

THE CHECKERED HISTORY OF REGULATORY REFORM SINCE THE APA

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We review four major regulatory reform statutes passed since the legal enshrinement of the regulatory state by the Administrative Procedure Act in 1946. None of the four statutes can be said to have accomplished their substantive goals (which usually involved reducing the burden of regulation). We recount the debate that accompanied the passage of these statutes and find that passage required the support of legislators and Presidents who favored strong regulation. The statutes, therefore, all gave considerable discretion to regulatory agencies. But regulatory agencies have used this discretion to ensure that the regulatory reform does not curb their ability to make their preferred regulatory decisions. We conclude that as long as the cooperation of political actors who support strong regulation is necessary, reforms to the regulatory process are likely to have minimal effects on the substance of regulation.

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INTRODUCTION

The Administrative Procedure Act (“APA”) was passed in 1946¹ and enshrined in law the modern administrative state. It was passed in reaction to the growth of executive-branch policymaking and was the result of countervailing impulses both to rein in administrative agencies and to cement their place in American governance. The statute’s chief accomplishments—the creation of informal rulemaking for writing regulations, due-process protections for formal agency adjudication, and set standards for all administrative actions—make it one of the most important (yet least heralded) statutes of the twentieth century.

The same cannot be said of many of the statutes that have attempted to reform the regulatory process created by the APA. These statutes have come in two waves, and we may be about to experience a third wave. The stagflation period of the late 1970s saw the passage of the Paperwork Reduction Act (“PRA”)² and the Regulatory Flexibility Act (“RFA”).³ The recession of the early 1990s and the Republican takeover of Congress in 1995 yielded the Unfunded Mandate Reform Act (“UMRA”)⁴ and amendments to the RFA entitled the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), including the Congressional Review Act (“CRA”).⁵ Currently, Congress continues to consider many bills that would reform the regula-

1. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

2. Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended in scattered sections of 5, 20, 30, 42, and 44 U.S.C.).

3. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§601–612 (2014)).

4. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).

5. Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601–612 (2014)).

tory process.⁶ Regulatory reform at the state level has followed a similar cyclical pattern.⁷

None of these statutes have had an effect that comes close to that of the APA. On some level, this result is to be expected. The APA established a legal process for executive-branch agency policymaking; the statutes passed since then have attempted to modify an existing process. However, these statutes have not even lived up to the claims of their proponents. Whether mitigating the paperwork burden of regulations, lessening their impact on small businesses or other units of government, or increasing congressional oversight of regulatory decisions, few of the ostensible goals of these statutes have been achieved.

And yet policymakers keep turning to regulatory reform. The 113th Congress proposed more than twenty bills that would alter the regulatory process.⁸ Before proceeding further with regulatory reform, policymakers need to better understand the problems that have beset earlier statutes that have been largely unsuccessful in trying to change regulatory output. The purpose of this Article is to explore what it means for a regulatory reform statute to “work,” which may assist future regulatory reformers. We outline several definitions of success for regulatory reform and then evaluate the efforts at statutory regulatory reform over the past several decades using those standards.

We argue that the failures of these reform efforts to effect regulatory change is the result of political compromise and, perhaps, political posturing by lawmakers. The efforts at regulatory reform since the APA have largely had minimal substantive effects. In part, this results from provisions in the statutes that give discretion to regulatory agencies. Wide-ranging discretion, as we will demonstrate below, simply allows agencies to avoid the harsher prescriptions within regulatory reform statutes. These provisions are not accidental; however, they were necessary to ensure passage of the statutes under divided government. Passage required support of Presidents (and in some cases congressional majorities) who have supported agency protections of public health, and therefore have been reluctant to make it difficult for agencies to issue regulations. To gain this support, the statutes gave agencies considerable discretion to interpret and implement regulatory

6. *See Status of Regulatory Reform Legislation, 113th Congress*, GEO. WASH. U., <http://regulatorystudies.columbian.gwu.edu/status-regulatory-reform-legislation-113th-congress> (last visited Feb. 8, 2016) (providing a tracked summary of recent failed and pending regulatory reform legislation).

7. STUART SHAPIRO & DEBRA BORIE-HOLTZ, *THE POLITICS OF REGULATORY REFORM* 123 (2013).

8. *See Status of Regulatory Reform Legislation, 113th Congress*, *supra* note 6.

reform, which often resulted in little or no change. Despite this substantive failure, the statutes have often served an important political purpose. For example, they have allowed incumbent politicians to claim credit for addressing economic ills during economy-wide downturns. They may also provide information for legislators to better oversee the executive-branch agencies.

This Article proceeds as follows. In Part I, we review the history of the APA and discuss the various definitions of what it means for regulatory reform statutes to be “effective.” Parts II through V discuss the various efforts at regulatory reform since the APA. We describe the RFA in Part II, the PRA in Part III, the UMRA in Part IV, and the SBREFA in Part V. In Part VI, we summarize our findings and discuss their implications.

I.

WHAT DOES IT MEAN FOR REGULATORY REFORMS TO “WORK”?

All regulatory reforms start with a familiar rhetorical flourish: something is broken in the regulatory process and needs to be fixed. This perceived shortcoming animates the motivations behind the reform, which then can be used to measure the success or failure of the resulting statute. If the reform addresses and improves the perceived shortcoming, it is a success. Regulatory shortcomings take on a variety of guises: the executive possesses power without accountability, the burdens on a regulated industry are too great, the regulations impede economic growth, it is too difficult for interested parties to give considered input. We will consider these goals in turn through the lens of the passage of the APA.

A. *The Legislative Goals of the Administrative Procedure Act*

The APA was the product of more than a decade of work. Beginning with recommendations by the American Bar Association to rein in New Deal agencies and protect regulated parties,⁹ the work progressed toward the bipartisan goal of creating both a management structure and political accountability for what was then a new administrative state.¹⁰ In 1939, President Franklin D. Roosevelt instructed his attorney general to study existing administrative practices and pro-

9. Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219 (1986).

10. *Id.*

cedures.¹¹ By 1945, President Harry Truman's attorney general, Tom Clark, was indicating executive-branch support for legislation.¹² When the APA passed in 1946, it did so unanimously.¹³

As the first statute passed with the sole intent of governing agency policymaking, the APA has been described as "more like a constitution than a statute."¹⁴ This characteristic differentiates the APA from the later statutes discussed in this Article. The APA (though motivated by attempts to gain political oversight over agency adjudications)¹⁵ created the regulatory process. Administrative law scholar Walter Gellhorn, who was involved in the debates over the APA, notes, "For the most part, the new statute was declaratory of what had already become the general, though not universal, patterns of good behavior"¹⁶ The statute was written in sufficiently general terms to have gained broad acceptance. Unlike later attempts at regulatory reform, talk of amending the APA has been rare.¹⁷ The Supreme Court noted that the APA has settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."¹⁸

The APA was also a hard-fought compromise between political forces. Indeed, when administrative reform was first considered in the 1930s, it was justifiably seen as an attack on New Deal policies and the executive branch.¹⁹ The APA only became law once supporters of the New Deal felt sufficiently comfortable that the agencies created during the 1930s were safe from judicial review (because of a judicial branch that had come to be staffed with Roosevelt appointees),²⁰ and the constraints on adjudication were leavened by a new procedure—rulemaking²¹—in which agencies were supreme.²² The APA effec-

11. *Id.* at 225.

12. *Id.* at 230.

13. *Id.* at 232.

14. Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986).

15. Gellhorn, *supra* note 9, at 219.

16. *Id.* at 232.

17. William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235 (1986).

18. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

19. See Martin Shapiro, *The APA: Past, Present, and Future*, 71 VA. L. REV. 447, 448 (1986).

20. See *id.* at 452 (describing the willingness of New Dealers to compromise once the statute no longer appeared to threaten the presidency).

21. The APA contains provisions for two types of rulemakings, informal rulemaking (the type everyone is familiar with today) and formal rulemaking, which is conducted using adjudication-like procedures, such as cross-examination. 5 U.S.C.

tively enshrined the idea of the administrative state in law. Attempts at regulatory reform since then can be seen as attempts to continue the negotiation that preceded the APA over the objections of regulatory supporters who were quite happy with the outcome in that statute.²³

B. Goals and Benchmarks for Regulatory Reform

Despite the “com[ing] to rest” cited in *Vermont Yankee*,²⁴ debates over regulation and the regulatory process have hardly ceased. As in the years before the passage of the APA, these debates are not merely motivated by the substance of regulatory decisions, and they continue to reflect the same tensions. The APA was motivated in part by the New Deal, which involved a large expansion of policymaking within the executive branch. Regulations are produced by executive-branch agencies and independent commissions. These agencies are effectively creating law without being located in the legislative branch. The political accountability of regulatory decisions continues to be a concern, particularly for members of Congress. Therefore, a primary way of judging the success of regulatory reforms is by examining the degree to which they increase the accountability of executive-branch decision-makers.

Political scientists have argued that procedures imposed on regulators serve this purpose.²⁵ They can facilitate “fire alarm” oversight by giving interest groups that are unhappy with a decision made by a

§ 553(c) (2014). However, formal rulemaking proved very burdensome. See Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132 (1972) (describing the difficulties the FDA has faced when required to act under formal rulemaking requirements). The Supreme Court ruled that “informal” notice-and-comment rulemaking was sufficient to satisfy requirements in organic agency statutes for a hearing. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 241 (1973); *United States v. Storer Broad. Co.*, 351 U.S. 192, 202 (1956); see also Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970) (discussing the decision between rulemaking and adjudication as policymaking tools).

22. Shapiro, *supra* note 19, at 449; see also Matthew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 196–201 (1999) (describing how the APA preserved agency authority when compared to other reform attempts).

23. Shapiro, *supra* note 19, at 480–92 (discussing proposals for amending the APA).

24. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 523 (1978).

25. See, e.g., Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that administrative procedures allow Congress to effectively engage in fire-alarm oversight).

regulatory agency additional capacity to inform sympathetic congressional representatives.²⁶ Procedures can also “stack the deck” by creating a decision-making environment for regulators that closely mirrors the one faced by the enacting coalition of legislators, thereby increasing the likelihood that regulators will make decisions that reflect the preferences of this coalition.²⁷ These arguments have their critics, as well.²⁸

Another way to phrase the benchmark of executive accountability is to ask whether the regulatory reform leads to regulatory decisions that are more responsive to the preferences of elected officials. We do not need to agree that increased responsiveness is a good thing to assess the more positive question of whether agencies are more or less responsive. However, we do need to think about whether the success of a regulatory reform is measured by responsiveness to the coalition that passed the regulatory reform or to later coalitions that then use the reform to oversee agencies.²⁹

Another goal of the APA was to provide some protection for the regulated parties from an increasingly powerful central government.³⁰ In the years since the APA’s enactment, these industries have been primarily concerned with increasing regulations protecting the environment, public health, and worker safety. These substantive concerns with regulation can be understood to be saying that regulations cost too much (one could add the qualifier “without producing sufficient benefits,” but many regulatory critics do not add this critical phrase). Indeed, the passages of many of the statutes considered in this Article were accompanied by speeches about reduced burden, either on the general public or on a particular constituency (such as small businesses).³¹ One way to judge the success of these statutes is by assess-

26. *See id.* at 166 (describing police-patrol oversight and fire-alarm oversight).

27. *See* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261–63 (1987) (describing deck-stacking); *see also* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468 (1989).

28. *See, e.g.*, Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”: Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 506–07 (1989) (critiquing the benefits of procedures stacking the deck in favor of constituent interests).

