifies the reforms).

Executive orders can expand governmental power as President Harry Truman's failed attempt to seize control of America's steel mills (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 1952) and Franklin Delano Roosevelt's confiscation of gold emphatically confirm (Traynor, 2013). These, too, were "pen and phone" executive orders; likewise, minus the phone, the Emancipation Proclamation to free slaves in the rebellious states. The optimistic spirit of the following recommendations holds that areas of bipartisan agreement between the executive and legislative branches in divided government can be found. We know from reforms in the 1990s that some Democrats are not going to go to the mat for maintaining a regulatory state that harms their constituents. If we do not succeed in directly reducing regulation in the next couple of years, some recommendations below will produce information about the state of regulation that can help enable reform in a more favorable future climate.

Enforce, strengthen and codify existing executive orders on regulation

In part 3, we covered the series of executive orders over recent decades meant to address the flow of regulation. For starters, Congress should insist that existing executive orders on cost analysis and review—to limit government—should be strictly applied, strengthened, and ultimately codified (as would be done via the aforementioned House-passed ALERRT Act) and further, extended to independent agency rules, guidance documents, and other agency proclamations.

Implement a regulatory moratorium

It is lost to the mists but upon entering office President Obama's chief of staff announced a regulatory freeze as part of a first 100 days initiative (Associated Press, 2009). The march of rule making was not appreciably reduced, but no permanent reduction followed a 90-day moratorium implemented by President George H.W. Bush either, who had directed agencies to look for rules to waive. Each generated just a few billions in savings (Sunstein, 2011). Moreover, many rules implement statutory requirements and are exempt from executive waiver, although recently with respect to the Patient Protection and Affordable Care Act, waivers applied via bulletin, memo, and press release by the Internal Revenue Service (Graham and Broughel, 2014). With the Bush moratorium, agencies were being asked to describe what they did badly—a task at odds with self-interest and bureaucratic turf building. Furthermore, Bush's three-month campaign was considerably shorter than needed to examine the fruits generated by an intense, thorough audit.

Obama's unilateral waivers notwithstanding, getting regulations off the books requires the same laborious public notice and comment procedures of a new rule. "Going back and reviewing stuff is as hard as drafting regulations", said Linda Fisher, who oversaw EPA pesticide regulation during the Bush effort (quoted in Davis, 1992). Still, a new effort should build upon the best of the Bush and Obama moratoria, and lawfully freeze regulation for a lengthier, more thorough audit, publish reports on the data generated, seek public comment on which rules should go, and so forth. Creativity will produce useful information to support more substantive reforms—such as stipulating that, for every new rule, one within or outside the agency should be eliminated. This latter would amount to a status quo "regulatory budget" or freeze for the duration of the review.

Boost resources at the Office of Information and Regulatory Affairs and increase free-market law and economics staff at agencies

More money and staff could enhance OIRA's executive order review function, or that of some subsequent body (see Dudley, 2011 on expanding OIRA resources). Where political circumstances prevent that, the administration and Congress might shift personnel and funds to concentrate on key agencies (or some subset).

However, since OIRA already grants special attention to major rules, and since a handful of agencies usually account for most major rules, OIRA already concentrates its resources for the most part, so this is a limited, even naïve, option. Additional analytical help can and does come from employees borrowed from federal agencies and departments. A moratorium could help the process of regrouping.

Alternatively, economists and divisions at agencies whose job is benefit-and-cost assessment and preparation of Regulatory Impact Analyses (RIAs) could be moved out of less active agencies. The president or OIRA chief or Congress could give these economists "Bureau of No" marching orders, to look for reasons *not* to regulate, to challenge conventional RIAs that somehow always find net benefits rather than net costs, and to underscore the role of competitive discipline and other factors that "regulate" economic efficiency and health and safety apart from Washington bureaus. Agency economists, deployed where objectively more useful in blocking the ceaseless regulatory flow, could provide greater assurance that more complete analyses were being carried out even without changes at OIRA.

It must be emphasized that *it is not enough for economists reviewing agency output to focus on Regulatory Impact Analyses*. Only a few get prepared. The flow, the rising costs, and the limited scrutiny to which even major rules are subject indicates that the ignored costs of "minor" rules may actually be very large. Recall from table 5.1 that non-major rules and independent agency rules make up the regulatory bulk. Still a rough 80/20 rule should apply such that, while costs can be masked behind the number of rules, a relative handful account for the bulk of impending regulatory burdens. Economists can get better at concentrating efforts on that few if there is presidential encouragement, and bipartisan support, of their role and acknowledgement of their importance.

Systematize review, sun-setting, revision and repeal of regulations

Short of the moratorium advocated above, and in keeping with the spirit of executive orders and retrospective reviews that agencies allegedly conduct already (details at *Federal Register*, no date), more aggressive periodic rule review by OMB and agencies would be valuable. Congress occasionally considers regulatory sun-setting; the president too could, in pen-and-phone fashion, require agency-generated regulatory requirements to expire or sunset within a given period of time unless they are re-proposed with public notice and comment.

This task requires an executive who agrees with the observation that regulations sometimes go too far, who recognizes that allowing even good rules to mount inappropriately is counterproductive (Mandel and Carew, 2013). While sunsets or rule phase-outs may be disregarded without legislative backup, formal reporting on deadlines and extensions and non-extensions, and disclosing ratios of what gets contained and what gets discarded helps quantify whether streamlining or supervision really happens. If the answer turns out to be no, we have automatically generated the record capable of prompting Congress to do so. Here are a few criteria by which agencies should routinely evaluate outstanding rules:

- Which rules can be eliminated or relaxed without becoming bogged down in scientific disputes over risk assessment? Which rules are just silly? Which are paternalistic?

- Are the data that regulated entities are required to report being used at all?

- Does the rule create unfavorable health costs (such as health costs of advertising restrictions on some needed drug)?

Such questions can help isolate burdensome or counterproductive rules. The president has already encouraged retrospective review with E.O. 13563's call for agencies to develop and execute plans to "periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome".

OMB *Reports to Congress* do make several worthwhile recommendations for regulatory improvement, including:

> [F]acilitating public participation and fostering transparency by using plain language; making objective, evidence-based assessment of costs and benefits an integral part of the regulatory decision-making process; using retrospective review to inform decisions about specific rules and, more broadly, about the appropriate interpretation of impact analyses that feature incomplete quantification; and, finally, aligning agency priorities across all levels of internal hierarchy. (US OMB OIRA, 2013: 5)

These are useful steps. However, besides reviewing the limited implementation of certain parts of E.O. 13563, including "regulatory look back, reducing paperwork burdens, simplifying government communications, and promoting long-run economic growth and job creation via international regulatory cooperation" (US OMB OIRA, 2013: 5), little about aggressively reducing existing regulation appears in OMB reports. Agency RIAs and the entire executive branch review process should reflect a higher burden of proof regarding rules' value. Where agency analyses under the various executive orders appear not to justify a rule, OMB should be more forthright about saying so, and it should challenge non-major rules as well.

OMB could recommend modifications to entire regulatory programs based on plain common sense, regardless of executive orders. OMB might note costs of presumably beneficial regulations, and compare those benefits to superior advantages available elsewhere (hiring policemen or firemen, dividing or painting highways). In other words, OMB has the experience and know-how to create a benefit "yardstick" to objectively critique high-cost, low-benefit rules (which can help inform the "Transparency Report Card" we will cover shortly). The president can continue pressing agencies about rule reductions, and demand that they rank regulations and show that their least effective rules are superior to another agency's rules. Findings should be published.

Again, the president's leadership role can legitimize the task of eliminating rules, of rolling government back from the places it should not be.

Reduce dollar thresholds that trigger Regulatory Impact Analyses

Non-major rule costs get disregarded since analysis is not required. Review is accordingly non-existent and burdens unheeded. The Federal Communications Commission's open internet ("net neutrality") order was not regarded as significant, only a "prophylactic" rule, for example (Federal Communications Commission, 2011), despite huge industry-altering effects.