29. *Id.* at 502–04 (describing the problems enacting legislatures face when trying to limit changes made by future coalitions).

30. Gellhorn, *supra* note 9, at 222 (citing arguments that equated administrative actions with “the forces of absolutism”).

31. *See, e.g., infra* notes 63–69 & 118.

ing whether regulations become more cost-effective or less burdensome to a particular group after their enactment.

Some scholars have argued that another political motivation for regulatory reform statutes could be the desire to claim credit for addressing the economic concerns of constituents.³² For example, proponents of regulatory reform in Congress may have been elected on promises to do something about the economy. The fact that regulatory reform statutes seem to peak during economic slowdowns is likely not coincidental. Regulatory reform (regardless of whether it is actually effective) is a way for such political actors to claim to be “fixing” the economy without actually repealing popular regulations or taking other more controversial measures.³³

The passage of the APA imposed notice-and-comment rulemaking procedures on agencies, requiring them to carefully consider comments received from interested parties, including the concerns raised by the industries being regulated.³⁴ A fourth goal of regulatory reform comes from a study of the notice-and-comment process, in which William West evaluates the role of public comment and describes three possible influences it can have on regulatory decision-making.³⁵ The first two correspond with the categories described above. He asks whether comments have a substantive effect on decisions (and answers mostly no) and whether they facilitate political oversight (possibly yes).³⁶ West adds a third category that public comments, and hence all regulatory reforms, can play. They can fill a symbolic role.³⁷ In the case of public comment, this role can mean allowing interested parties to get the sense that they are participating in decisions that affect them. Other statutory reforms can have the same effect (e.g., the RFA gives small businesses an additional voice in regulatory decisions), or the statute can make clear that efficiency, federalism, or principles of representation are important values.

C. *The Efficacy of the Public Comment Process*

Before turning to the regulatory reform statutes since the APA, it is instructive to discuss evaluations of the notice-and-comment pro-

32. See, e.g., SHAPIRO & BORIE-HOLTZ, *supra* note 7, at 127.

33. *Id.*

34. Administrative Procedure Act, Pub. L. No. 79-404, § 4(b), 60 Stat. 237, 239 (1946) (codified as amended in scattered sections of 5 U.S.C.).

35. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004).

36. *Id.* at 66.

37. *Id.* at 67.

cess created in the APA in order to show that the use of administrative procedure is not necessarily effective at influencing regulatory decisions. As described previously, West conducted one such examination and found that public comments mostly fulfill the role of facilitating fire-alarm oversight by congressional overseers, rather than inducing agencies to change course.³⁸ In a study of eleven rulemakings, Marissa Golden also was skeptical that public comments had much weight with regulatory agencies, except when commenters across the ideological spectrum agreed on a potential change.³⁹ Several other studies are similarly dubious about the role of public comment.⁴⁰

However, Susan Yackee has performed perhaps the most sophisticated examinations of the role of public commenting, and she is considerably more positive than many other scholars about agencies' attentiveness to public comments. In a study of forty rulemakings across four regulatory agencies, she concludes that "interest group comments can and often do affect the content of final government regulations." She acknowledges that she studies only low-salience regulations and that her conclusion may not be generalizable to regulations with a higher political profile.⁴¹ Similarly, Stuart Shapiro, looking at a larger dataset of more than nine hundred regulations promulgated during the Clinton and George W. Bush administrations, finds that agencies make changes in response to comments nearly half the time, but also frequently do not receive comments or use direct or interim final rules to bypass the public comment process.⁴² Along the same lines, Connor Raso finds that while agency decisions to bypass notice and comment are often upheld in the courts, judicial review is

38. *Id.* at 73.

39. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. 245, 259–60 (1998) (finding that while agencies rarely made significant modifications in the face of comments, they did so in two cases where all commenters were united in their opposition).

40. *See, e.g.*, Steven Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663 (1998) (finding that the Health Care Financing Administration was more responsive to physician comments than comments submitted by patients, who were more likely to be the constituents inspiring the legislation); Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393 (2007) (arguing that, despite different regulatory preferences under Presidents Clinton and Bush, similar agency responses to public comments cast doubt on the efficacy of procedural reform efforts).

41. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 119–20 (2006).

42. Shapiro, *supra* note 40, at 403–04.

unpredictable, giving the APA more influence over agencies than subsequent regulatory reform statutes.⁴³

Yackee has also done several studies with coauthors, examining which comments receive the most attention from regulatory agencies. Using the same dataset (of lower-salience regulations), they find that when comments are submitted on both sides of an issue, the side that submits more substantive comments often is more likely to effectuate agency changes in its direction.⁴⁴ Not surprisingly, they find that businesses are more likely to persuade agencies to change than are other types of interest groups.⁴⁵ This conclusion is supported by another recent study of ninety Environmental Protection Agency (“EPA”) air-toxicity regulations, which reports that changes in final rules from initial proposals are four times as likely to favor businesses as other parties.⁴⁶ A study of the Securities and Exchange Commission (“SEC”), however, finds little evidence that businesses have more influence than other parties.⁴⁷ Still, a rough consensus exists that organized interests tend to dominate the public comment process and have the best chance of being heard at most agencies.⁴⁸

Although the academic literature is divided on the substantive role of public comment, agreement exists that organized interests use the procedure most effectively. Organized interests are also the groups that can most easily pull “fire alarms” and alert Congress to issues of concern raised by agency proposals.⁴⁹ Although some researchers are

43. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 101 (2015).

44. Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RES. 336, 344 (2007).

45. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133–35 (2006).

46. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 130 (2011) (finding that eighty-three percent of changes involved in the rulemakings studied weakened the regulation to the industry commenter’s advantage); see also Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1380–86 (2010) (arguing that the business community, because it has the capacity to overwhelm agencies with information, has dominated the public comment process and thereby corrupted its original intent).

47. David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59, 72 (2002).

48. See William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 508 (2013) (finding that the “usual suspects,” including business and professional groups, have a good deal of influence in many settings).

49. See McCubbins & Schwartz, *supra* note 25, at 166 (describing fire-alarm oversight).

cynical about the predominance of business interests in the notice-and-comment process,⁵⁰ and few would argue that the process has lived up to the hopes of its most grandiose proponents,⁵¹ enough evidence exists that it makes a difference in agency decision-making to declare it at least a partially successful regulatory reform. The APA as a whole, including the creation of notice-and-comment rulemaking, has clearly been a deeply influential statute. How have attempts to shape regulation through statutory changes to the regulatory process compared with this experience?

Since the passage of the APA, two major successful⁵² waves of regulatory reform arose prior to the current fascination with regulatory reform. The first occurred through the late 1970s and early 1980s. Amid rising concerns about high inflation and high unemployment,⁵³ Congress passed, and President Carter signed, the RFA and the PRA.⁵⁴ The second wave occurred in the mid 1990s, with the Republican takeover of Congress after the 1994 election. Congress amended the RFA and passed the UMRA, and these bills were signed by President Clinton. In the next Parts, we review the history of these statutes and attempt to discern the intentions of their supporters before turning to assess whether these goals have been realized.

50. See Wagner et al., *supra* note 46, at 109–10 (arguing that a significant portion of agency rulemaking takes place in areas with a disproportionate share of industry influence); see also Wagner, *supra* note 46, at 1387 (noting that the ability of industry players to submit technically sophisticated comments increases this influence over the outcome of the final rule).

51. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 85 (1969) (arguing that transparency in rulemaking procedures “is not a protection against arbitrariness, or against fairness, or against decisions contrary to law, or against political deals which ignore open law and open policy, or against any other kind of administrative abuse”).

52. There have been a few failed attempts to revise the APA, including an effort by the American Bar Association in the 1960s and a movement in the Senate to direct courts to be less deferential to agencies in the early 1980s. See Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 99, 103 (1996) (describing these attempts to amend the APA).

53. See Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. 37, 51 (2011).

54. The beginning of the Reagan administration was also a high point for regulatory reform, but this mostly centered on the executive branch with the adoption of Executive Order 12,291. See *id.* at 63–64.

II.

THE REGULATORY FLEXIBILITY ACT

A. *History of the Passage of the RFA*

The RFA⁵⁵ was passed in order to ease the burden of regulation on small businesses. It requires agencies to analyze the impact of some of their regulations—those that have significant impacts on small businesses—and then to use that analysis to inform policy alternatives that minimize this impact. President Carter signed the RFA on September 19, 1980. The original version of the bill (“S. 1974”) was introduced in 1977, sponsored by Democratic senators Gaylord Nelson (D-WI) and John Culver (D-IA). At the time, Nelson was the chairman of the Senate Small Business Committee and acted as an advocate for the needs of small businesses.⁵⁶ The bill was amended and introduced again to the Ninety-Fifth Congress,⁵⁷ and incorporated changes that were a culmination of the suggestions and recommendations of federal agencies and public witnesses during various hearings.

In addition to these Senate bills, several House bills addressing regulatory reform emerged at the same time. Particularly noteworthy was House Bill 4660—known as the Smaller Enterprise Regulatory Improvement Act Bill (an expansion of the earlier Small Business Regulatory Flexibility Bill)—which was considered and favorably reported by the House Small Business Committee. The Senate version of the bill was criticized in comparison to the House bill for having a less encompassing judicial review provision.⁵⁸ Also, the House bill relied heavily on a specific list of methods for reducing regulatory burdens on small businesses, whereas the Senate bill only required agencies to list their own methods and explain their rejection of alternatives.⁵⁹

After much debate over the judicial review provisions, the final bill sought to strike a balance between enforceability and preventing

55. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601–612 (2014)).

56. See *Hearing on S. 1974 Before the Subcomm. on Admin. Practice & Procedure of the Comm. on the Judiciary*, 95th Cong. 18–21 (1977) [hereinafter *Hearing on S. 1974*] (statement of Sen. Nelson, Chairman, Senate Select Committee on Small Business).

57. See S. REP. NO. 96-878, at 1 (1980); see also Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 227 (1982).

58. 126 CONG. REC. 24,582 (1980) (statement of Rep. Moorhead) (endorsing the House alternative bill because of stronger judicial review provisions, among other things). But see Verkuil, *supra* note 57, at 228 (claiming that the House bill did not have judicial review provisions).

59. See Verkuil, *supra* note 57, at 228.

unnecessary delays in the regulatory process.⁶⁰ The final bill clearly requires agencies to conduct regulatory flexibility analyses when they issue rules that have a “significant impact on a substantial number of small entities” but also provides that these regulatory flexibility analyses are not subject to judicial review. However, to strike a balance, the contents of the analyses may be available and examined by the courts when the validity of the rules themselves are called into question. This lack of judicial review of the RFA itself,⁶¹ however, would play a prominent role in its implementation.⁶²

Hearings demonstrated widespread dissatisfaction and frustration with regulatory and reporting requirements, emphasizing the different challenges entities of smaller size face and the inability of individuals to have their opinions heard on this disparity.⁶³ Various individuals spoke on behalf of the RFA in terms of economic theory.⁶⁴ Milton Kafoglis—a professor of economics at the University of Florida and then a member of the Council on Wage and Price Stability—stated that a uniform standard of regulation imposes large fixed costs on small firms, thereby resulting in an uneven playing field among firms of different sizes.⁶⁵ In this regard, uniform application is not “neutral,” because it creates barriers to entry for small firms, imposes economies of scale, and arbitrarily increases the minimum size of the firm that can effectively compete in the marketplace.⁶⁶ Kafoglis testified that, in his opinion, these issues could develop into larger concerns over business concentration, the viability of competition in the market, and thereby the level of prices.⁶⁷ Alfred Dougherty from the Bureau of Competition⁶⁸ (a subagency of the Federal Trade Commission) further

60. 126 CONG. REC. 24,579 (1980) (statement of Rep. Kastenmeier); *see also* 126 CONG. REC. 24,581 (1980) (statement of Rep. Bedell) (“I think this is a good, balanced approach to judicial review, which will achieve the benefits the bill seeks without causing any unnecessary litigation.”).

61. Judicial review would later be added in SBREFA. *See infra* Part V.

62. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-94-105, REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES’ COMPLIANCE 6–7 (1994) [hereinafter REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES’ COMPLIANCE].

63. *See, e.g., Regulatory Reform: Hearings on S. 104, S. 262, S. 755, S. 1291 Before the Subcomm. on Admin. Practice & Procedure of the Comm. on the Judiciary*, 96th Cong. 3–4 (1979) [hereinafter *RFA Hearings*] (statement of Peter J. Petkas, Director, The Regulatory Council) (describing the disproportionate impact on small businesses and uncertainty about benefits resulting from burdensome regulations).

64. *See, e.g., Hearing on S. 1974, supra* note 56, at 21–32 (statement of Milton Kafoglis).

65. *Id.* at 26.

66. *Id.*

67. *Id.*

68. The main role of the Bureau is to jointly enforce antitrust laws in the United States with the Antitrust Division of the Department of Justice (DOJ). The Bureau

addressed the issue of perceived “neutrality” in laws or regulations of business, stating that uniform regulations are indeed not neutral if they have differential impacts on firms of different sizes.⁶⁹

During consideration of the RFA, several prominent issues arose that foreshadowed compromises that would reduce the RFA’s efficacy. Among these concerns were (a) whether the agencies would be required to compromise the underlying statutes that authorize their rulemaking, (b) whether administrative costs would increase for each agency whose rules were subjected to review, and (c) whether increased oversight powers would lead to litigation over small business impact and subsequently cause excessive delays in the regulatory process.⁷⁰

In response to these concerns, a report by the Senate Judiciary Committee asserted that the bill would not alter regulatory goals and carefully stipulated that agencies could consider only alternatives to a proposed rule that are in accordance with the objectives of underlying statutes authorizing rulemaking for that agency.⁷¹ Proponents argued that if an agency could not consider alternative regulatory rules without compromising the legally mandated goals of the statute underlying rulemaking, it could summarize this factor in the regulatory analysis

monitors any attempts to prevent competition through actions such as monopolistic or attempted monopolistic conduct, conspiracies to restrain trade practices, and all other anticompetitive business practices. *See About the Bureau of Competition*, FED. TRADE COMMISSION, <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/about-bureau-competition> (last visited Nov. 30, 2015).

69. The full quote from Dougherty is as follows:

Why does “neutral” regulation have a differential impact on large and small firms? Two general observations should be made. First, even if actual regulatory costs are equal between competing large and small firms, small firms have fewer units of output over which to spread such costs and must include in the price of each unit a larger component of regulatory cost. Second, where small firms have smaller actual regulatory costs than large firms (as is generally the case), small firms remain at a competitive disadvantage because they are unable to take advantage of the “economies of scale” of regulatory compliance. Large firms generally already have extensive “in-house” data compilation and reporting systems and specialized staff accountants, lawyers and managers whose primary function is regulatory compliance. Small firms, by comparison, must either hire additional personnel or purchase expensive consulting services in order to acquire the necessary regulatory expertise.

Regulatory Reform: Hearings Before the S. Judicial Comm. on S. 104, S. 262, S. 299, S. 755, and S. 1291, 96th Cong. 350 (1979) (statement of Alfred Dougherty, Director, Federal Trade Commission Bureau of Competition).

70. 126 CONG. REC. 21,455 (1980) (statement of Sen. Culver).

71. S. REP. NO. 96-878, at 2 (1980).

as a reason for rejecting alternatives.⁷² This argument would later become a common refrain from agencies when explaining their rejection of alternative regulatory options discussed under the RFA.⁷³ The committee also asserted that no unwarranted delays would result because of litigation and that the bill did nothing to expand or alter the process for legal action against an agency by an individual or business.⁷⁴ The Government Accountability Office (“GAO”) stated that it did not believe the language of the bill threatened regulatory goals or compromised the underlying and mandated statutes of rulemaking.⁷⁵

Senator Culver also personally addressed criticisms of the statute. He stated that in certain cases, where the use of flexible regulations would inhibit an agency’s ability to protect environmental, health, and safety concerns, such alternatives might be legally impermissible. An agency in this situation would simply use the Initial Regulatory Flexibility Analysis (which accompanies a notice of proposed rulemaking) and the Final Regulatory Flexibility Analysis to summarize why uniform regulation is necessary for a particular rule and how alternative strategies or exemptions would be harmful and have therefore been rejected.⁷⁶

Numerous representatives expressed concerns about the efficacy of the RFA, which would prove prescient. Rep. Elliott Levitas (D-GA) stated that he did not believe the bill was a solution in the long run because of its failure to establish a strict and effective enforcement mechanism.⁷⁷ Similarly, Rep. Tom Kindness (R-OH) stated that despite its requirement that agencies undertake regulatory analyses, the bill did not mandate that agencies act on the conclusions of those analyses, thus rendering them useless.⁷⁸ Rep. Carlos Moorhead (R-CA) expressed concern about the lack of congressional oversight, stating that failing to give either one- or two-house veto power on regulations

72. *See id.* (responding to concerns by noting that “[a]n agency which rejected a less burdensome alternative would have to explain, when it published the final rule, why it did so”).

73. *See, e.g.*, Occupational Exposure to 4,4’ Methylenedianiline (MDA), 57 Fed. Reg. 35,630, 35,641 (Aug. 10, 1992). The standard was set at ten parts per billion, but an alternative of twenty parts per billion was rejected because it did not meet the Occupational Safety and Health Administration’s (“OSHA”) requirement for adequately protecting workers.

74. S. REP. NO. 96-878, at 2796.

75. *Id.* at 2797 (citing the conclusions of the General Accounting Office). The GAO was then known as the General Accounting Office.

76. 126 CONG. REC. 21,455 (1980) (statement of Sen. Culver).

77. *Id.* at 24,581 (statement of Rep. Levitas).

78. *Id.* at 24,580 (statement of Rep. Kindness).

was unfair to the American public because it was giving complete control over regulation to unelected officials.⁷⁹

Several interesting themes emerge from the statutory history of the RFA. Clearly, sponsors wanted to help small businesses in what they saw as a regulatory process that was systematically biased against them. However, sponsors also had symbolic goals, such as giving small businesses a voice, and clear enthusiasm existed across party lines for proclaiming support for small businesses during difficult economic times.⁸⁰ It was also clear that unless critics were assured that the statute would not undermine existing regulatory statutes, the likelihood of passage was smaller—perhaps negligible.⁸¹ Numerous provisions in the statute—particularly the provision that allows agencies to assert that their regulations will not have a significant impact on a substantial number of small entities, as well as the limited role of judicial review—were the product of mollifying supporters of strict regulation.⁸²

B. *Implementation of the RFA*

The GAO has conducted a number of studies on the RFA. The GAO concluded in 1994 that “agencies’ compliance with the RFA varied widely.”⁸³ In 2001, reporting on the RFA and on subsequent amendments, the GAO said that these provisions’ “full promise has not been realized.”⁸⁴ In particular, the GAO identified the terms “significant economic impact” and “substantial number of small entities” to be of issue, leading agencies to construct their own definitions and interpretations. In the same 2001 report, the GAO stated, “Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress

79. *Id.* at 24,582 (statement of Rep. Moorhead).

80. H.R. REP. NO. 104-49, pt. 1, at 6–8 (1995) (discussing the legislative purpose behind the RFA).

81. 126 CONG. REC. 24,583 (1980) (statement of Rep. Bloomfield) (emphasizing the fact that the bill was not intended to disrupt existing legislative or regulatory schemes).

82. Verkuil, *supra* note 57, at 247–48 (“It is obvious that Congress did not want to use the RFA as a means of overruling statutory requirements. The RFA in all likelihood would not have become law if it amounted to an implicit rejection of substantive legislative requirements, especially those in the health, safety, consumer, and environmental areas. Thus, in such areas there was never a case made for giving small entities special treatment.”).

83. REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES’ COMPLIANCE, *supra* note 62, at 2.

84. U.S. GEN. ACCOUNTING OFFICE, GAO-01-669T, REGULATORY FLEXIBILITY ACT: CLARIFICATION OF KEY TERMS STILL NEEDED 1 (2001).

has not acted.”⁸⁵ The GAO has made this point repeatedly over the years. The Congressional Research Service (“CRS”) has echoed these concerns.⁸⁶

Academic studies of the implementation of the RFA are limited, but they echo the point that the RFA has failed to require agencies to review their regulations with a critical eye toward reducing the regulatory burden.⁸⁷ In the most thorough study, Connor Raso finds that agencies exempted over ninety-two percent of their rules from the RFA.⁸⁸ He also finds that lawsuits have been rare under the RFA, and that even when agencies have been sued, they have won in sixty-one of seventy-two cases.⁸⁹ Finally, even in those eleven cases in which agencies have lost, rules were vacated in only six cases.⁹⁰ Thus, in the thousands of cases in which agencies have declared their rules exempt from the RFA, they have been forced by the courts to abandon the rules in only six instances.⁹¹

A different story comes from the Office of Advocacy, the office within the SBA charged with ensuring RFA compliance.⁹² That office,

85. *Id.*

86. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34355, THE REGULATORY FLEXIBILITY ACT: IMPLEMENTATION ISSUES AND PROPOSED REFORMS 1 (2002) (noting that a lack of clarity in terms has been an ongoing concern for over twenty years).

87. *See, e.g.*, Randall Lutter, *Regulatory Policy: What Role for Retrospective Analysis and Review?*, 4 J. BENEFIT-COST ANALYSIS 17 (2013) (noting that agencies have largely ignored a provision requiring retrospective regulatory review and suggesting that this likely is due to a lack of enforcement mechanism); Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—and Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199 (2005) (noting that courts have deferred to agency determinations regarding the Act's applicability); Sarah E. Shive, *If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior and How Congress Can Fix It*, 1 ENTREPRENEURIAL BUS. L.J. 153 (2006) (focusing on the ability of agencies to determine the Act's applicability to their own regulations). The causes for the limited role of section 610 likely include lack of an enforcement mechanism in the RFA to ensure the quality of the retrospective reviews required in the statute. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD 99-55, REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY (1999); Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. PA. J. BUS. L. 837, 838 (2011) (“[S]mall businesses continue to suffer disproportionately from the cost of regulations . . .”); *see also* Eric D. Phelps, *The Cunning of Clever Bureaucrats: Why the Small Business Regulatory Enforcement Fairness Act Isn't Working*, 31 PUB. CONT. L.J. 123 (2001).

88. Raso, *supra* note 43, at 69.

89. *Id.* at 97–98.

90. *Id.* at 99.