During the Carter-era regulatory review programs, when the $100-million major-rule threshold originated, there were a "suspiciously large number of regulations … projected to cost $90–95 million" (DeMuth, 1980: 21). Rules may have exceeded the threshold but were ignored or understated just enough by agencies to evade scrutiny. Along with reinstating moratoria, devising criteria for a periodic review and stressing review driven by executive order, the president (or of course Congress) may also reduce the flow of rules that escape analysis simply by lowering the threshold at which written Regulatory Impact Analyses are asked to be prepared.

The current $100-million threshold translates into written analysis for a handful of rules. More rules would be brought within that umbrella simply by lowering the bar to $50 million or $25 million. Doing so will not automatically improve how RIA tallies of costs and (especially) benefits are performed. In fact, if net-benefit analysis rather than cost-analysis persists, RIA exploitation for dubious net benefits will continue. Further, some agencies may strategically adapt behavior to the likelihood of review and present major rules larger than truly intended in order to negotiate and give the appearance of compromise (DeMuth, 1980: 21), but expanding their sphere of influence.

Such behaviors can be confronted: President Reagan's E.O. 12291 permitted the Director of OMB to order rules to be treated as major even when at first blush they do not appear to be, thereby activating the RIA requirement. Far fewer rules should escape cost analysis and subsequent reconsideration and review.

Scrutinize all agency decrees that affect the public, not just "rules"

To what extent do agency guidance documents get review? With tens of thousands of agency proclamations annually, it does not suffice for executive agency "significant" or "major" rules to receive OMB review. Nor is it enough any longer to include independent agencies. Regulatory dark matter is gaining ground on the readily observable.

Today, "undocumented regulation" like presidential and agency memos, guidance documents, bulletins, and press releases may enact policy directly or indirectly (Crews, 2014c) or even by veiled threat (Brito, 2014). Interpretations may be articulated by agencies, and regulated parties pressured to comply without an actual formal regulation or understanding of costs. The EPA Clean Water Act jurisdictional guidance on "Waters of the United States" is a prominent example we noted earlier. To address this loophole, former OIRA director John Graham and James Broughel propose options such as reinstating a George W. Bush requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents (Graham and Broughel, 2014).

As a July 2012 report by the US House of Representatives Committee on Oversight and Government Reform expressed it:

> Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However … they are increasingly used to effect policy changes, and they

> often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply. (2011: 7)

Policy making ought not to have descended to this level. All potentially significant decrees by agencies need scrutiny, not just "rules". It is the case that agencies will attempt to strategically adapt to the new scrutiny (Shapiro, 2014) but a highly engaged executive, and Congress, can draw attention to and definitively address quasi- or semi-regulatory activity.

Require publication of rules in the Unified Agenda of Federal Regulations

There are rules, and then there are rules. Agencies are supposed to alert the public to their priorities in the semi-annual Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions (the "Agenda"). It normally appears in the *Federal Register* each fall and, minus the Regulatory Plan, each spring. The Agenda is intended to give researchers a sense of the flow in the regulatory pipeline as it details rules recently completed, plus those anticipated within the upcoming 12 months by federal departments, agencies, and commissions. But, there is a whopper of a disclaimer, as the *Federal Register* noted: "The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it" (NARA OFR, 2009: 64,133). An executive order, and legislation, should command that agencies *do* confine their regulatory activities to those appearing in the Agenda.

Tally federal regulations that accumulate as businesses sectors grow

The observation that there is no free lunch may hold particularly for the small businessperson. The "Small Business Anthem", heard on the radio program, the *Small Business Advocate® Show* (SmallBusinessAdvocate.com), goes in part:

> Even though you make payroll every Friday,
> You don't have a guaranteed paycheck.
> You're a small business owner, and you eat what you kill.

For perspective on the small-business regulatory climate, the list in *table* 5.3 shows basic, non-sector-specific laws and regulations that affect small businesses as they

Table 5.3. Federal Workplace Regulation Affecting Growing Businesses

1 employee

- Fair Labor Standards Act (overtime, minimum wage [27% min. wage increase since 1990]).
- Social Security matching and deposits.
- Medicare, Federal Insurance Contributions Act (FICA).
- Military Selective Service Act (allowing 90 days leave for reservists, rehiring of discharged veterans).
- Equal Pay Act (no sex discrimination in wages).
- Immigration Reform Act (eligibility that must be documented).
- Federal Unemployment Tax Act (unemployment compensation).
- Employee Retirement Income Security Act (standards for pension and benefit plans).
- Occupational Safety and Health Act.
- Polygraph Protection Act.

4 employees—all the above, plus:

- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship).

15 employees—all the above, plus:

- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping).
- Americans with Disabilities Act (no discrimination, reasonable accommodations).

20 employees—all the above, plus:

- Age Discrimination Act (no discrimination on the basis of age against those 40 and older).
- Older Worker Benefit Protection Act (benefits for older workers to be commensurate with younger workers).
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination).

25 employees—all the above, plus:

- Health Maintenance Organization Act (HMO option required).
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty).

50 employees—all the above, plus:

- Family and Medical Leave Act (12 weeks unpaid leave or care for newborn or ill family member).

100 employees—all the above, plus:

- Worker Adjustment and Retraining Notification (WARN) Act (60-day written notice of plant closing)—Civil Rights Act (annual EEO-1 form).

grow. This list, however, assumes non-union, non-government contractor firms with interstate operations and a basic employee benefits package. Only general workforce-related regulation is included: omitted are categories such as environmental and consumer product safety regulations and regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms. For those enterprises, numerous other laws and regulations would apply (For one industry-specific roundup, see National Automobile Dealers Association, 2014).

By executive order or statute, the federal government must build upon this by revealing how federal regulations now accumulate *in specific sectors*. This will give some idea of impacts in particular industries and economic subdivisions, which can help guide reforms and liberalization.

Compile an Annual Regulatory Transparency Report Card

Measure what is measurable, and make measurable what is not so.

—Frequently attributed to Galileo but, alas, probably not his.

Improving annual public disclosure for regulatory output and trends is one realm in which the president can unambiguously undertake initiatives on his own without statutory regulatory reform or congressionally stipulated transparency reporting. An annual Regulatory Transparency Report Card detailing agency regulatory output in digest form, incorporating the current year's data plus historical tables could be encapsulated and published as a chapter in the Federal Budget, the *Economic Report of the President*, the OMB *Benefits and Costs* report, or some other format. Before 1994, information such as numbers of proposed and final rules, and major and minor rules was collected and published in the appendix, Annual Report on Executive Order 12291, in the annual *Regulatory Program of the United States Government* (US OMB, 1992). This report identified what actions the OMB took on proposed and final rules it reviewed per that order, and the preceding 10 years' data, with information on specific regulations that were sent back to agencies for reconsideration. The *Regulatory Program* ceased when the Clinton administration's E.O. 12866 replaced E.O. 12291 with the aforementioned reaffirmation of agency primacy.

Significant but valuable *non-cost* information should also be published. Agencies and the OMB could assemble quantitative and non-quantitative data into charts and historical tables, enabling cross-agency comparisons. Presenting ratios of rules with, *and without*, benefit calculations helps reveal whether or not the regulatory enterprise can be deemed as doing the good it claims. Table 5.1 above showing the "Funnel of Gov" in part aims at this conceptualization.

Table 5.4 gives a sample of what should be officially summarized and published annually by program, agency and grand total, and with historical tables (Crews, 2011b).

Some elements shown here were incorporated H.R. 2804, the ALERRT Act (Achieving Less Excess in Regulation and Requiring Transparency), which, as noted, passed the House in 2014 (but not the Senate) and, before that, into S. 3572, the Restoring Tax and Regulatory Certainty to Small Businesses Act introduced by Sen. Olympia Snowe (R-Maine) in the 112th Congress, but never passed.