91. *Id.*

92. The Office of Advocacy was created four years before the passage of the RFA in the Small Business Export Development Act, Pub. L. No. 94-305, § 201, 90 Stat. 663, 668 (1976). The office was subsequently given greater powers in both the RFA

empowered by the RFA to ensure implementation of the statute, claims that the Act saved small businesses \$2.4 billion in 2013.⁹³ This statement comes after a history of very bold assertions regarding the Office's performance and, by extension, the RFA's. The Office's annual reports on the RFA claim an aggregate savings of more than \$80 billion because of the RFA.⁹⁴

The Office of Advocacy is hardly an unbiased source of estimates; its justification for existence depends largely on its ability to demonstrate that the RFA is working. Its estimates are contrary to the external assessments of the RFA given previously.⁹⁵ In part, this difference may be because changes to agencies' regulations from proposal (or first conception) to finalization are likely caused by a number of factors. Whether the changes for which the Office of Advocacy credits the RFA are thanks to the statute or are owing to public comments, Office of Information and Regulatory Affairs ("OIRA") review, or agencies' "overproposing" their regulations so they can make concessions and still reach their preferred outcome is unclear.⁹⁶

When the Office of Advocacy does find savings for small businesses, it does so based on questionable assumptions and estimates. In the 2013 report, the Office cites changes to seven rules and claims that all the reduced costs for the changes stem from its own work.⁹⁷ The descriptions of the changes within the text of the report make clear that public comment or other factors may have also played a role. The largest of the changes was a categorization of certain solid wastes as nonhazardous by the EPA. The Office claimed that its work led to \$690 million of savings for small businesses.⁹⁸ In addition to it being impossible to discern the actual cause of the EPA's change of catego-

and the 1996 amendments to the RFA. See ROBERT JAY DILGER, CONG. RESEARCH SERV., R43625 SBA OFFICE OF ADVOCACY: OVERVIEW, HISTORY, AND CURRENT ISSUES 1 (2015).

93. U.S. SMALL BUS. ASS'N, OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2013, at 5 (2014), https://www.sba.gov/sites/default/files/rs421_0.pdf.

94. *The RFA at 25: Needed Improvements for Small Business Regulatory Relief: Hearing Before the H. Comm. on Small Bus.*, 109th Cong. 14 (2005) (statement of Jere Glover, Brand Law Group). The annual reports, detailing the savings for each fiscal year, are available at *Regulatory Flexibility Act Annual Reports*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports> (last visited Feb. 1, 2016).

95. See *supra* notes 88–91 and accompanying text.

96. Stuart Shapiro, *Defragmenting the Regulatory Process*, 31 RISK ANALYSIS 893, 898 (2011) (arguing that the Regulatory Flexibility Act adds little to a regulatory process already heavy in requirements).

97. U.S. SMALL BUS. ASS'N, *supra* note 93, at 33–43.

98. *Id.* at 35.

rization, the Office of Advocacy relies on an industry estimate for the magnitude of the savings.⁹⁹

To the contrary, the comparatively neutral reports by the GAO and the CRS all raise significant questions about the RFA's efficacy in the regulatory process.¹⁰⁰ Even conceding some of the examples cited by the Office of Advocacy as lowering costs on small businesses, the RFA's impact has been significantly less than was envisioned at the time of its passage. Indeed, if the Act had been a success in alleviating the concerns of small businesses, advocates for small business would have made little demand for its amendment in 1995 or today.¹⁰¹

The sources of the RFA's failure seem to be threefold, according to the reports and articles cited previously. First, regulatory agencies retain control of the process for determining when the RFA applies.¹⁰² Second, terms within the Act, particularly "significant impact" and "substantial number of small entities," were sufficiently vague to allow agencies to credibly claim that the RFA did not apply to some of their regulations.¹⁰³ Finally, courts have been deferential toward agencies in their interpretations of the applicability of the RFA.¹⁰⁴ All these issues came up during the debate on the RFA, and many were foretold by those who criticized the statute as too weak.¹⁰⁵

99. *Id.* An industry estimate is not necessarily incorrect, but industry has incentives to overstate the burden of regulations as part of their argument against a regulation. Industry estimates are rarely if ever used in the academic literature on cost-benefit analysis. *See, e.g.,* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1503 (2002) (discussing the problems associated with using estimates provided by regulated actors in cost-benefit analysis).

100. *See supra* notes 83–86.

101. One could argue that demand for its amendment is not sufficient to diagnose failure in the RFA. Indeed, there have been a few movements to amend the APA as well. *See supra* note 52. However, the demand for an amendment to the RFA specifically focuses on the burden that regulations impose on small businesses, the very problem the RFA was intended to address.

102. COPELAND, *supra* note 86, at 1.

103. Raso notes that other provisions of the RFA give agencies considerable discretion as well. These include provisions to allow agencies to exempt rules that do not have a proposed rule, a lack of clarity over whether the Act applies to statutorily required provisions in regulations, and whether indirect impacts on small entities "count" as part of the overall impact. Raso, *supra* note 43, at 100.

104. *See, e.g.,* *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497, 1520 (E.D. Pa. 1986) (finding that an agency's certification that a proposed rule will not have a significant economic impact on a substantial number of small entities is not subject to judicial review).

105. 126 CONG. REC. 24,583, 24,590 (1980) (statements of Rep. Broomfield and Rep. Danielson, respectively).

III.

THE PAPERWORK REDUCTION ACT

A. *History of the PRA*

The PRA was intended to reduce the amount of information provided by the public to the government. It created the Office of Information and Regulatory Affairs (“OIRA”) to supervise its implementation and required agencies to seek OIRA approval any time they wished to collect information from ten or more individuals or businesses.

The amount of paperwork imposed on the public by the government has long been a concern.¹⁰⁶ The Federal Reports Act (“FRA”) was intended to minimize the burden of government information collection and avoid duplicate collections¹⁰⁷ but was widely seen as toothless, and in 1974, in response to concerns about a growing paperwork burden on the public, Congress created a Commission on Federal Paperwork to examine the increasing burden that the government was imposing by requiring businesses, individuals, and other entities to provide information. The Commission completed its work in 1977 and found that the FRA was flawed;¹⁰⁸ among other conclusions, the commission cited the Internal Revenue Service (IRS) exemption, insufficient funding for FRA supervision, and providing for review too late in the decision-making process to make a difference.¹⁰⁹ After the GAO reported that the Commission’s recommendations were not being implemented quickly enough,¹¹⁰ legislators began work on the PRA.¹¹¹

An earlier version of the PRA was introduced as House Bill 3570, the Paperwork and Redtape Reduction Act of 1979, accompa-

106. The first serious attempt to manage government information came with the Federal Reports Act of 1942, Pub. L. No. 77-841, 56 Stat. 1078.

107. U.S. GOV’T ACCOUNTABILITY OFFICE, NEEDED CHANGES TO THE FEDERAL REPORTS ACT 4 (1979).

108. COMM’N ON FED. PAPERWORK, REPORT OF THE COMMISSION ON FEDERAL PAPERWORK: FINAL SUMMARY REPORT 50 (1977). The Commission’s final report was sixty-eight pages and contained many recommendations. *Id.*

109. *Id.* at 50.

110. *See* U.S. GENERAL ACCOUNTING OFFICE, GGD-80-36, PROGRAM TO FOLLOW-UP FEDERAL PAPERWORK COMMISSION RECOMMENDATIONS IS IN TROUBLE, at i–iv (1980); *see also* STUART SHAPIRO, THE PAPERWORK REDUCTION ACT: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM 3 (2012) (discussing this aspect of the impetus behind the PRA).

111. Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended in scattered sections of 5, 20, 30, 42, and 44 U.S.C.); *see also* SHAPIRO, *supra* note 110, at 2–4 (providing background on the PRA).

nied by the companion Senate Bill 1411.¹¹² Because no interest group benefits from tedious and burdensome paperwork requirements, this legislation enjoyed strong and consistent bipartisan support.¹¹³ Hearings on the PRA included testimony from various federal, state, and local officials.¹¹⁴ Noteworthy associations that supported legislative efforts included the Citizens Committee on Paperwork Reduction, the Association of Records Managers and Administrators, and the Business Advisory Council on Federal Reports.¹¹⁵ Supporters of the PRA also included members of the business community and state and local governments.¹¹⁶ While some government and independent agencies testified to advocate for an exemption (or partial exemption) under the proposed clearance and review processes,¹¹⁷ testimony at each of the hearings drew consensus that the processes for collecting and disseminating information by the federal government were inefficient and burdensome.¹¹⁸

Floor statements echoed this consensus while also reassuring potential opponents that agency flexibility would be protected. For ex-

112. The House bill was sponsored by Rep. Frank Horton (R-NY) and Rep. Jack Brooks (D-TX), while the Senate bill was sponsored by Sen. Lawton Chiles (D-FL), Sen. Lloyd Bentsen (D-TX), and Sen. John Danforth (R-MO). One year later, Horton—who previously acted as the chairman of the Commission on Federal Paperwork—and Brooks reintroduced their bill as House Bill 6410 as a new companion to the Senate bill. 126 CONG. REC. 30,176 (1980).

113. See, e.g., Murray L. Weidenbaum, *Progress in Federal Regulatory Policy, 1980–2000*, CONTEMP. ISSUES SERIES (Ctr. for the Study of Am. Bus., St. Louis, Mo.), May 2000, at 4 (observing the fact that these paperwork reduction proposals generated “substantial bipartisan support”).

114. Hearings held specifically on PRA legislation took place in the Senate before the Committee on Governmental Affairs, Subcommittee on Federal Spending Practices and Open Government, during November 1979 and in the House before the Committee on Government Operations, Subcommittee on Legislation and National Security, during February 1980; *Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 Before the Subcomm. on Fed. Spending Practices & Open Gov’t of the S. Comm. on Governmental Affairs*, 96th Cong. (1980) [hereinafter *Hearing on S. 1411*]; *Paperwork Reduction Act of 1980: Hearing on H.R. 6410 Before the Subcomm. on Legis. & Nat’l Sec. of the H. Comm. on Gov’t Operations*, 96th Cong. (1980) [hereinafter *Hearing on H.R. 6410*].

115. TADAO MIYAKAWA, 5 *THE SCIENCE OF PUBLIC POLICY: ESSENTIAL READINGS IN POLICY SCIENCE* 593 (2000).

116. *To Reduce Paperwork and Enhance the Economy and Efficiency of the Government and the Private Sector by Improving Federal Information Policy-Making, and for Other Purposes: Hearing on H.R. 6410, supra* note 114, at 310–18 (including statements from the Associated General Contractors of America, Chamber of Commerce, Civil Aeronautics Board, and Commodities Futures Trading Commission).

117. These agencies included the Federal Reserve, SEC, and EPA. None of the agencies received exemptions. *Id.* at 322, 329, 336.

118. See, e.g., *Hearing on S. 1411, supra* note 114, at 3–6 (statement of Sen. Chiles).

ample, according to Senator Chiles, one of the intentions behind the creation of OIRA was to increase the visibility of the oversight process and therefore the accountability of agencies that wished to collect information from the public.¹¹⁹ However, in response to concerns that expanded OMB authority would endanger the independent status of regulatory agencies, he cited various provisions in the bill that were specifically developed to protect against this eventuality, including an override mechanism that would allow an independent agency to call for a majority vote of its members to overturn a disapproval by OMB of an information collection request.¹²⁰ In addition, he pointed out that the language of the bill did not actually affect the existing authority of OMB with respect to substantive policies and programs of agencies and departments.¹²¹ Implementing reforms designed to curb regulatory excesses at the same time as reassuring agencies that their independent authority would not be curbed would foreshadow problems with effective implementation.

When signing the law, President Carter echoed many of the justifications given during the debate in Congress and summarized the substantive goal of the PRA:

This legislation, which is known as the Paperwork Reduction Act of 1980, is the latest and one of the most important steps that we have taken to eliminate wasteful and unnecessary Federal paperwork and also to eliminate unnecessary Federal regulations. . . .

. . . .

This legislation is another important step in our efforts to trim waste from the Federal Government and to see to it that the Government operates more efficiently for all our citizens.¹²²

As with the RFA, the PRA had a clear substantive goal. Members of the enacting coalition stated over and over that they wanted to reduce the burden of providing information to the government for businesses and other constituents.¹²³ From a political perspective, the Act had widespread support (few people are pro-paperwork), but it was particularly attractive to businesses, large and small.¹²⁴ Also, as for

119. *Id.* at 8.

120. *See* S. REP. NO. 96-930, at 47 (1980).

121. *Id.* at 15.

122. Remarks on Signing H.R. 6410 into Law, 3 PUB. PAPERS 2795 (Dec. 11, 1980).

123. *See, e.g.*, 126 CONG. REC. 30,190 (1980) (statement of Sen. Danforth) (reiterating the fact that the bill ostensibly would reduce the burdens that federal paperwork requirements imposed on the American people).

124. *See id.* at 30,192 (statement of Sen. Bentsen) (emphasizing the benefits that the bill would have for American businesses).

the RFA, the statute's sponsors took pains to note that the statute would not weaken existing regulatory statutes.¹²⁵ Unlike the RFA, the PRA had a goal that was relatively easy to measure: reducing the paperwork burden on the American public.¹²⁶ With an easy-to-measure goal, it is harder to argue that the PRA serves a symbolic purpose if that goal is not achieved.

B. Implementation of the PRA

Evaluating the PRA has also largely been the province of the GAO. Reports by the GAO repeatedly highlight the increasing burden of information collection on the American public, the dominance of a small number of collections by the IRS in making up the total burden, repeated violations of the Act by agencies, and the lack of resources at OIRA to exercise more effective oversight.¹²⁷ The theme of the reports is largely that the PRA has been ineffective in changing government information collection policy.¹²⁸

OIRA must annually report to Congress on the implementation of the PRA. Among the information provided in these reports are the annual burden-hours imposed on the American public. Table 1 depicts the history of burden imposition from 1997 to 2013.¹²⁹

125. *See id.* (statement of Sen. Danforth).

126. *See id.* at 30,191.

127. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-477T, PAPERWORK REDUCTION ACT: NEW APPROACHES CAN STRENGTHEN INFORMATION COLLECTION AND REDUCE BURDEN (2006); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-424, PAPERWORK REDUCTION ACT: A NEW APPROACH MAY BE NEEDED TO REDUCE GOVERNMENT BURDEN ON THE PUBLIC (2005); U.S. GEN. ACCOUNTING OFFICE, GAO-02-598T, PAPERWORK REDUCTION ACT: BURDEN INCREASES AND VIOLATIONS PERSIST (2002); U.S. GEN. ACCOUNTING OFFICE, GAO-04-676T, PAPERWORK REDUCTION ACT: AGENCIES' PAPERWORK BURDEN ESTIMATES DUE TO FEDERAL ACTIONS CONTINUE TO INCREASE (2004); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-59, EPA PAPERWORK: BURDEN ESTIMATE INCREASING DESPITE BURDEN REDUCTION CLAIMS (2000); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-120, REGULATORY MANAGEMENT: IMPLEMENTATION OF SELECTED OMB RESPONSIBILITIES UNDER THE PAPERWORK REDUCTION ACT (1998); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-83-35, IMPLEMENTING THE PAPERWORK REDUCTION ACT: SOME PROGRESS, BUT MANY PROBLEMS REMAIN (1983).

128. This is largely reflected in the titles of the reports, which include phrases like "Problems Remain," "Paperwork Reduction Increasing," and "Violations Persist." *See* sources cited *supra* note 127.

129. The annual OMB reports on which this table is based—the Information Collection Budget of the United States Government—are available for review and download on the OMB's website. *See Federal Collection of Information*, OFF. MGMT. & BUDGET, https://www.whitehouse.gov/omb/inforeg_infocoll#icbusg (last visited Feb. 1, 2016).

TABLE 1. INFORMATION COLLECTION BURDENS

Fiscal year	Annual burden-hours (millions)
1997	6,970
1998	6,967
1999	7,183
2000	7,361
2001	7,651
2002	8,223
2003	8,099
2004	7,971
2005	8,240
2006	8,924
2007	9,642
2008	9,711
2009	9,795
2010	8,783
2011	9,140
2012	9,470
2013	9,450

With the exception of a decrease of one billion burden-hours in 2010, which was actually a correction of a previous error,¹³⁰ the trend in information collection burden has been unmistakably upward.

Burden-hours have gone up for a multitude of reasons, most notably Congress's continued propensity to pass statutes that require agencies to collect information from the public.¹³¹ Possibly the burden would have increased even more in the absence of the PRA. However, no good reason exists to believe that Congress would have acted any differently without the PRA. The legislative history of the PRA makes it clear that agency supporters were consistently reassured that the Act would not curb the work of the executive-branch agencies.¹³² Also, much of the burden comes from the IRS.¹³³ Although the IRS has

130. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT 3 (2013) (explaining the correction to the IRS's estimated burden-hours).

131. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code). According to a report from the American Action Forum (an anti-regulatory advocacy group), Dodd-Frank has resulted in 60.7 million paperwork hours with the largest burdens arising from the "Conflict Minerals" regulation from the SEC and the "Volcker Rule" from the Federal Reserve. See Andy Winkler et al., *Dodd-Frank at 4: More Regulation, More Regulators, and a Sluggish Housing Market*, AM. ACTION F., <http://americanactionforum.org/research/dodd-frank-at-4-more-regulation-more-regulators-and-a-sluggish-housing-mark> (last visited Dec. 23, 2015).

132. *Hearing on S. 1411, supra* note 114, at 10 (statement of Sen. Chiles).

133. See CURTIS W. COPELAND & VANESSA K. BURROWS, CONG. RESEARCH SERV., R40636, PAPERWORK REDUCTION ACT (PRA): OMB AND AGENCY RESPONSIBILITIES AND BURDEN ESTIMATES 9 (2009).

made efforts to reduce the information collection burden over the past decade, those efforts are hard to ascribe to the PRA.¹³⁴ The IRS would be under pressure to reduce the burden whether or not the PRA existed.

A report for the Administrative Conference of the United States argues that the PRA has had some benefits, including improving some small percentage (but perhaps a particularly important subset) of information collection and encouraging public participation in the information collection approval process.¹³⁵ However, the PRA has also imposed significant costs, including causing delays and incentivizing agencies to abandon some beneficial types of information collection and alter others.¹³⁶

The stated goal of the PRA was to reduce the burden of government information collection on the American public.¹³⁷ Unlike any of the other statutes discussed in this Article, there are metrics by which to measure the PRA's success in achieving this objective, and those measurements indicate that the Act has not met its goal.¹³⁸ External reasons may account for the goal not being met, but little evidence indicates that, absent those factors, the PRA would have led to large-scale burden reduction. The PRA may have had other effects. Indeed, some evidence indicates that it has deterred some unnecessary forms of collection and led to modifications of others.¹³⁹ However, the massive increase in burden does indicate a clear failure to achieve its most important substantive goal. In the face of these data, arguing that the PRA had symbolic value is difficult. Nor are there instances in which the information collection process has acted as a "fire alarm" for congressional overseers.¹⁴⁰ We are left with the possibility that the PRA allowed its sponsors to claim credit for addressing a problem perceived as critical by the public.

134. SHAPIRO, *supra* note 110, at 19.

135. *Id.* at 12.

136. *Id.* at 22–28 (describing the administrative and compliance costs of the PRA).

137. See Remarks on Signing H.R. 6410 into Law, 3 PUB. PAPERS 2795 (Dec. 11, 1980).

138. See *supra* notes 128–33 and accompanying text.

139. See SHAPIRO, *supra* note 110, at 12.

140. See generally Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 7–10 (1994) (examining why reporting requirements such as those set forth in the PRA do not clearly facilitate "fire alarm" oversight by Congress).

IV.

THE UNFUNDED MANDATE REFORM ACT

A. *History of the UMRA*

Much as the RFA was designed to reduce the burdens of regulations, the UMRA was intended to accomplish the same goal for state and local governments.¹⁴¹ It requires agencies to analyze the impacts of their regulations on other governmental entities and to consult with these entities in the regulatory process.¹⁴² Throughout the 1970s and 1980s, the number of intergovernmental mandates imposed on state and local governments increased substantially.¹⁴³ The continued growth and cost of these mandates into the 1990s, including the establishment of complex statutes such as the Americans with Disabilities Act and the Clean Air Act, sparked opposition from various government officials, interest groups, and associations.¹⁴⁴

In debate over an earlier version of the UMRA,¹⁴⁵ testimony from various state and local officials, as well as from individuals from the private sector, revealed a strong sentiment that federal mandates had resulted in unreasonable and unmanageable fiscal burdens.¹⁴⁶ Several county commissioners spoke about their budget deficits and their inability to cut services or raise taxes to pay for mandate provisions.¹⁴⁷ Larry Kephart, executive director of the Pennsylvania Association of County Commissioners, testified that Pennsylvania county governments relied on local property tax revenue to fund their mandates, a practice that disproportionately affects the elderly and the poor.¹⁴⁸

Although several of the provisions contained in this version of the bill were later included in the UMRA, the Senate failed to vote on

141. See ROBERT JAY DILGER & RICHARD S. BETH, CONG. RESEARCH SERV., R40957, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES 1–2 (2016).

142. 2 U.S.C. § 1501 (2014).

143. See DILGER & BETH, *supra* note 141, at 1–2.

144. See, e.g., 141 CONG. REC. 3040 (1995) (statement of Rep. Manzullo) (noting the need for a study of the costs to states and other parties of complying with bills like the Clean Air Act).

145. Federal Mandate Accountability and Reform Act, H.R. 4771, 103d Cong. (1994).

146. H.R. REP. NO. 104-1, pt. 2, at 9–10 (1995).

147. *Id.*

148. *Id.* at 10 (quoting *The Impact of Federal Mandates on State and Local Governments: Hearing Before the Human Res. & Intergovernmental Relations Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. 64 (1993) [hereinafter *Unfunded Mandate Hearing*] (statement of Larry Kephart, County Comm'r, Clinton County, Pennsylvania)).

it before the session adjourned.¹⁴⁹ The debate surrounding this bill foreshadows Democratic concerns that would lead to concessions for agency flexibility and cause problems in the UMRA's successful implementation.¹⁵⁰ Many of the floor debates that took place for earlier bills on unfunded mandates featured Democratic Party concerns that the legislation would impede the federal government's ability to protect public health.¹⁵¹ As with the debates on the PRA and the RFA, supporters of regulation were concerned that the analyses proposed in the UMRA would inhibit the agencies' abilities to regulate and would also serve as an additional venue of influence for opponents of regulation.¹⁵²

Senators Glenn and Kempthorne introduced a revised version of the bill, which ultimately became the UMRA, in the 104th Congress in January 1995.¹⁵³ One major amendment made to the bill included the addition of private-sector cost impact statements for legislation in excess of \$100 million. Hearings were subsequently held before the Senate Committee on Governmental Affairs and the Senate Budget Committee on January 5 and 9, 1995. The UMRA of 1995 was passed by the Senate on January 27, 1995, and passed by the House, with amendment, on February 1, 1995. A conference between the House and the Senate took place to resolve debates, and the UMRA was subsequently signed into law by President Clinton on March 22, 1995.¹⁵⁴

There were a number of powerful groups representing a wide variety of sub-governments that advocated for the passage of the UMRA. Among the associations that took an interest in this issue were the National League of Cities, the National Association of Counties, and the U.S. Conference of Mayors.¹⁵⁵ In 1993, these groups organized a National Unfunded Mandates Day to gain support for their cause.¹⁵⁶ In addition to initiating a media flurry, National Unfunded Mandates Day helped the movement gain wide media coverage as well as public and congressional awareness.¹⁵⁷ The following year, these same groups organized a National Unfunded Mandates Week,

149. See DILGER & BETH, *supra* note 141, at 11.

150. *See id.* at 43.