Regular highlight reporting accompanied by the affirmation of a presidential cheerleader would reaffirm the importance of disclosure and, in the process, expose to what extent Congress itself causes regulatory excess. Congress delegated

Table 5.4: Annual Regulatory Transparency Report Card: Recommended Official Summary Data by Program, Agency & Grand Total (with Five-Year Historical Tables)

- Tallies of economically significant, major, and non-major rules by department, agency, and commission.
- Numbers and percentages of rules affecting small business.
- Depictions of sectoral regulatory accumulation.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages lacking cost estimates, with explanations for absence of cost estimates.
- Federal Register analysis, including numbers of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the GAO in its database of reports on regulations.
- Rankings of most active executive and independent rule-making agencies.
- Identification of rules that are deregulatory rather than regulatory.
- Allegedly "non-regulatory" rules that affect internal agency procedures alone (important as federal government expansion into new realms of activity displaces the private sector).
- Number of rules new to the Unified Agenda; number that are carry-overs from previous years.
- Numbers and percentages of rules facing 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 the OMB and action taken (echoing figure 5.1 above).

too much power to agencies, and Congress imposed the statutory deadlines that can undermine regulatory analysis. Disclosure will help shift the narrative back to congressional accountability for what agencies do, which is a proper stance.

Designate multiple classes of major rules in transparency reporting

Above, we advocated lowering cost thresholds for regulatory review. For decades, regulations have been loosely divided into those that are major or economically significant (over $100 million in annual impacts) and those that are not. But this gives only a rough idea of minimum costs. For example, given the definition an economically significant rule, we can infer that the 200 major rules in the 2014 year-end *Unified Agenda*, when fully implemented someday, will have economic impacts of around $20 billion annually (100 million times 200 rules), minus any rules among that 200 that reduce costs (Crews, 2014b).

A Regulatory Transparency Report like that described above should obviously include the number of economically significant (or major) rules but this designation should be expanded to disclose more than a minimum level of costs. OMB could develop guidelines recommending that agencies separate economically significant rules into categories representing increasing costs and present them in the Regulatory Transparency Report. Here is one suggested breakdown:

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

This itemization is merely one option for presenting numbers within each category, and was incorporated in the Restoring Tax and Regulatory Certainty to Small Businesses Act (S. 3572) and the ALERRT Act (H.R. 2804), but the executive branch could facilitate such reporting on its own. For example, some cost estimates of the EPA New Source Performance Standards rule figure about $738 million annually (US EPA, 2001). Appreciating when EPA is imposing “Category 2” rules and the like would be more helpful shorthand than knowing about economic significance. This could be especially useful as Congress explores formal hearing requirements for mega rules, such as the House passed in January 2015 as part of the Regulatory Accountability Act.

Report separately on economic, health and safety, and environmental regulations

While economic regulation had lost favor in the 1980s compared to environmental or health and safety rules, there has been a resurgence of it in banking, energy, telecommunications, and other realms. Alas, these are often the domain of independent agencies not subject to central OMB review. This is ironic since the origins of executive branch regulatory review were driven in part by the recognition that economic regulation worked against the public interest. Such views were sustained by OMB's one-time willingness to adopt the premise that some economic regulation "produces negligible benefits" (US OMB, 1997).

Indeed, whether the proposition is "fine tuning" of the macro economy, or direct government management of an specific industry's output and prices (such as agricultural quotas or electricity generation prices) or entry into an industry (such as trucking), coercive economic interference lacks legitimacy. The reality of governmental failure and acknowledgement of cronyism in economic concerns is more evolved now, as is (among some) an appreciation of the impossibility of central economic planning and calculation (von Mises, 1920). Economic regulations can no longer be presumed rooted in the public interest; the more defensible default assumption is that they serve the regulated and their captured bureaus.

However today, an engaged executive's and even Congress' ability to address economic regulation as opposed to health and safety rules is undermined by that lack of oversight of independent agency rules that increasingly govern. In presenting itself as authoritative on aggregate regulatory net benefits, the annual *Report to Congress* conceals more than it reveals in this regard.

Since the role of health and safety regulation differ so from economic regulation, separate presentation—in the *Report to Congress*, in any Regulatory Transparency Report or elsewhere—are important from the standpoint of comparing the relative merits of regulations. Conceptual differences render meaningless any comparison of, for example, purported economic benefits from an energy regulation with lives saved by a safety regulation, so such categories of costs should be presented and analyzed separately and congressional accountability for outcomes established.

With executive buy-in, to the extent that analyses such as the OMB *Report to Congress* and other investigations help in delegitimizing economic regulation, such realms can be freed from government purview altogether (a utopian thought, as aggressions as recent as net neutrality clearly attest). But, with that new rationality we would leave Congress and OMB with the "lesser" task of documenting and controlling costs of environmental, health, and safety regulations. Then, where health and safety rules reveal that they too are based upon private interest or are detrimental to the public, a motivated executive can urge their rollback as well. Isolating categories for analysis is a first step toward enabling this greater oversight.

Improve assessments of "transfer" costs

Paralleling the distinction between "economic" and "social" regulation, process rulings like leasing requirements for federal lands and revenue collection standards and service-oriented administrative paperwork—such as that for business loans, passports and obtaining government benefits already appear separately in OMB reports, and in some cases the federal *Information Collection Budget* (US OMB OIRA, 2014b).

Certain of these administrative costs represent not regulation as such, but "services" secured from government by the public. But that does not make it appropriate to fail in actively disclosing and questioning them, or in anticipating their entailing future costs or having displacement or deadweight effects. Similarly, it is important not to lump service-related paperwork in the same category with the tax compliance burden and other involuntary, non-service-related process costs such as workplace reporting requirements. All these are hardly minimal and should be tallied and reduced where possible.

OMB has begun recognizing that these transfers "may impose real costs on society", may "cause people to change behavior", and result in "deadweight losses"; OMB expressed that it "will consider incorporating any such (cost-benefit) estimates into future Reports" (US OMB, 2013: 22). More needs to be done to analyze the costs of these transfers and their impacts on individual rights and economic growth.

As more of the economy—such as health care—succumbs to federal supervision, there is less inclination for subsequent generations of Americans to recognize what government does as regulation or interference; it just "is". This becomes more of a concern as quasi-regulation grows; addressing it all is an increasingly important task of the executive branch and Congress.

Acknowledge and minimize indirect costs of regulations

In its *Report to Congress*, OMB allows that "many regulations affect economic growth indirectly through their effects on intermediate factors" (US OMB, 2013: 48), but is non-committal on whether the net effects are positive or negative. If indirect costs of regulation are too difficult for policy makers themselves to compute, then government cannot credibly argue that compliance is feasible or fair or affordable.

Compliance-focused regulatory cost estimates may inadvertently or purposely omit indirect costs. That uncertainty requires that indirect costs be guarded against and minimized, since some have argued that indirect costs of regulation could even exceed the magnitude of direct costs (Laffer and Bord, 1992: 18), and since OMB itself occasionally has acknowledged that regulatory costs could be many times the amount it presents annually attaching to major rules (US OMB OIRA, 2002: 37).

Fairness and accountability in government require acknowledging indirect costs. Without addressing indirect effects, officials will systematically underestimate and downplay regulatory impacts and over-regulate. Taxing and spending are substitutes for regulation, and if regulation is perceived as an artificially cheap alternative means of achieving governmental ends, policy makers will exploit it and it will increase. Allowing regulators to disregard entire categories of indirect costs (such as bans or disapprovals of pipelines or antitrust regulation or product bans) could inspire more regulations of that very type. Imagine acknowledging only direct costs of regulations—such as the engineering costs of controlling an emission—while ignoring outright input or product bans as indirect costs. Under such scenarios, many regulations could be expected to feature bans or disapprovals so that regulators could appear to avoid imposing high regulatory costs.

Recognizing and in a level-headed manner incorporating indirect cost into the analysis presents serious challenges but, if the executive branch and Congress emphasize cost over net-benefit assessments, manpower and resources are freed for a wider assessment of indirect regulatory costs.

Dealing with indirect costs, and all costs for that matter, will ultimately require congressional approval of final agency rules, because complete cost assessments and quantification are impossible for third parties who are mere mortals (Buchanan, 1969: 42–43), no matter which government agency they work for. This points to an important principle: the aim of annual regulatory accounting cannot be not solely accuracy, but to make Congress more accountable to voters for regulatory impacts, and to induce agencies to minimize indirect costs by ensuring that they "compete" before Congress for the "right" to regulate. Even imperfect recognition of the magnitude of indirect costs can provide a basis for allocating scarce resources in loose correspondence with where a (perhaps one day) more accountable Congress believes benefits to lie. The presidential pen and phone can raise the profile of this important concern.