151. *See id.*

152. *Id.* at 41.

153. S. 1, 104th Cong. (as introduced to Senate, Jan. 4, 1995); *see also* DILGER & BETH, *supra* note 141, at 42.

154. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).

155. DILGER & BETH, *supra* note 141, at 38.

156. *Id.* at 39-40.

157. *Id.* at 42.

which raised further support for their cause.¹⁵⁸ Senator Glenn commented in a congressional hearing on the UMRA that National Unfunded Mandates Week had succeeded in bringing to light the concerns about unfunded mandates.¹⁵⁹

The Act also attracted the support of various business organizations and the U.S. Chamber of Commerce, which were opposed to the imposition of mandates by the federal government on the private sector.¹⁶⁰ Pro-business attitudes were especially evident at hearings, with testimony by representatives from a multitude of companies and industries. Ken Mease, president of Ken-Tex Corporation, testified that federal mandates like the Clean Air Act were unreasonable, stating that government intervention was unnecessary and solutions to the problem could be more readily found in the market.¹⁶¹ He stated that this and other cases of “legislative overkill” would result in bankruptcy for many businesses.¹⁶²

One issue that persisted throughout consideration of UMRA legislation concerned the definitions of key terms, including “federal mandate.” Senator Judd Gregg (R-NH) objected to the lack of a precise statement as to what constitutes a federal mandate, arguing that this lack would result in litigation, debate, and ultimately noncompliance.¹⁶³ Although many agreed that “federal mandate” was a term in need of a clear, succinct definition, there were still disagreements over what the definition should be.¹⁶⁴ Ultimately, the definition that passed was not as clear as the one state and local governments had endorsed.¹⁶⁵ The final language defined a federal intergovernmental mandate as “any provision that imposes an enforceable duty on State, local, or tribal governments or any provision in legislation, statute or regulation that relates to a then-existing Federal program under which \$500 million or more is provided annually to State, local, and tribal governments under entitlement authority.”¹⁶⁶ Various exemptions and stipulations to these two categories exist, such as non-inclusion of pro-

158. *Id.* at 40–41.

159. *Id.* at 42–43.

160. DILGER & BETH, *supra* note 141, at 23.

161. H.R. REP. NO. 104-1, pt. 2, at 10 (1995) (quoting *Unfunded Mandate Hearing*, *supra* note 148, at 86 (statement of Kenneth F. Mease, President, Ken-Tex Corp.)).

162. *Id.*

163. DILGER & BETH, *supra* note 141, at 4 (quoting *Federal Mandates on State and Local Governments: Hearing Before the S. Comm. on Governmental Affairs*, 103d Cong. 66 (1993) (statement of Sen. Judd Gregg)).

164. *See id.* at 5.

165. *Id.* at 10.

166. Unfunded Mandates Reform Act, Pub. L. No. 104-4, § 421, 109 Stat. 48, 51–52 (1995).

visions that are a condition of federal assistance or a duty arising from participation in a voluntary program.¹⁶⁷

Senator Frank Lautenberg (D-NJ) was among those who opposed the Act, stating that the federal government had an obligation to set national standards that protect the environment and quality of life.¹⁶⁸ He was concerned that agencies such as the EPA and OSHA would be unable to create uniform national standards and thus would be unable to fulfill their duties, and that states would have a “patchwork” of differing standards.¹⁶⁹

Arguments also arose over the issue of exemptions and exclusions under the Act, including whether certain federally mandated programs would be exempt, whether independent agencies would be covered, and what agency actions would require UMRA analysis.¹⁷⁰ State and local governments were particularly wary of exemptions, stating that the overall effectiveness of the Act would be reduced and that exemptions would limit implementation.¹⁷¹ For example, under the Clean Air Act, primary air-quality standards are health-based, and the EPA is prohibited from considering costs.¹⁷² This underlying statute effectively exempts the EPA from undertaking a benefit-cost analysis.¹⁷³ UMRA supporters feared that giving preference to statutes such as the Clean Air Act would allow many agencies to avoid compliance with the UMRA.¹⁷⁴ Indeed, research has indicated that the benefit-cost analyses conducted under the UMRA have differed little from those conducted under Executive Order 12,866,¹⁷⁵ whereas statutory schemes like those under which the EPA operates have reduced

167. DILGER & BETH, *supra* note 141, at 51.

168. *Id.* at 45.

169. Senator Lautenberg said:

Let us look at occupational safety, or environmental regulation. With a patchwork of differing standards across the States, would we see a migration of factories and jobs to States with lower standards? I think so. But by mandating floors in environmental and workplace conditions, the Federal Government ensures that States will comply with minimal standards befitting a complex, interrelated, and decent society.

Id. at 45.

170. *Id.* at 22–24.

171. *Id.* at 23.

172. DAVID P. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS § 4.06 (1981).

173. *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

174. *See* H.R. REP. NO. 104-1, pt. 1, at 36 (1995) (citing minority concerns that the UMRA would either lower clean air standards or impose additional financial burdens on the federal government).

175. Executive Order 12,866 requires agencies to conduct a Regulatory Impact Analysis (RIA) on any regulation that has an economic impact of more than \$100 million in any calendar year. This RIA includes an assessment of the benefits and costs of the

the effectiveness of benefit-cost analysis requirements.¹⁷⁶ Also, like Executive Order 12,866, the UMRA does not cover independent agencies.¹⁷⁷ Finally, final rules that are not preceded by notices of proposed rulemaking have been declared exempt.¹⁷⁸

The passage of the UMRA has numerous parallels with the passage of the RFA sixteen years earlier. A vocal constituency (states and localities versus small businesses) was upset with regulatory burdens. Big businesses provided support. Supporters of protections for public health ensured that the statute had numerous exemptions, and the requirements preserved considerable agency discretion. Although the legislation had substantive goals (reduced regulatory burdens), they were not as easily measurable as those of the PRA. Both the RFA and the UMRA also had a clear symbolic purpose: giving a voice to an important constituency. However, statutes with purely symbolic purposes have been criticized in the literature as unworkable.¹⁷⁹

B. Implementation of the UMRA

Less has been written about the implementation of the UMRA than about the RFA or the PRA.¹⁸⁰ This is likely because no single agency is given responsibility to ensure the implementation of the UMRA (unlike the Office of Advocacy for the RFA, and OIRA for the PRA). In addition, the UMRA has received less academic attention than other regulatory reform statutes. The little information that exists comes from government agencies, the GAO, and the CRS.

A report released by the GAO in 1998 found that the UMRA had limited impact on agency rulemaking actions.¹⁸¹ Much as the vague definition of “significant impact” in the RFA was a source of agency discretion, the term “economically significant” in the UMRA was

regulation, a requirement that mirrors the requirement in the UMRA. Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

176. Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, REG. & GOVERNANCE, June 2012, at 189, 197–98 (finding little correlation between the information provided by a cost-benefit analysis and the net benefits of the underlying rule).

177. 2 U.S.C. § 658(1) (2014).

178. § 1532(a).

179. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 234, 292 (1990) (describing the difficulties agencies face when they are directed to implement a purely symbolic and therefore likely unworkable statute).

180. One exception is Raso, who finds that ninety-nine percent of agency regulations have been exempted from the UMRA. Raso, *supra* note 43, at 69.

181. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-30, UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES’ RULEMAKING ACTIONS 3 (1998).

largely left open to interpretation by individual agencies.¹⁸² Critics of the Act noted that the vague definition allows agencies to evade assessments and benefit-cost analyses by determining that rules do not qualify as economically significant.¹⁸³ The GAO supported this criticism, stating that the Act gave agencies too much discretion in complying with requirements.¹⁸⁴ Much more recently, the CRS has reported dissatisfaction with the UMRA.¹⁸⁵ It notes that state and local governments have consistently called for an expansion of the authority and scope of the Act.¹⁸⁶

The economic analysis requirement under the UMRA was basically subsumed into the economic analysis requirements under Executive Order 12,866, which was issued by President Clinton shortly after passage of the Act.¹⁸⁷ Therefore, it is impossible to discern the impact of these provisions beyond the requirements in the executive order. There has been no discernible difference in the quality of regulatory impact analyses when analysis has been required under both the UMRA and Executive Order 12,866 and when analysis has been required under the executive order alone.¹⁸⁸

V.

THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

A. *History of the SBREFA*

The SBREFA is an amendment to the RFA. It strengthens some of the provisions of the RFA, adds a new requirement that the EPA and OSHA convene panels of small businesses to review their regulations, and includes provisions for congressional review of regulations in what is referred to as the CRA. In addition to passing the UMRA, the 104th Congress made significant changes to the RFA. The SBREFA¹⁸⁹ was enacted on March 29, 1996, and signed into law by

182. *Id.*

183. *See id.* (finding that the UMRA did not require written statements for seventy-eight of eighty analyzed rules).

184. *Id.*; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-04-637, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE 3-4 (2004) (describing the limited circumstances under which the UMRA requirements must be met).

185. DILGER & BETH, *supra* note 141, at 24.

186. *Id.*

187. *See* OFFICE OF MGMT. & BUDGET, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER EXECUTIVE ORDER 12,866 (1996).

188. Shapiro & Morrall, *supra* note 176, at 198 n.18.

189. Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601-612 (2014)).

President Clinton as a part of the Contract with America Advancement Act. SBREFA forms Title II of the Contract with America Advancement Act.

The SBREFA was motivated in part by the 1995 meeting of the White House Conference on Small Business.¹⁹⁰ Tasked with exploring the weaknesses of the regulatory process under the RFA, the conference ultimately recommended the implementation of amendments and provisions that would strengthen the legislation.¹⁹¹ Resolutions from this conference that were particularly prominent included requests for legislation that would require promulgated regulations to sunset after a prescribed period of time, as well as for reevaluation of all existing regulations every five years using the same standards as for new regulation.¹⁹² Although the SBREFA as enacted did not include a sunset provision, the sentiment was cited as part of the justification for the CRA.

The SBREFA and the CRA were intended to address the weaknesses of the RFA by increasing congressional power over regulatory processes as well as reinforcing the required consideration of regulatory impact on small businesses.¹⁹³ The stated purpose of the SBREFA was to (a) implement various recommendations of the White House Conference on Small Business of 1995, (b) amend the RFA by incorporating judicial review into the regulatory process and by increasing accountability among regulators by providing more opportunities for redress, (c) encourage small business participation in the regulatory process through simplification of language and increased accessibility of information, and (d) create a more cooperative environment by lessening punitive action against small businesses that seek redress.¹⁹⁴

Many of the hearings that took place for the original Senate Bill 942 revealed extreme dissatisfaction with the RFA and the ability to

190. JODY WHARTON, *THE WHITE HOUSE CONFERENCES ON SMALL BUSINESS, 1980–1995* (2004) (on file with authors).

191. *Id.*

192. *Implementing the White House Conference on Small Business—Recommendations on Regulations and Paperwork: Hearing on S. 917 and S. 942 Before the S. Comm. on Small Bus.*, 104th Cong. 29–30, 32 (1996).