Formalize "do not regulate" reporting and offices

Some have called for an independent congressional office of regulatory analysis resembling the Congressional Budget Office (US HR CGRO, 1998). This would go beyond more resources for OIRA or agency economics. There are scenarios in which the independent office could be a good idea, such as if the entity were formally chartered with an anti-regulatory "bias" to offset the pro-regulatory bias prevailing in the entire rest of the federal government, including its independent agencies. Some formal entity could highlight the desirability of market-oriented alternatives over command options for every regulation, and continually present the case for eliminating existing rules and create plans for elimination of regulatory agencies themselves. A much stronger version of OIRA or a body that replaces it, in conjunction with agency law and economics personnel of laissez-faire persuasion, could bolster this "Bureau of No" role.

Conclusion

> *Joyfully to the breeze royal Odysseus spread his sail, and with his rudder skillfully he steered.*
>
> —Homer, *The Odyssey* (trans. G.R. Palmer).

The modern conceit is that untethered regulation and rule making always work. They do not; overreach by bureaucracy and the administrative state may not only impede economic efficiency but also undermine health, safety, and environmental progress. Healthy government requires recognizing downsides to coercive intervention; it requires vigilant legislative and executive institutions and mindsets that seek reasons *not* to add yet another rule or decree to the existing tens of thousands. Meanwhile the public has a right to know the ways federal agencies have harmed and harm that which they oversee, and how those negatives may propagate beyond the agency throughout the economy and society.

Despite semi-formal central review of economic, environmental, and health and safety regulations and their accompanying paperwork since the late 1970s and the 1980s, a significant and escalating regulatory burden is apparent:

- costs of regulation and realms subject to regulation have grown, while benefits remain ambiguous;
- entire sectors of society experience regulation from independent agencies that get little scrutiny;
- *Federal Register* page counts occupy record heights;

- economically significant and major rules reviewed annually have increased notably over the past decade;
- regulatory dark matter outside the normal notice and comment procedure lacks adequate scrutiny.

It is no longer enough just to cut federal spending and balance the budget. This essay has stressed the need to offset the march of bureaucracy and regulation and proposed ideas for doing that, even though the current reality assures us that the Constitution is not coming to the rescue in the near term. There is much about which to be optimistic; the ideas that created the American experiment in the first place remain "discovered", available in the public domain. One might say, there will always be an America—somewhere. To keep it here, we need merely the rocks off of America's economic lawn. Given today's economy, there should be bipartisan momentum for economic and regulatory reform, some animated new constituency for limited government.

The regulatory process, therefore, itself needs more regulation. The executive and legislative branches may not agree on congressional reassertion of its authority with respect to making of law and regulation. While it would be preferable that Congress engage by implementing the Regulatory Improvement Act, the REINS Act, and other measures that directly limit agency authority, those face veto threat and must await a change in the presidency. Still, many recommendations presented here can be implemented by executive action, by the same pen and phone now used to expand the state. However it happens, the new normal needs to be one that ensures that, if an expensive or burdensome regulation is enacted, elected representatives are on record for or against, and accountable to voters.

The federal regulatory enterprise increasingly affects many, and changes are likely one way or another. With conventional options to restore liberties and elevate the rule of law exhausted or ignored, the states themselves may address the federal government's expansion by taking rightful powers back from Congress and the executive branch. The Constitution's Article V does provide for the states to call a convention to amend the Constitution and restore balance of power, and several states are pursuing that option (Brown, 2014). One proposal with respect to over-regulation specifically is the "Regulation Freedom Amendment" that would empower two thirds of the states to force Congress to propose said amendment. The amendment would stipulate that, in any given instance, a quarter of the members of either the House or the Senate could require Congress to vote on a significant federal regulation, very much like the REINS Act legislation would do (Buhler, 2013). Such as step can be avoided by reconsidering the regulatory state via recommendations presented here. The modern statesman's primary task is to double GDP, rather than to double spending or regulatory burdens, no matter the political party.

References

Action Aid and Competitive Enterprise Institute (2011). Information Quality Act Request for Correction Regarding Impacts of Biofuel Mandates on Global Hunger and Mortality. Filing submitted to US Environmental Protection Agency Information Quality Guidelines Staff (October 13). Statement at: <http://cei.org/news-releases/actionaid-usa-cei-target-ethanol-fuel-programs-epa-filing>; petition at: <http://cei.org/sites/default/files/Data%20Quality%20Request%20Oct%20%2013.pdf>.

Adler, Jonathan H. (2013). Placing "REINS" on Regulations: Assessing the Proposed REINS Act. *New York University Journal of Legislation and Public Policy* 1; Case Legal Studies Research Paper No. 2012-33. Available at SSRN: <http://ssrn.com/abstract=2167074>.

Associated Press (2009). Obama Orders Halt to Pending Regulations for Review (January 20). <http://www.foxnews.com/politics/2009/01/20/obama-orders-halt-pending-regulations-review/>.

Bloomberg Business (1991). Dan Quayle, Regulation Terminator (November 3). <http://www.bloomberg.com/bw/stories/1991-11-03/dan-quayle-regulation-terminator>.

Bolton, Alex, Rachel Augustine Potter, and Sharece Thrower (2014). How Politics and Organizational Capacity Influence OIRA Rule Review. White Paper (May 2). <http://www.lsa.umich.edu/UMICH/polisci/Home/Events/Thrower,%20Presidential%20Oversight%20and%20Regulatory%20Delay.pdf>.

Brennan, Patrick (2015). Study: 2014's Employment Boom Almost Entirely Due to the Expiration of Unemployment Benefits Obama Wanted to Renew. *National Review Online* (January 26). <http://www.nationalreview.com//corner/397174/study-2014s-employment-boom-almost-entirely-due-expiration-unemployment-benefits-obama>.

Brito, Jerry (2014). "Agency Threats" and the Rule of Law: An Offer You Can't Refuse. Mercatus Center White Paper. <http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_553_Brito.pdf>.

Brown, Keri (2014). NC Leaders Push Momentum for Constitutional Convention. *National Public Radio* (October 28). <http://wfdd.org/post/nc-leaders-push-momentum-constitutional-convention>.

Buchanan, James M. (1969). *Cost and Choice: An Inquiry in Economic Theory*. University of Chicago Press.

Bueno de Mesquita, Bruce, and Alastair Smith, Randolph M. Siverson and James D. Morrow (2003). *The Logic of Political Survival*. MIT Press.

Buhler, Roman (2013). Op-Ed: Indiana Can Rein in Federal Regulators. *Indiana Policy Review* (December 5). <http://inpolicy.org/2013/12/op-ed-indiana-can-rein-in-federal-regulators/>.

Carey, Maeve P. (2014). *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*. Congressional Research Service (November 26). <http://fas.org/sgp/crs/misc/R43056.pdf>.

Casselman, Ben (2013). Risk-Averse Culture Infects U.S. Workers, Entrepreneurs. *Wall Street Journal* (June 2). <http://online.wsj.com/news/articles/SB10001424127887324031404578481162903760052?mg=reno64-wsj>.

Casselman. Ben (2014). The Slow Death of American Entrepreneurship. *FiveThirtyEight* Economics (May 15). <http://fivethirtyeight.com/features/the-slow-death-of-american-entrepreneurship/>.

CBS and Associated Press (2014). Report: More Than 92 Million Americans Remain Out of Labor Force. *CBS DC* (May 2). <http://washington.cbslocal.com/2014/05/02/report-more-than-92-million-americans-remain-out-of-labor-force/>.

CNN Wire Staff (2010). Kahn, the Architect of Airline Deregulation, Dies at 93. CNN (December 28). <http://www.cnn.com/2010/BUSINESS/12/28/obit.kahn/>.

Competitive Enterprise Institute [CEI] (1994). *Soft Targets for Elimination at Energy, Interior, & EPA*. <https://cei.org/sites/default/files/Dec%201994%20-%20Marlo%20Lewis%20-%20Energy%20-%20Dirty%20Dozen.pdf>.

Congressional Budget Office [CBO] (2015). *The Budget and Economic Outlook: 2015 to 2025*. January. <https://www.cbo.gov/sites/default/files/cbofiles/attachments/49892-Outlook2015.pdf>.

Copeland, Curtis W. (2014). Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress. White Paper (July 15). <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/07/25/National-Politics/Advance/Graphics/CRA%20Report%200725.pdf>.

Cox, Braden, and Clyde Wayne Crews Jr. (2005). *Communications without Commissions: A National Plan for Reforming Telecom Regulation*. Issue Analysis 2005 No. 9 (October). Competitive Enterprise Institute. <http://cei.org/pdf/4911.pdf>.

Crain, Nicole V., and W. Mark Crain (2010). *The Impact of Regulatory Costs on Small Firms*. Report prepared for the Small Business Administration, Office of Advocacy (September). Contract No. SBAHQ-08-M-0466. <http://www.sba.gov/advocacy/7540/49291>.

Crain, W. Mark (2005). *The Impact of Regulatory Costs on Small Firms*. Report prepared for the Small Business Administration, Office of Advocacy (September). Contract no. SBHQ-03-M-0522. <https://www.sba.gov/sites/default/files/files/rs264tot.pdf>.

Crain, W. Mark, and Nicole V. Crain (2014). *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*. National Association of Manufacturers (September 10). <http://www.nam.org/~/media/A7A8456F33484E498F40CB46D6167F31.ashx>.

Crain, W. Mark, and Thomas D. Hopkins (2001). *The Impact of Regulatory Costs on Small Firms*. Report prepared for the Small Business Administration, Office of Advocacy (October). RFP No. SBAHQ-00-R-0027. <http://www.sba.gov/advo/research/rs207tot.pdf>.

Crandall, Robert (1992). *Why Is the Cost of Environmental Regulation So High?* Center for the Study of American Business, Policy Study Number 110 (February).

Crews Jr., Clyde Wayne (1998). Promise and Peril: Implementing a Regulatory Budget. *Policy Sciences* 31, 4 (December): 343–369. <http://link.springer.com/article/10.1023%2FA%3A1004483131309>.

Crews Jr., Clyde Wayne (2011a). Nice Talk. When's the Jobs Speech? *Forbes.com* (September 8). <http://www.forbes.com/sites/waynecrews/2011/09/08/nice-talk-whens-the-jobs-speech/>.

Crews Jr., Clyde Wayne (2011b). *The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation*. Issue Analysis 2001 No. 4 (October). Competitive Enterprise Institute. <http://cei.org/sites/default/files/Wayne%20Crews%20-%20The%20Other%20National%20Debt%20Crisis.pdf>.

Crews Jr., Clyde Wayne (2013a). *Boosting Regulatory Transparency*. Comments of the Competitive Enterprise Institute on the Office of Management and Budget's 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act. Document ID: OMB_FRDOC_0001-0118 (July 31). <https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/comments/comments_of_wayne_crews_competitive_enterprise_institute_on_2013_draft_report_to_congress_on_the_benefits_and_costs_of_federal_regulation.pdf>.

Crews Jr., Clyde Wayne (2013b). Federal Regulation: The Costs of Benefits. *Forbes.com* (July 7). <http://www.forbes.com/sites/waynecrews/2013/01/07/federal-regulation-the-costs-of-benefits/>.

Crews Jr., Clyde Wayne (2014a). 2014 Ends with a 78,978-Page *Federal Register*; 3,541 Rules and Regulations. *OpenMarket* (December 31). <https://cei.org/blog/2014-ends-78978-page-federal-register-3541-rules-and-regulations>.

Crews Jr., Clyde Wayne (2014b). Big Sexy Holiday Fun with the 2014 Unified Agenda of Federal Regulations. *Forbes* (November 24). <https://cei.org/content/big-sexy-holiday-fun-2014-unified-agenda-federal-regulations>.

Crews Jr., Clyde Wayne (2014c). Despotism-Lite? The Obama Administration's Rule By Memo. *Forbes.com* (July 1). <http://www.forbes.com/sites/waynecrews/2014/07/01/despotism-lite-the-obama-administrations-rule-by-memo/>.

Crews Jr., Clyde Wayne (2014d). *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*. Competitive Enterprise Institute. <http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf>.

Crews Jr., Clyde Wayne (2014e). *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway.* 2015 Edition (September 29). Available at SSRN: <http://ssrn.com/abstract=2502883>; <http://dx.doi.org/10.2139/ssrn.2502883>.

Crews Jr., Clyde Wayne (2015). CEI's 2015 Unconstitutionality Index: 27 Regulations for Every Law. *OpenMarket* (January 4). <https://cei.org/blog/ceis-2015-unconstitutionality-index-27-regulations-every-law>.

Davis, Bob (1992). Bush Preparing Program for Agencies to Weed Out Federal Rules Periodically. *Wall Street Journal* (September 4).

Davis, Susan (2015). State of the Union: 7 Things to Watch. *USA Today* (January 19). <http://www.usatoday.com/story/news/politics/2015/01/18/obama-sotu-preview/21958115/>.

Dawson, John W., and John J. Seater (2013). Federal Regulation and Aggregate Economic Growth. <http://www4.ncsu.edu/~jjseater/regulationandgrowth.pdf>. Forthcoming in *Journal of Economic Growth*. Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223315>.

Dearie, John, and Courtney Geduldig (2013). *Where the Jobs Are: Entrepreneurship and the Soul of the American Economy*. John Wiley & Sons.

DeMuth, Christopher C. (1980). Constraining Regulatory Costs, Part One: The White House Review Programs. *Regulation* (January/February): 13–26. <http://www.aei.org/publication/constraining-regulatory-costs-part-i-the-white-house-review-programs/>.

Dilger, Robert J., and Richard S. Beth (2014). *Unfunded Mandates Reform Act: History, Impact, and Issues*. Congressional Research Service (November 17). <http://fas.org/sgp/crs/misc/R40957.pdf>.

Dudley, Susan E. (2011). Prepared Statement of Director, George Washington University Regulatory Studies Center, Trachtenberg School of Public Policy and Public Administration; Hearing on Federal Regulation: A Review of Legislative Proposals, Part II; Before the Homeland Security and Governmental Affairs Committee, United States Senate (July 20). <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf>.

Executive Office of the President, Office of Management and Budget [EOoP OMB] (2015). Statement of Administration Policy: H.R. 185 – Regulatory Accountability Act of 2015 (January 12). <https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr185r_20150112.pdf>.

Federal Communications Commission (2011). Preserving the Open Internet. *Federal Register* 76, 185 (September 23). <http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf >.

Federal Register (no date). Retrospective Review Documents & Agency Plans: Implementing Executive Order 13563 of January 18, 2011. Regulatory Improvement. <https://www.federalregister.gov/blog/learn/regulatory-improvement/retrospective-review-documents>.

Firey, Thomas A. (2011). A Salute to Carter, Deregulation's Hero. *Herald-Mail.com* (February 20). <http://articles.herald-mail.com/2011-02-20/opinion/28614285_1_jimmy-carter-deregulation-peanut-farmer>.

Ford, Paul Leicester (1892). *Essays on the Constitution of the United States Published During Its Discussion by the People, 1787–1788*. Historical Printing Club. The Project Gutenberg EBook of Essays on the Constitution of the United States. <http://www.gutenberg.org/files/31891/31891-h/31891-h.html>.

Geddes, R. Richard. (1992). A Historical Perspective on Electric Utility Deregulation. *Regulation* (Winter): 75–82.

Gehrke, Joel (2012). 55 Percent of Small Business Owners Would Not Start Company Today, Blame Obama. *Washington Examiner* (September 26). <http://www.washingtonexaminer.com/55-percent-of-small-business-owners-would-not-start-company-today-blame-obama/article/2509069>.

Gillespie, Nick (2014). What Is the Biggest Barrier to Innovation in US? Government, Government, and Government. Reason. *Hit & Run Blog* (November 12). <http://reason.com/blog/2014/11/12/what-is-the-biggest-barrier-to-innovatio>.