193. *Id.* at 70 (statement of Victor Tucci, Committee Chair, National Small Business United) (“With [the RFA], Congress firmly established the principle that small businesses are unique, and that regulators would no longer pass rules and regulations without considering the effect on smaller businesses and considering less burdensome alternatives.”).

194. § 601 note (Small Business Regulatory Fairness).

enforce its provisions.¹⁹⁵ Ultimately, the key objective of the RFA was to encourage “self-reform” on the part of the individual agencies, and critics described it as more suggestive than anything else.¹⁹⁶ The SBREFA was partially intended to correct deficiencies in the RFA and to prevent circumvention of its legislative intent.¹⁹⁷

Among the many proponents of the legislation were the U.S. Chamber of Commerce, the Small Business Administration (SBA), the National Association for the Self-Employed, the National Association of Towns and Townships, and the Small Business Legislative Council.¹⁹⁸ Hearings took place throughout 1995 and 1996, at which many small business owners, legislative sponsors, and organizations testified on the ineffectiveness of the RFA and the need for reform.¹⁹⁹ In particular, witnesses recognized the need for the addition of judicial review to the RFA to make the Act more enforceable.²⁰⁰ The SBA Chief Counsel for Advocacy and the SBA Administrator were among those who expressed their support for RFA reform.²⁰¹

Subtitle E of the SBREFA outlines the provisions of the CRA, a mechanism within the law that allows Congress to review and disapprove of all federal agency rules.²⁰² The CRA allows Congress to bypass normal procedures (including the filibuster in the Senate) to pass a resolution of disapproval within sixty session days of the publication of a final rule.²⁰³ This resolution effectively vetoes the regulation and prohibits the passage of any regulation that is “substantially the same.”²⁰⁴ A resolution can be vetoed by the President.²⁰⁵ As with any bill, a two-thirds majority vote is required to override a presidential veto.²⁰⁶ Therefore, other than the changes to the filibuster, the CRA

195. *See, e.g.*, 142 CONG. REC. S1640 (daily ed. Mar. 7, 1996) (statement of Tom Halicki, Executive Director, National Association of Towns and Townships) (“NATaT has long recognized the failings of the RFA . . .”).

196. Thomas Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L. REV. 123, 126 (1997).

197. Phelps, *supra* note 87, at 124.

198. 142 CONG. REC. S1639–42 (Mar. 7, 1996).

199. *See, e.g.*, 142 CONG. REC. 3885 (1996).

200. *See, e.g., id.* (“NATaT strongly supports the judicial review language and would oppose any efforts to weaken it.”)

201. *See* 142 CONG. REC. 3881 (1996) (statement of Sen. Bond) (“The SBA chief counsel for advocacy released a report that said that small businesses bear a disproportionate share of the regulatory burden.”).

202. 5 U.S.C. §§ 801–808 (2014).

203. § 801(d)(1).

204. § 801(b)(2).

205. § 801(c)(1).

206. § 801(c)(3).

gave Congress no powers aside from those that it already possessed (the ability to overturn a regulation with a law that is subject to veto).

Although the CRA was a late addition to the SBREFA, it enjoyed bipartisan support in Congress. One of the main purposes of the CRA was to shift power from the executive branch to the legislative branch. Some scholars have claimed²⁰⁷ that the CRA legislation was inspired by the 1983 Supreme Court case of *Immigration and Naturalization Service v. Chadha*.²⁰⁸ *Chadha* resulted in the ruling that one-house vetoes in Congress were a constitutional violation of the separation of powers, and left many in Congress feeling as though their oversight powers had been diminished.²⁰⁹ Senators Don Nickles (R-OK), Harry Reid (D-NV), and Ted Stevens (R-AK) stated, “This legislation will help to redress the balance [between the branches], reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.”²¹⁰

The other provision of the SBREFA that most directly affects the regulatory process was the creation of small business panels to review regulations before their proposal.²¹¹ These SBREFA panels were required only for the EPA and OSHA,²¹² and only for regulations that have a significant economic impact on small businesses. The panels of small business owners review and comment on the agency proposals under the guidance of the promulgating agency, the SBA’s Office of Advocacy, and OIRA.²¹³

Although the bill was said to have attracted bipartisan support, some disagreement took place along party lines, with Republicans claiming that Democrats in Congress had refused to consider the bill or allow it to reach the floor. Some accused Democratic Party members of attempting to filibuster the legislation.²¹⁴ Senator Tom Daschle (D-SD) addressed these accusations, stating that there was no objection to the substance of the bill but that the understanding of some “technical details” remained to be resolved.²¹⁵ He defended the Democratic Party’s resistance to Senate Bill 942, claiming, “The dilemma is

207. See Michael Kolber, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2165 (2009).

208. 462 U.S. 919 (1983).

209. Kolber, *supra* note 207, at 2165.

210. See 142 CONG. REC. 8197 (1996) (statement of Sens. Nickles, Reed, and Stevens).

211. 5 U.S.C. § 609(b)(3) (2014).

212. This requirement was later expanded to include the Consumer Financial Protection Bureau. See § 609(d)(2).

213. § 609(e).

214. See, e.g., 142 CONG. REC. 8197 (statement of Sen. Burns).

215. 142 CONG. REC. 3878 (1996) (statement of Sen. Daschle).

that the bill will very likely be used as the vehicle for another very big debate, unlimited debate, over the whole issue of comprehensive regulatory reform.”²¹⁶ We can infer that Democrats’ reluctance to wholeheartedly embrace the statute can be attributed to some of the limitations within this bill, including the limited nature of the CRA and limited changes to agency discretion under the RFA to determine the Act’s applicability.

The passage of the SBREFA and the CRA is instructive both in its own right and in reflection regarding the RFA. Clearly the RFA was not achieving its stated goals in the eyes of supporters of the SBREFA, and the statutes’ substantive goals were roughly the same. One important addition was the goal of increasing congressional power in the regulatory process as embodied in the CRA.²¹⁷ As with the other statutes described here, supporters of the bill had to make concessions to ensure its passage, and these concessions inevitably weakened the bill. Also as with the other bills, the SBREFA has a clear symbolic goal (supporting small businesses), and “credit claiming”²¹⁸ could have been a major motivation for the bill, particularly in the wake of the 1995 Republican takeover of Congress.

B. Implementation of the SBREFA

The 1996 amendments to the RFA were intended to “fix” the RFA.²¹⁹ In this sense, the data regarding the lack of efficacy of the RFA, discussed *supra* Section II.B, apply to the amendments. Continued concerns about the burden of regulation on small business and continued attempts to amend the regulatory process both speak to the point that, like the original RFA, the amendments have not achieved their substantive goals.

As for the particular pieces of the 1996 amendments, very little research has been done into their effects. In the case of the CRA, detailed research is not really possible. The CRA has been used exactly once, and that was in a very particular set of circumstances. A highly controversial regulation (OSHA’s ergonomics regulation) was issued at the conclusion of the Clinton administration and was overturned by a Republican Congress.²²⁰ The CRA resolution was then signed by the

216. *Id.*

217. See *supra* notes 208–10 and accompanying text.

218. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52–53 (2d ed. 2004).

219. See H. REP. NO. 104-49, pt. 1, at 1–2 (1995).

220. Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 727 (2011).

new President, George W. Bush.²²¹ Furthermore, reports issued by the Congressional Research Service in 2008²²² and by the Administrative Conference of the United States in 2014²²³ noted that in many cases, agencies did not even adhere to the simple requirement that they submit covered rules to Congress and to the GAO. Finally, one of the enforcement mechanisms later added to improve enforcement of the CRA (review of agency benefit-cost and risk analyses by the GAO) was never implemented, due to a lack of appropriated funds.²²⁴ None of these developments are signals of an effective statute.

Small business panels have been required for EPA and OSHA for fifteen years now,²²⁵ but no one has examined their effectiveness. However, Raso has found that subsequent to the passage of the SBREFA, the EPA and OSHA declared fewer of their rules to be subject to the RFA.²²⁶

VI.

DISCUSSION

The history of regulatory reform since the passage of the APA is a messy one. From the preceding discussion, it is clear that although the statutes examined may have had some limited effects, none has lived up to the rhetoric that accompanied its passage. The number of hours Americans spend providing information to the government has continued to increase.²²⁷ Small businesses still feel burdened by regulations, and states and localities still complain about unfunded mandates.²²⁸ If the speeches that were made when these statutes were passed and the plain language of their titles reflect the goals of these

221. *Id.*

222. MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 18, 28–34 (2008) (citing the lack of judicial enforceability of agency decisions to submit rules for review as a possible reason the CRA process has been used sparingly).

223. CURTIS W. COPELAND, CONGRESSIONAL REVIEW ACT: MANY FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 47–48 (2014), <http://www.acus.gov/report/copeland-report-congressional-review-act>.

224. *See* 5 U.S.C. § 801 note (2014) (Truth in Regulating); *see also* Susan Dudley, *Congress Needs Its Own Regulatory Review Office*, PENN PROGRAM ON REG.: REG. BLOG (Aug. 10, 2011), <http://www.regblog.org/2011/08/10/congress-needs-its-own-regulatory-review-office/> (describing the failure to appropriate contingent funds).

225. The full list of panels can be found on the SBA website. *See SBREFA*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/category/advocacy-navigation-structure/regulatory-policy/regulatory-flexibility-act/sbrefa> (last visited Feb. 1, 2016).

226. Raso, *supra* note 43, at 102–03.

227. *See supra* notes 127–30 and accompanying text.

228. *See supra* notes 181–88 and accompanying text.

statutes, then they must be deemed failures. Now we examine why these failures have occurred and then contemplate other goals the statutes may have been intended to fulfill.

A. *Compromise and the Courts: Sources of Substantive Disappointment*

All the statutes discussed in this Article were signed by Democratic Presidents. The RFA and the PRA were passed by Congresses with Democratic majorities in both houses. Therefore, to become law, each of these regulatory reform efforts needed the acquiescence of political actors who also supported the substantive goals of many of the same regulatory statutes that motivated reformers to curb the power of regulatory agencies. To get this support, the statutes needed to be the product of intensive negotiation and compromise.

As a result, each of these statutes contains exceptions and vague terms that have been left to regulatory agencies to define. The RFA covers regulations that have a “significant economic impact on a substantial number of small entities.”²²⁹ But agencies determine which impacts are significant and how many small entities make up a substantial number.²³⁰ The sponsors of the PRA made clear that the goal of the statute was not to undermine existing statutes²³¹ and put no mechanism in the statute to enforce the reduction of paperwork burden.²³² The UMRA left the term “federal mandate” vaguely defined and made it clear that existing statutory obligations must be fulfilled.²³³ Finally, the CRA requires the signature of the President to veto a regulation—usually the same President who supervised its promulgation.²³⁴

These amendments are examples of strategic behavior by congressional representatives. Provisions such as those in the regulatory reform statutes fall under the category of *saving amendments*—amendments that may be contrary to the purpose of the underlying bill but that are necessary to ensure its passage (or to ensure that the bill

229. Regulatory Flexibility Act, Pub. L. No. 96-354, § 609, 94 Stat. 1164, 1168 (1980).

230. See *supra* Part II (discussing the implementation of the RFA).

231. *Hearing on S. 1411, supra* note 114, at 10 (statement of Sen. Bellmon) (“The bill does not waive any existing reporting requirements.”).