Gordon, John Steele (2004). *An Empire of Wealth: The Epic History of American Economic Power*. Harper-.

Graham, John D., and James W. Broughel (2014). Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act. Mercatus Center White Paper. <http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf>. This paper is a summary of the Mercatus papers and published in the *Harvard Journal of Law & Public Policy* 1: 30–53.

Hamburger, Philip (2014a). *Is Administrative Law Unlawful?* Univ. of Chicago Press.

Hamburger, Philip (2014b). The History and Danger of Administrative Law. *Imprimis* 43, 9. <http://imprimisarchives.hillsdale.edu/file/archives/pdf/2014_09_Imprimis.pdf>.

Hamilton, Alexander (1788). *The Executive Department Further Considered*. Federalist Papers No. 70. From the New York Packet, March 18, 1788. Yale Law School, Lilllian Goldman Law Library. <http://avalon.law.yale.edu/18th_century/fed70.asp>.

Hathaway, Ian, and Robert E. Litan (2014). Declining Business Dynamism in the United States: A Look at States and Metros. Economic Studies at Brookings (May). Brookings Institution. <http://www.brookings.edu/~/media/research/files/papers/2014/05/declining%20business%20dynamism%20litan/declining_business_dynamism_hathaway_litan.pdf>.

Higgs, Robert (1987). *Crisis and Leviathan: Critical Episodes in the Growth of American Government*. Oxford University Press.

Hopkins, Thomas D. (1976). An Evaluation of the Inflation Impact Statement Program. Prepared for the Economic Policy Board, by the Staff of the Council on Wage and Price Stability and the Office of Management and Budget. White Paper (December 7). <http://www.thecre.com/pdf/Ford_HopkinsReport.PDF>.

Hopkins, Thomas D. (1992). The Costs of Federal Regulation. *Journal of Regulation and Social Costs* 2, 1 (March): 5–31.

Hopkins, Thomas D. (1995). The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress. Office of the Chief Counsel for Advocacy, US Small Business Administration (October). <http://www.sba.gov/advo/laws/archive/law_brd.html>.

Howell, William G. (2013). *Thinking about the Presidency: The Primacy of Power*. Princeton University Press.

Ingraham, Christopher (2014). U.S. Businesses Are Being Destroyed Faster than They're Being Created. Washington Post (May 5). <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/05/u-s-businesses-are-being-destroyed-faster-than-theyre-being-created/?hpid=z5>.

Investor's Business Daily (2015). Is American Business on Road to Extinction? Editorial (January 14). <http://news.investors.com/ibd-editorials/011415-734766-businesses-dying-faster-than-theyre-being-created.htm>.

Istook, Ernest (2014). Finally! After 17 Years, FDA About to Act on Breath Mint Label Regulation. *Washington Times* (August 6). <http://www.washingtontimes.com/news/2014/aug/6/istook-finally-after-17-years-fda-about-to-act-on-/?page=all>.

Istook, Ernest (2015). Consumers Pay the Tab as Feds Take on the Window Blind Menace. *Washington Times* (January 21. <http://www.washingtontimes.com/news/2015/jan/21/ernest-istook-window-blind-safety-could-cost-consu/>.

Jones, Jeffrey M. (2013). Record High in U.S. Say Big Government Greatest Threat. *Gallup* (December 18). <http://www.gallup.com/poll/166535/record-high-say-big-government-greatest-threat.aspx>.

Korte, Gregory (2015). Obama Veto Threats at Record Pace to Begin New Congress. *USA Today* (January 27). <http://www.usatoday.com/story/news/politics/2015/01/27/obama-veto-threats-january-pace/22357299/>.

Kritikos, Alexander S. (2014). Entrepreneurs and Their Impact on Jobs and Economic Growth. *IZA World of Labor* (May). <http://wol.iza.org/articles/entrepreneurs-and-their-impact-on-jobs-and-economic-growth>.

Kuhnhenn, Jim (2015). Good Presidential Muscle? It's In the Eye of the Beholder. *Associated Press/Yahoo News* (March 7). <http://news.yahoo.com/good-presidential-muscle-eye-beholder-144839604.html>.

Laffer III., William G., and Nancy Bord (1992). *George Bush's Hidden Tax: The Explosion in Regulation*. Backgrounder No. 905 (July 10). Heritage Foundation.

Leef, George (2014). Could Compact for America's Constitutional Amendment Stop the Federal Juggernaut? *Forbes*. <http://www.forbes.com/sites/georgeleef/2014/12/16/could-compact-for-americas-constitutional-amendment-stop-the-federal-juggernaut/>.

Link, A. (1954). *Woodrow Wilson and the Progressive Era 1910–1917*. Harper.

Little, Katie (2013). Fast Food CEO: How Govt Regulation Is Driving Us Abroad. CNBC (December 31). <http://www.cnbc.com/id/101302181>.

Mandel, Michael, and Diana G. Carew (2013). *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*. Policy Memo (May). Progressive Policy Institute. <http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf>.

Manheim, Frank T. (2009). *The Conflict over Environmental Regulations in the United States: Origins, Outcomes, and Comparisons with the EU and other Regions*. Springer.

Marks, Josh (2013). Obama: If Congress Doesn't Act on Climate Change, "I Will". *The National Memo* (February 13). <http://www.nationalmemo.com/obama-if-congress-doesnt-act-on-climate-change-i-will/>.

May, Randolph J. (2010). Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox. *Administrative Law Review* 62, 2 (Spring): 433–447. Available at SSRN: <http://ssrn.com/abstract=1624662>.

McCormick, Robert E., and Robert D. Tollison (1982). *Politicians, Legislation, and the Economy: An Inquiry into the Interest Group Theory of Government.* Martinus Nijhoff.

McNabb, Bill (2013). Uncertainty Is the Enemy of Recovery. *Wall Street Journal* (April 28). <http://online.wsj.com/news/articles/SB10001424127887323789704578443431277889520#printMode>.

Mendelson, Nina A., and Jonathan B. Wiener (2014). Responding to Agency Avoidance of OIRA. *Harvard Journal of Law and Public Policy* 37, 2 (April 20): 447–521. Also, University of Michigan Public Law Research Paper No. 415. Available at SSRN: <http://ssrn.com/abstract=2463491>.

Mercatus Institute (2014). Mercatus Releases Five Academic Articles in *Harvard Journal of Law and Public Policy*. Expert Commentary (May 13). <http://mercatus.org/expert_commentary/mercatus-releases-five-academic-articles-harvard-journal-law-and-public-policy>.

Merline, John (2011). Home Depot Co-Founder: Obama Is Choking Recovery. *Investor's Business Daily* (July 20). <http://www.investors.com/NewsAndAnalysis/Article/578920/201107201835/Marcus-Home-Truths-On-Jobs.aspx>.

Meyer, Ali (2014). Labor Force Participation Remains at 36-Year Low. *CNSNews* (December 5). <http://www.cnsnews.com/news/article/ali-meyer/labor-force-participation-remains-36-year-low-0>.

Miller III, James C., and William F. Shughart II, and Robert D. Tollison (1984). A Note on Centralized Regulatory Review. *Public Choice* 43: 83–88.

Millman, Gregory J., and Samuel Rubenfeld (2014). Compliance Officer: Dream Career? *Wall Street Journal* (January 15). <http://online.wsj.com/news/articles/SB10001424052702303330204579250722114538750>.

Moore, Stephen (2013). Bob Funk: Where the Jobs Are—and How to Get One. *Wall Street Journal* (September 20). <http://online.wsj.com/news/articles/SB10001424127887324492604579087044033601178>.

Mueller, Dennis C. (1989). *Public Choice II*. Cambridge University Press.

Murray, Iain (2014a). Lawmaker Excluded from CFPB Meeting, Unable to Hold Executive to Account. *National Review Online* (March 20). <http://www.nationalreview.com/corner/373839/lawmaker-excluded-cfpb-meeting-unable-hold-executive-account-iain-murray>.

Murray, Iain (2014b). Obamaloans: How Obama Plans to Use Dodd-Frank to Take Over the Financial Industry. *National Review Online* (January 15). <http://www.nationalreview.com/article/368499/obamaloans-iain-murray>.

Murray, Iain (2014c). The Worst Federal Agency. *National Review Online* (April 24. <http://www.nationalreview.com/article/376433/worst-federal-agency-iain-murray>.

National Archives and Records Administration, Office of the Federal Register [NARA OFR] (2009). *Federal Register* (December 7).

National Archives and Records Administration, Office of the Federal Register [NARA OFR] (various). Tutorials, History, and Statistics, *Federal Register* & CFR Publication Statistics – Aggregated Charts. <https://www.federalregister.gov/learn/tutorials>.

National Automobile Dealers Association (2014). *The Impact of Federal Regulations on Franchised Automobile Dealerships*. Prepared by the Center for Automotive Research (April). <http://www.nada.org/NR/rdonlyres/A873EF86-8A0D-4C28-A072-F8AF94D619F1/0/CAR_The_Impact_of_Federal_Regulations_on_Franchised_Automobile_Dealerships_.pdf>.

Niskanen Jr., William A. (1971). *Bureaucracy and Representative Government*. Aldine-Atherton.

Niskanen Jr., William A. (1992). Reduce Federal Regulation. In Edward H. Crane and David Boaz, eds., *Market Liberalism: A Paradigm for the 21st Century* (Cato Institute): 103–114.

Nou, Jennifer (2013). Agency Self-Insulation under Presidential Review. *Harvard Law Review* 126, 7 (May): 1,755–1,837. <http://harvardlawreview.org/wp-content/uploads/pdfs/vol126_nou.pdf>.

Office of Sen. Rand Paul (2015). Sen. Paul and Rep. Young Introduce REINS Act. Press Release (January 22). <http://www.paul.senate.gov/?p=press_release&id=1274>.

Olson, Mancur (1965). *The Logic of Collective Action*. Harvard University Press.

Olson, Walter (2001). Overlawyered & Overgoverned. *Reason.com* (March). <http://reason.com/archives/2001/03/01/overlawyered-overgoverned/print>.

Oreskovic, Alexei (2013). U.S. Regulator Tells Web Search Firms yo Label Ads Better. *Reuters* (June 25). <http://www.reuters.com/article/2013/06/26/us-internet-search-idUSBRE95P01O20130626>.

Perez v. Mortgage Bankers Association, Supreme Court of the United States, 2015 (Thomas concurring in judgment). <http://www.supremecourt.gov/opinions/14pdf/13-1041_0861.pdf>.

Pub.L. 79–404, Administrative Procedure Act (APA), 60 Stat. 237, enacted June 11, 1946.

Raso, Connor (2010). *Do Agencies Use Guidance Documents to Avoid Presidential Control?* Gellhorn-Sargentich Law Student Essay Competition. Yale Law School, Class of 2010. <http://www.americanbar.org/content/dam/aba/migrated/adminlaw/awardsprogram/Connor_Raso_GS_Essay_Winner.authcheckdam.pdf>.

Reuters (2012). U.S. Business Startups Rate at Record Low. US edition (May 2). <http://www.reuters.com/article/2012/05/02/us-usa-economy-businesses-idUSBRE84113G20120502>.

Richardson, Tom (2013). Small Companies Tend to Stay That Way In France. Letter to the *Financial Times* (July 18). <http://www.ft.com/cms/s/0/3107fbfe-ef1c-11e2-9269-00144feabdc0.html>.

Rogowsky, Robert A. (1989). Sub Rosa Regulation: The Iceberg beneath the Surface. In Roger E. Meiners and Bruce Yandle, eds., *Regulation and the Reagan Era: Politics, Bureaucracy and the Public Interest* (Homes & Meier): 209–222.

Rucker, Philip (2014). Obama's 7 State of the Union Talking Points. No. 6. "The Pen and Phone" Strategy. *Washington Post* (January 27). <http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/27/obamas-7-state-of-the-union-talking-points-no-6-the-pen-and-phone-strategy/>.

Schoenbrod, David S. (1993). *Power without Responsibility: How Congress Abuses the People through Delegation*. Yale University Press.

Schoenbrod, David S., and Jerry Taylor (2003). The Delegation of Legislative Powers. In Edward H. Crane and David Boaz, eds., *Cato Handbook for Congress: Policy Recommendations for the 108th Congress* (Cato Institute): 77–85. <http://www.cato.org/pubs/handbook/hb108/hb108-8.pdf>.

Seeking Alpha$^{\alpha}$ (2011). *Wynn Resorts' CEO Discusses Q2 2011 Results - Earnings Call Transcript*. Seeking Alpha Transcripts (July 18). <http://seekingalpha.com/article/279999-wynn-resorts-ceo-discusses-q2-2011-results-earnings-call-transcript?part=qanda>.

Shapiro, Stuart (2014). Agency Oversight as "Whac-A-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules. *Harvard Journal of Law & Public Policy* 37, 2: 523–552. <http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_523_Shapiro.pdf>.

Simon, Ruth, and Caelainn Barr (2015). Endangered Species: Young U.S. Entrepreneurs. *Wall Street Journal* (January 2). <http://www.wsj.com/articles/endangered-species-young-u-s-entrepreneurs-1420246116>.

Sink, Justin, and Scott Wong (2015). Veto Battles Set to Begin. *The Hill* (January 12). <http://thehill.com/homenews/administration/229116-veto-battles-set-to-begin>.

Smith, Sam (2012). Alcohol Industry Blames Flat Sales in Md. on 9% Tax. *MarylandReporter.com* (November 15). <http://marylandreporter.com/2012/11/15/alcohol-industry-blames-flat-sales-in-md-on-9-tax/>.

Syrett, Harold C. (1965). *The Papers of Alexander Hamilton,* Volume 9. Columbia University Press.

Stemberg, Thomas (2013). A New Law to Liberate American Businesses. *Wall Street Journal* (August 21). <http://online.wsj.com/article/SB10001424127887324653004578651852012786828.html?mod=WSJ_Opinion_LEADTop>.

Stigler, George J. (1971). The Theory of Economic Regulation. *Bell Journal of Economics and Management Science* 2 (Spring): 3–21.

Strauss, Peter L. (1992). The Rulemaking Continuum. *Duke Law Journal* 41, 6 (June): 1,463–1,489. <http://scholarship.law.duke.edu/dlj/vol41/iss6/3>.

Sunstein, Cass (2011). Washington Is Eliminating Red Tape. *Wall Street Journal* (August 23). <http://online.wsj.com/news/articles/SB1000142405311190359690457651865278310119>.

Sunstein, Cass (2012). Why Regulations Are Good—Again. *Chicago Tribune* (May 19). <http://articles.chicagotribune.com/2012-03-19/opinion/ct-oped-0319-regs-20120319_1_regulation-baseball-scouts-requirements>.

Tamny, John (2013). Sorry Class Warriors: Small Businesses Are Not the Backbone of the U.S. Economy. *Forbes* (October 6. <http://www.forbes.com/sites/johntamny/2013/10/06/sorry-class-warriors-small-businesses-are-not-the-backbone-of-the-u-s-economy/>

Traynor, Ben (2013). Roosevelt's Gold Confiscation: Could It Happen Again? *Telegraph* (April 3). <http://www.telegraph.co.uk/finance/personalfinance/investing/gold/9968494/Roosevelts-gold-confiscation-could-it-happen-again.html>.

Tollison, Robert D. (1982). Rent Seeking: A Survey. *Kyklos* 35: 575–602.

Turley, Jonathan (2014). *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws*. Written Statement. Committee on the Judiciary, United States House of Representatives (February 26). <http://jonathanturley.files.wordpress.com/2014/02/turley-enforcement-testimony.pdf>.

US Census Bureau (2014). *Firm Characteristics Data Tables*. Business Dynamics Statistics (September 25). <http://www.census.gov/ces/dataproducts/bds/data_firm.html>.

US Consumer Product Safety Commission [US CPSC] (2013). *Window Blind Cords Voluntary Standards Activities*. June 7. <http://www.cpsc.gov/en/Regulations-Laws--Standards/Voluntary-Standards/Window-Blind-Cords/>.