232. See *supra* notes 77–79 and accompanying text.

233. Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995).

234. Congressional Review Act, Pub. L. No. 104-121, § 251, 110 Stat. 857, 868–71 (1996).

will be signed by the President).²³⁵ In the regulatory reform context, these saving amendments allow the bill to be passed but then can be used by regulatory agencies to subvert the goals of the remainder of the bill.²³⁶ Even those who oppose the saving amendment because it weakens the underlying statute may support it to guarantee passage of the bill.²³⁷

Courts could have strictly interpreted the regulatory reform statutes (emphasizing the bulk of the statute rather than the amendments) and theoretically forced agencies to view these statutes as restricting their regulatory abilities.²³⁸ But such an approach would run counter to judicial deference to agencies in the regulatory arena.²³⁹ It would also contradict the legislative histories discussed previously, from which it is clear that the regulatory reform bills would not have passed had they been clearly intended to curb regulatory activity.

Congress continues to return to regulatory reform during difficult economic times. This response is fed by a combination of genuine concerns with particular regulations and media emphasis on regulation.²⁴⁰ Congress does this despite the knowledge that a clear consensus to curb agency regulatory activity does not exist across the elected branches of government. This lack of consensus inevitably means that the substantive goals of regulatory reform statutes (fewer regulations affecting small businesses or state and local governments, less information collection burden on the American public) will not be met. So why persist?

235. See generally James M. Enelow, *Saving Amendments, Killer Amendments, and an Expected Utility Theory of Sophisticated Voting*, 43 J. POL. 1062 (1981).

236. See James M. Enelow & David H. Koehler, *The Amendment in Legislative Strategy: Sophisticated Voting in the U.S. Congress*, 42 J. POL. 396, 396–401 (1980) (explaining strategic voting in Congress in the context of amendments which undermine a bill's purpose but without which the bill will be unlikely to pass).

237. *Id.*

238. See, e.g., Susan E. Dudley, *Prospects for Regulatory Reform in 2011*, 11 EN-GAGE 7, 12 (2011) (discussing the ways in which courts have interpreted the requirements imposed by regulatory reform statutes).

239. See *Massachusetts v. EPA*, 549 U.S. 497, 505–34 (2007) (reiterating the narrow scope of judicial review due the broad discretion given to agencies, but holding that the EPA abdicated its duties in failing to regulate certain greenhouse gas emissions); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) (holding that courts must defer to an executive-branch agency's interpretation of the statute it administers, provided that its interpretation is reasonable and that Congress has not already spoken directly to the issue).

240. See MICHAEL A. LIVERMORE ET AL., *THE REGULATORY RED HERRING: THE ROLE OF JOB IMPACT ANALYSES IN ENVIRONMENTAL POLICY DEBATES* (2012) (examining the political response to the suffering job market).

B. *The Political Goals of Regulatory Reform*

Possibly, Congress is happy to pass regulatory reform bills for purely symbolic purposes.²⁴¹ Giving a voice to small businesses or local governments or putting a priority on reducing paperwork is not of trivial importance.²⁴² Yet the legislative histories and the timing of regulatory reform statutes indicate that other forces are at work. By far, the most important of these forces is the self-interest of legislators.

The RFA and the PRA were passed during the stagflation era and burgeoning recession of 1979 through 1980. The UMRA and the RFA amendments were passed in the wake of the economic slowdown in the 1990s and after an election campaign during which the new Republican majority in Congress had promised to relieve regulatory burdens on business. The current wave of regulatory reform proposals comes during the slow recovery from the great recession. Other work has shown that this same pattern of fascination with regulatory reform has occurred in the fifty states.²⁴³

This pattern gives us our most powerful explanation for why regulatory reform statutes pass but are designed without much regard to their effectiveness: they are intended to create a public perception of solutions for economic ills. One of the leading factors affecting the reelection prospects of a politician is the state of the economy.²⁴⁴ Few political actors, perhaps even including the President, can affect this key variable. Despite this inability, incumbent officials feel the need to convince voters that they are addressing economic conditions. As a result, in tough economic times, politicians tend to blame regulations for poor economic outcomes (particularly job loss).²⁴⁵ Once politicians have labeled regulation as the problem, regulatory reform is labeled as the solution.

Even if a regulatory reform statute were to achieve its substantive goals perfectly, years would likely be required after its passage before

241. See Dwyer, *supra* note 179, at 233–50 (discussing lawmakers' incentives for enacting symbolic legislation).

242. Dwyer argues that such legislation has deleterious impacts, leaving agencies to make policy decisions without legislative guidance. However, his focus is on environmental statutes with overbroad mandates. The regulatory reform efforts achieve their symbolic goals in a different way—by actually undermining their intents with provisions to preserve agency discretion. See *id.* at 179.

243. SHAPIRO & BORIE-HOLTZ, *supra* note 7, at 141–43.

244. Alan I. Abramowitz & Jeffrey A. Segal, *Determinants of the Outcomes of U.S. Senate Elections*, 48 J. POL. 433, 433–39 (1986) (analyzing the effect of conditions such as the strength of the national economy on senatorial elections).

245. One study found a 17,000% increase in the use of the phrase “job-killing regulations” in the media between 2007 and 2011. See LIVERMORE ET AL., *supra* note 240, at 2.

that success would become apparent. Sponsors, whose goal is touting regulatory reform as an antidote to economic ills, have no reason to care about how these statutes actually work. The economy will eventually improve as part of the natural business cycle (or through the application of large scale fiscal or monetary policy). But legislators with short electoral timeframes can't necessarily wait for that. We propose that the goal of these legislators is to get bills that can be sold as economic solutions passed. Hence, a statute with vague terms and exceptions²⁴⁶ that passes is preferable to one that fails.²⁴⁷ Passage allows the legislation's supporters to claim credit for addressing economic concerns.²⁴⁸

We have not ruled out the other political rationale for passage of regulatory reform: congressional oversight. Political scientists have described procedural reform as performing a signaling function,²⁴⁹ or serving as a "fire alarm," for legislators.²⁵⁰ The implementation of the regulatory reform statutes discussed in this Article provides little evidence that they have successfully performed this function. Caution should be used to avoid over-interpreting this result, however. The lack of evidence does not indicate that such a function has not been performed in a way invisible to the outside researcher.²⁵¹ In fact, the requirement for analyses of impacts on small businesses, states, and localities; SBREFA panels; and calculations of paperwork burdens can all be seen as ways of making more information available to ease congressional oversight of regulatory agencies.²⁵²

The question of the impact of regulation on the economy is a complicated one. Numerous studies have reached varying conclusions about the effect of regulation on jobs, productivity, and other aspects

246. Enelow & Koehler, *supra* note 236, at 398 (demonstrating that a bill with a "saving amendment" that weakens it is preferable to no bill).

247. Interestingly, the regulatory reform efforts currently underway have not yet borne fruit in signed legislation. Only time will tell whether the sponsors in the current Congress will be willing to make the compromises necessary to ensure passage.

248. MAYHEW, *supra* note 218, at 52–53 (discussing credit claiming).

249. West, *supra* note 35, at 66 (arguing that rulemaking procedures provide a cue for the accommodation of interests through processes grounded in political accountability).

250. McCubbins & Schwartz, *supra* note 25, at 166 (describing fire alarm oversight).

251. Research at the state level has indicated that regulatory reform can perform this signaling function. See SHAPIRO & BORIE-HOLTZ, *supra* note 7, at 128. *But see* Shapiro, *supra* note 140, at 7–10 (positing that the nature of some requirements imposed by regulatory reform statutes are ill-suited to serve as fire alarms for purposes of congressional oversight).

252. See, e.g., McCubbins & Schwartz, *supra* note 25, at 171–73 (describing how fire alarm oversight is likely to be a more effective response to information overload).

of the macro-economy.²⁵³ It therefore not only is unlikely that the regulatory reforms that Congress has passed since the passage of the APA are effective in changing regulations, but also is unclear whether there would be any measurable effects on the economy at large even if they were effective.²⁵⁴

CONCLUSION

The APA was passed in 1946. Although it largely ratified the practice of executive-branch policymaking that had emerged during the New Deal,²⁵⁵ cementing this practice in the statute was critical. Particularly, the formal creation of the rulemaking process, even though it was constrained by notice and comment and judicial review, was a major empowerment of the federal bureaucracy. The APA made permanent a new avenue for policymaking and “permitted the growth of the modern regulatory state.”²⁵⁶

This expansion was the intent of the New Deal liberals who supported the APA after years of opposing statutory constraints on agency policymaking. Fearing that the gains of the New Deal would be eroded by potential Republican takeovers of the executive and legislative branches, the New Deal coalition decided that using the judicial branch to constrain the bureaucracy (especially because most judges had been appointed by President Franklin D. Roosevelt) was worthwhile rather than allowing the political branches to do so.²⁵⁷ The result was an adjudication process that was infused with greater due process and a rulemaking system that was centered on agency expertise.²⁵⁸

From a substantive perspective, regulatory reforms since the APA can be seen as attempts to walk back this deal, but constraining a government function once it is created is very difficult. The coalition that supported the New Deal in the first place still exists, supplemented by supporters of the great wave of public health protection that emerged in the 1960s.²⁵⁹ These supporters will fight constraints on

253. See DOES REGULATION KILL JOBS? (Cary Coglianese et al. eds., 2013) (collecting opposing viewpoints on the effects of regulation on employment).

254. Certainly if the reforms were effective, and fewer regulations were issued that imposed burdens on industry but protected public health, there would be effects at the micro level on the reallocation of welfare.

255. Gellhorn, *supra* note 9, at 232.

256. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557, 1559 (1996).

257. See *id.*

258. Shapiro, *supra* note 19, at 451, 459; McCubbins et al., *supra* note 22, at 184.

259. See *supra* Section I.B.

agency decision-making and ensure that if constraints are passed, they will contain sufficient provisions to retain agency discretion so as to be largely ineffectual. Absent the loopholes, passing the constraints is impossible.

For this fundamental reason, statutes such as the RFA, PRA, and UMRA have been substantively ineffective. The statutes all give agencies significant discretion regarding their implementation. This outcome is not an accident; the legislative histories of the statutes indicate that these quid pro quos were necessary to ensure their passage in Congress and their signing by a Democratic president. The current wave of regulatory reform is largely restricted to the very conservative House of Representatives, which clearly has the substantive goal of reducing federal regulation.²⁶⁰ There it will stay, barring a sea change in electoral politics or a set of compromises that weaken the proposals.

But regulatory reform statutes—even with provisions that weaken them—are not without appeal for elected officials. Particularly in times of economic distress, regulatory reform allows legislators and executives to appear to address economic concerns. With few tools to “create jobs,” politicians turn to regulatory reform to give the appearance of helping the economy. Whether an unconstrained regulatory reform statute would improve economic conditions is a question beyond the scope of this study (the authors are skeptical). However, even a constrained statute, which does little to change regulatory policy, can serve the needs of self-interested incumbents. That is why, at both the federal and state levels, we will continue to see interest in regulatory reform.

260. *See, e.g.*, Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015) (which would require greater agency use of Advanced Notices of Proposed Rulemaking and more stringent economic analysis); Searching for and Cutting Regulations that Are Unnecessarily Burdensome Act of 2015, H.R. 1155, 114th Cong. (2015) (which would require agencies to review existing regulations and repeal old regulations when they promulgate new ones).