US Dep't of Commerce, Bureau of Economic Analysis [US DoC BEA] (2014a). *Table 6.17D. Corporate Profits before Tax by Industry*. National Income and Product Accounts Tables. <http://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=1&isuri=1>.

US Dep't of Commerce, Bureau of Economic Analysis [US DoC BEA] (2014b). *National Income and Product Accounts, Gross Domestic Product: Third Quarter 2014 (Third Estimate)*. News Release (December 23). <https://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm>.

US Dep't of Labor, Bureau of Labor Statistics [US DoL BLS] (2012). *Average Annual Expenditures and Characteristics of All Consumer Units, Consumer Expenditure Survey, 2006–2011*. <http://www.bls.gov/cex/2011/standard/multiyr.pdf>. Find the 2012 version at <http://www.bls.gov/cex/2012/standard/multiyr.pdf>.

US Dep't of Labor, Bureau of Labor Statistics [US DoL BLS] (2013). *Average Annual Expenditures and Characteristics of All Consumer Units, Consumer Expenditure Survey, 2006–2011*. <http://www.bls.gov/cex/2012/standard/multiyr.pdf>.

US Dep't of Labor, Bureau of Labor Statistics [US DoL BLS] (2014a). *Consumer Expenditures--2013*. Economic News Release (September 9). <http://www.bls.gov/news.release/cesan.nr0.htm>.

US Dep't of Labor, Bureau of Labor Statistics [US DoL BLS] (2014b). *CPI Detailed Report Data for April 2014*. <http://www.bls.gov/cpi/cpid1404.pdf>.

US Environmental Protection Agency [US EPA] (2011). *Oil and Natural Gas Sector--New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants*. RIN: 2060-AP76 (Fall). <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76>.

US Environmental Protection Agency [US EPA] (2014). Definition of "Waters of the United States" under the Clean Water Act; Proposed Rule. *Federal Register* 79, 76 (April 21). <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>.

US Federal Communications Commission [US FCC] (2015). *Report and Order on Remand, Declaratory Ruling, and Order*. In the Matter of Protecting and Promoting the Open Internet (GN Docket No. 14-28). Adopted February 26, 2015; released March 12, 2015. <http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf>.

US Food and Drug Administration [US FDA] (2014). *Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed at One-Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments*. Proposed Rule (March 3). <https://www.federalregister.gov/articles/2014/03/03/2014-04385/food-labeling-serving-sizes-of-foods-that-can-reasonably-be-consumed-at-one-eating-occasion>.

US General Accounting Office [US GAO] (1995). *Regulatory Reform: Information on Costs, CostEffectiveness, and Mandated Deadlines for Regulations*. Briefing Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate (March). GAO/PEMD9518BR. <http://archive.gao.gov/t2pbat1/153774.pdf>.

US Government Accountability Office [US GAO] (various). *Congressional Review Act Resources*. Website. <http://www.gao.gov/legal/congress.html>.

US Government Printing Office [US GPO] (1993). *Federal Register* 58, 190 (October 4).

US Government Printing Office [US GPO] (1995–2014). *Public and Private Laws*. <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>.

US Government Printing Office [US GPO] (2009). *Federal Register* 74, 233 (December 7).

US Government Printing Office [US GPO] (2011a). *Federal Register* 76, 14 (January 21).

US Government Printing Office [US GPO] (2011b). *Federal Register* 76, 135 (July 14).

US House of Representatives, Committee on Government Reform and Oversight [US HR CGRO] (1998). *Congressional Office of Regulatory Analysis Creation Act*. Report 105-441 (June 3). <http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt441/pdf/CRPT-105hrpt441-pt2.pdf>.

US House of Representatives, Committee on Oversight and Government Reform [US HR COGR] (2011). *Broken Government: How the Administrative State has Broken President Obama's Promise of Regulatory Reform*. Staff Report, 112th Congress (September 14). <http://oversight.house.gov/wp-content/uploads/2012/01/9.13.11_Broken_Government_Report1.pdf>.

US Office of Management and Budget [US OMB] (1992). Appendix: Annual Report on Executive Order 12291. *Regulatory Program of the United States Government* (April 1, 1991–March 31, 1992).

US Office of Management and Budget [US OMB] (1997). Chapter II. Estimates of the Total Annual Costs and Benefits. *Report to Congress on the Costs and Benefits of Federal Regulations*. <https://www.whitehouse.gov/omb/inforeg_chap2>; <http://georgewbush-whitehouse.archives.gov/omb/inforeg/chap2.html>.

US Office of Management and Budget [US OMB] (2002). *Draft Report to Congress on the Costs and Benefits of Federal Regulations*. Federal Register 67, 60 (March 28). Pp. 15037-8. <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cbreport.pdf>.

US Office of Management and Budget, Office of Information and Regulatory Affairs [US OMB OIRA] (2002). *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf>.

US Office of Management and Budget, Office of Information and Regulatory Affairs [US OMB OIRA] (2013). *2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. <https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf>.

US Office of Management and Budget, Office of Information and Regulatory Affairs [US OMB OIRA] (2014a). *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf>. Tables cited: Table 1-4: Total Annual Benefits and Costs of Major Rules by Fiscal Year, October 1, 2003–September 30, 2013 (billions of 2001 or 2010 dollars), May, pp. 20–21; Table 1-6(b): Major Rules Reviewed with Partial Estimates of Annual Benefits or Costs, October 1, 2012 - September 30, 2013, (billions of 2001 or 2010 dollars), pp. 26–28; Table 1-7(a) Major Rules Implementing or Adjusting Federal Budgetary Programs, October 1, 2012 - September 30, 2013, pp. 28–29.

US Office of Management and Budget, Office of Information and Regulatory Affairs [US OMB OIRA] (2014b). *Information Collection Budget of the United States Government*. <http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2014.pdf>.

U.S. Office of Management and Budget, Office of Information and Regulatory Affairs [US OMB OIRA] (various). *Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions*. <http://www.reginfo.gov/public/do/eAgendaMain>.

US Office of Management and Budget [US OMB] (2015). Table 2.1—Receipts by Source: 1934–2019. *Historical Tables*. <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/hist02z1.xls>. This spreadsheet is regularly found at <http://www.whitehouse.gov/omb/budget/Historicals>.

von Mises, Ludwig (1920 [2012]). *Economic Calculation in the Socialist Commonwealth*. Mises Institute. <http://library.mises.org/books/Ludwig%20von%20Mises/Economic%20Calculation%20in%20the%20Socialist%20Commonwealth_Vol_2.pdf>.

Walsh, Deirdre, and Dana Bash (2014). Boehner: House GOP Files Obamacare Lawsuit. CNN (November 21). <http://www.cnn.com/2014/11/21/politics/house-gop-sue-the-president-over-obamacare/>.

Whisner, Mary (2014). Some Guidance about Federal Agencies and Guidance. University of Washington School of Law Research Paper. *Law Library Journal* 105, 3. (Summer/August 14): 385–394. Available at SSRN: <http://ssrn.com/abstract=2310315>.

White House (2012). *State of the Union Address*. Enhanced Version. Video (January 25). <http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript>.

White House (2014). *Net Neutrality: President Obama's Plan for a Free and Open Internet*. <https://www.whitehouse.gov/net-neutrality>.

White House, Office of the Press Secretary (2014). President Obama Announces Two New Public-Private Manufacturing Innovation Institutes and Launches the First of Four New Manufacturing Innovation Institute Competitions. Media advisory (February 25). <http://www.whitehouse.gov/the-press-office/2014/02/25/president-obama-announces-two-new-public-private-manufacturing-innovatio>.

White House, Office of the Press Secretary (2015a). Remarks by the President in State of the Union Address. Media Release (January 20). <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>.

White House, Office of the Press Secretary (2015b). Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act. Media Release (February 24). <https://www.whitehouse.gov/the-press-office/2015/02/24/veto-message-senate-s-1-keystone-xl-pipeline-approval-act>.

World Bank (2014). *Gross Domestic Product 2013*. World Development Indicators database (December 16). <http://databank.worldbank.org/data/download/GDP.pdf>.